TEXAS REGISTER

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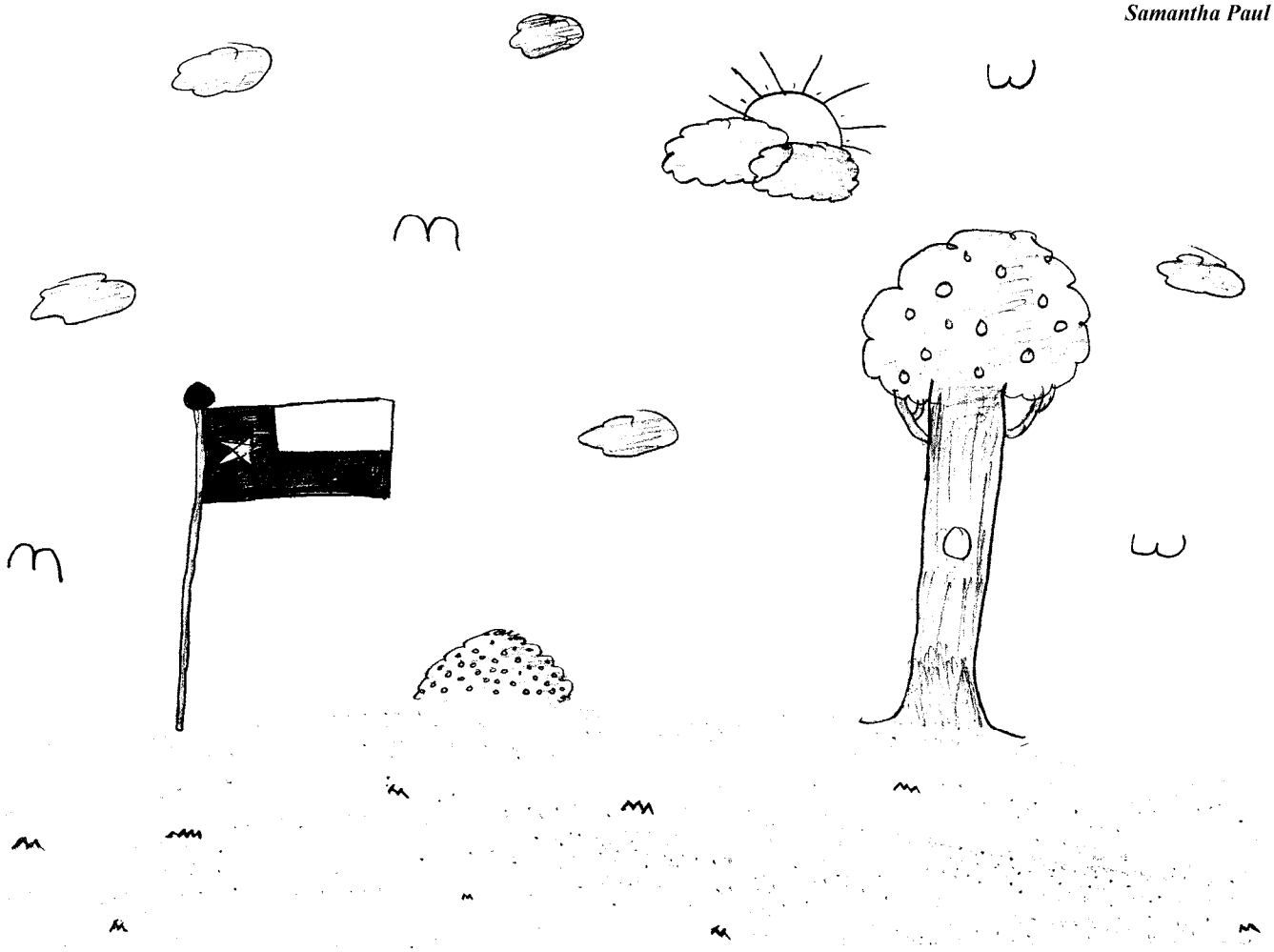
Samantha Paul



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

WITHDRAWN RULES

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.

Executive Order

RP 75

Relating to the establishment and support of Western Governors University Texas

WHEREAS, although enrollment in all Texas institutions of higher education has increased 47 percent since 2000, there is still a significant need to provide adult learners with greater access to opportunities to obtain higher education degrees; and

WHEREAS, increasing the number of Texans with college degrees and credentials will make Texas even more competitive in the global economy; and

WHEREAS, Western Governors University (WGU), a nationally recognized, nonprofit, independent university that is regionally and nationally accredited, offers online degrees based on demonstrated competency as opposed to degrees based on credit hours, clock hours or grades; and

WHEREAS, WGU is fully independent and requires no direct state financial participation or support; and

WHEREAS, Texas helped create WGU in 1997 to provide greater access to affordable education and training opportunities through online, competency-based programs, and Texas pledged to take appropriate actions to support the goals of WGU; and

WHEREAS, the mission of WGU is making higher education more affordable while improving educational quality; expanding access to underserved populations, including veterans; graduating students, and not just enrolling them; and meeting key workforce needs; and

WHEREAS, Texas and WGU desire to substantially increase the availability of this unique educational opportunity to Texans by establishing WGU Texas as a nonprofit educational institution in and for the State of Texas; and

WHEREAS, the State of Texas should take additional significant steps to enable WGU to expand its services in Texas for the benefit of our adult learners;

NOW, THEREFORE, I, RICK PERRY, Governor of the State of Texas, by virtue of the power and authority vested in me by the Constitution and the laws of the State of Texas, do hereby declare and express the commitment of the State of Texas to WGU and in its establishment of WGU Texas to meet the needs of more Texas students by providing online, competency-based educational opportunities, and in support thereof I do hereby call upon:

All agencies and officials of the State of Texas to work cooperatively with WGU toward the creation and establishment of WGU Texas as a nonprofit Texas institution of higher education that will provide Texans with enhanced access to online, competency-based higher education degree programs.

The Texas Higher Education Coordinating Board (THECB) to recognize, endorse and support online, competency-based education as an important component of the state's higher education system; to work to eliminate any unnecessary barriers to WGU Texas' delivery of such education programs; and to work with WGU Texas to integrate its academic programs and services into the state's higher education policy and strategy.

The Texas Workforce Commission (TWC) to explore, consider and implement appropriate and effective methods to promote online competency-based education opportunities like those that WGU Texas will provide to dislocated workers, veterans and other Texans in need of higher education achievement and degrees.

The Texas Education Agency (TEA) to explore, consider and implement appropriate and effective methods to promote and partner with WGU Texas to expand the supply of science, technology, engineering and math related teachers in Texas.

THECB, TWC, TEA and all other agencies whose assistance is required to create appropriate data-sharing processes, as may be required by state or federal guidelines for higher education providers, to assess WGU Texas' performance and determine the extent to which it helps the state achieve the goals of its higher education system.

In further support of these efforts, the state is entering into an addendum to the Memorandum of Understanding that the state and WGU executed in 1997, to further memorialize and enhance the state's participation in and support of WGU Texas. Pursuant to the terms of that addendum, WGU Texas shall establish an advisory board whose members shall be appointed in consultation with the governor.

This executive order supersedes all previous orders in conflict or inconsistent with its terms and shall remain in effect and in full force until modified, amended, rescinded or superseded by me or by a succeeding governor.

Given under my hand this the 3rd day of August, 2011.

Rick Perry, Governor

TRD-201104068

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Executive Order

RP 76

Relating to the suspension of the seven-day waiting period for certain state unemployment insurance claimants who have become unemployed as a direct result of wildfires.

WHEREAS, devastating wildfires struck several counties in Texas beginning on August 30, 2011, causing severe damage to homes, businesses and residents; and

WHEREAS, I issued an Emergency Disaster Proclamation on December 21, 2010, as extreme fire hazard posed a threat of imminent disaster in specified counties in Texas; and

WHEREAS, this Emergency Disaster Proclamation is currently in effect, having been recently renewed on September 1, 2011; and

WHEREAS, the President of the United States issued a major disaster declaration (FEMA 4029-DR) under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. Section 5121 et seq.; and

WHEREAS, pursuant to Section 207.0212 of the Texas Labor Code, the seven-day waiting period requirement for certain state unemployment insurance claimants who have become unemployed as a direct result of a natural disaster that resulted in the major disaster declaration issued by the President of the United States may be suspended by the governor;

NOW, THEREFORE, I, RICK PERRY, Governor of Texas, by virtue of the power and authority vested in me by Section 207.0212 of the Texas Labor Code, do hereby suspend the seven-day waiting period requirement imposed under Section 207.021(a)(7) of the Texas Labor Code to authorize an individual to receive benefits for that waiting period if the individual:

(1) is unemployed as a direct result of a natural disaster that resulted in the major disaster declaration issued by the President of the United States (FEMA 4029-DR) under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S. C. Section 5121 et seq.; and

(2) is otherwise eligible for unemployment compensation benefits under the Texas Unemployment Compensation Act; and

(3) is not receiving disaster unemployment assistance benefits for the period included in that waiting period.

This executive order supersedes all previous orders in conflict or inconsistent with its terms and shall remain in effect and in full force until modified, amended, rescinded or superseded by me or by a succeeding governor.

Given under my hand this the 17th day of September, 2011.

Rick Perry, Governor

TRD-201104069

♦ ♦ ♦

Proclamation 41-3284

TO ALL TO WHOM THESE PRESENTS SHALL COME:

I, RICK PERRY, TO ALL TO WHOM THESE PRESENTS SHALL COME:

WHEREAS, Governor of the State of Texas, issued an Emergency Disaster Proclamation on December 21, 2010, as extreme fire hazard posed a threat of imminent disaster in specified counties in Texas.

WHEREAS, the extreme fire hazard continues to create a threat of disaster for the people in the State of Texas; and

WHEREAS, record high temperatures, preceded by significantly low rainfall, have resulted in declining reservoir and aquifer levels, threatening water supplies and delivery systems in many parts of the state; and

WHEREAS, these exceptional drought conditions have reached historic levels, posing an imminent threat to public health, property and the economy; and

WHEREAS, this state of disaster includes all 254 counties in the State of Texas;

THEREFORE, in accordance with the authority vested in me by Section 418.014 of the Texas Government Code, I do hereby renew the disaster proclamation and direct that all necessary measures, both public and private as authorized under Section 418.017 of the code, be implemented to meet that disaster.

As provided in Section 418.016 of the code, all rules and regulations that may inhibit or prevent prompt response to this threat are suspended for the duration of the state of disaster.

In accordance with the statutory requirements, copies of this proclamation shall be filed with the applicable authorities.

IN TESTIMONY WHEREOF, I have hereunto signed my name and have officially caused the Seal of State to be affixed at my Office in the City of Austin, Texas, this the 1st day of October, 2011.

Rick Perry, Governor

TRD-201104185

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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-0998-GA

Requestor:

Ms. Jeanna Willhelm

Winkler County Auditor

Post Office Drawer O

Kermit, Texas 79745

Re: Whether a county treasurer, county auditor, or a county human resources officer is responsible for the performance of various duties involving disbursement and endorsement (RQ-0998-GA)

Briefs requested by October 14, 2011

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

TRD-201104206
Jay Dyer
Deputy Attorney General
Office of the Attorney General
Filed: October 5, 2011

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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 3. OFFICE OF THE ATTORNEY GENERAL

CHAPTER 69. CENTRAL PURCHASING SUBCHAPTER B. HISTORICALLY UNDERUTILIZED BUSINESS PROGRAM

1 TAC §69.25

The Office of the Attorney General (OAG) proposes an amendment to §69.25. The proposal would update references to the Comptroller of Public Accounts' rules found at 34 TAC, Part 1 Comptroller of Public Accounts, Chapter 20 Texas Procurement and Support Services, Subchapter B Historically Underutilized Business Program, §§20.10 - 20.28. This amendment is necessary due to the Comptroller of Public Accounts updating and adding sections to the above referred rule.

Julie Geeslin, Director, Budget and Purchasing Division, has determined that for each of the first five years following the amendment of §69.25, the public benefit expected as a result of the amended rule is that it will provide accurate information to the public regarding the OAG's participation in the Historically Underutilized Business Program.

Ms. Geeslin has also determined that during the first five-year period following the amendment of §69.25, there will be no foreseeable fiscal implications for state or local government as a result of the amendment. Further, she has determined that for each of the first five years following the amendment of §69.25, there will be no economic cost to persons required to comply with the section. Therefore, there is no need to consider less costly alternatives to the amendment. Finally, Ms. Geeslin has determined that the amendment of §69.25 will have no adverse effect on small business or micro-business or local employment.

Written comments on the proposal may be submitted for 30 days following the publication of this notice to Julie Geeslin, Director, Budget and Purchasing Division, Office of the Attorney General, P.O. Box 12548, Austin, Texas 78711-2548, (512) 475-4495, julie.geeslin@oag.state.tx.us.

The proposed amendment to this rule is authorized in accordance with Government Code §2161.003, which requires state agencies to adopt the rules of the Comptroller of Public Accounts regarding Historically Underutilized Businesses under Government Code §2161.002 as its own.

The proposed amendment to this rule does not affect any other statutes.

§69.25. Historically Underutilized Business Program.

In accordance with Texas Government Code, §2161.003, the OAG adopts by reference the Comptroller of Public Accounts' rules found at 34 TAC, Part 1 Comptroller of Public Accounts, Chapter 20 Texas Procurement [~~Purchasing~~] and Support Services, Subchapter B [~~Historically Underutilized Business Program, §§20.11 - 20.28,~~] relating to Historically Underutilized Business Program[~~, with the following addition: For the purpose of Subchapter B, §69.25, "Commission" refers to the Comptroller of Public Accounts~~].

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 29, 2011.

TRD-201104085
Jay Dyer
Deputy Attorney General
Office of the Attorney General
Earliest possible date of adoption: November 13, 2011
For more information regarding this publication, contact Zindia Thomas, Agency Liaison, at (512) 936-9901.

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TITLE 7. BANKING AND SECURITIES

PART 7. STATE SECURITIES BOARD

CHAPTER 107. TERMINOLOGY

7 TAC §107.2

The Texas State Securities Board proposes an amendment to §107.2, concerning definitions, to change the definition of "EFD System" from "Electronic Form D system" to "Electronic Filing Depository system." This amendment reflects a change made by the North American Securities Administrators Association ("NASAA") to the name of the program since they anticipate that, in the future, the system will be expanded to facilitate electronic filing of other forms, not just Form D.

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

Ms. Loutherback 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 consistent use of terms used throughout the Board's rules and within the industry. There will be no effect on micro- or small businesses. There is no anticipated economic cost to persons who are required to comply

with the rule as proposed. There is no anticipated impact on local employment.

Comments on the proposal to be considered by the Board should be submitted in writing within 30 days after publication of the proposed section in the *Texas Register.* Comments should be sent to Kara L. Kennedy, General Counsel, State Securities Board, P.O. Box 13167, Austin, Texas 78711-3167, or sent by facsimile to (512) 305-8336.

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

The proposal affects Texas Civil Statutes, Article 581-1, et seq.

§107.2. Definitions.

The following words and terms, when used in Part 7 of this title (relating to the State Securities Board), shall have the following meanings, unless the context clearly indicates otherwise.

(1) - (43) (No change.)

(44) EFD System--The Electronic Filing Depository [~~Form D~~] system provided by the North American Securities Administrators Association (NASAA) that is used for electronic filing of Form D with the Securities Commissioner.

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 30, 2011.

TRD-201104092
Benette L. Zivley
Securities Commissioner
State Securities Board
Earliest possible date of adoption: November 13, 2011
For further information, please call: (512) 305-8303

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CHAPTER 115. SECURITIES DEALERS AND AGENTS

7 TAC §115.3

The Texas State Securities Board proposes an amendment to §115.3, concerning examination. The amendment to subsection (c) would update the waiver of the reexamination requirements for a dealer or an agent whose prior Texas registration has lapsed more than two years, but who has nevertheless completed the required examinations and has been registered with the Financial Industry Regulatory Authority ("FINRA") and with another state securities regulator during the previous two years. The amendment would remove the conditions that the person may not have been unregistered for more than 60 days, and had to have been registered with the state in which the person maintains its principal place of business during the period of the lapse from Texas registration.

The "unregistered for no more than 60 days" provision of the existing rule is inconsistent with the North American Securities Administrators Association's ("NASAA") current recognition and acceptance of the FINRA Central Registration Depository ("CRD") Continuous Registration Period, which requires a registration gap in excess of two years before it deems a person to be subject to exam deficiencies. Similarly, the CRD Continuous Registration Period does not consider whether or not the person's registration within the previous two years has been with the state in which the dealer or agent maintains its principal place of business. Rather, it waives the reexamination requirements for any person whose registration with FINRA and with any state securities regulator has not lapsed for more than two years. Since at least 2007, the staff has repeatedly recommended and the Securities Commissioner has granted reexamination waivers for persons whose Texas registration had lapsed more than two years, but who had completed the required examinations and whose registration with FINRA and with any other state securities regulator had not lapsed more than two years. This proposed amendment to §115.3(c) was previously published in the August 12, 2011, issue of the *Texas Register* (36 TexReg 5061), which has been withdrawn so it could be combined with the proposed amendment to subsection (d) of that rule.

The amendment to subsection (d) would implement the requirements of Senate Bill 867, requiring state agencies to provide reasonable examination accommodations to an examinee diagnosed as having dyslexia for each licensing examination administered by the agency. This amendment would take a broader approach and provide for accommodations to all persons with disabilities under the Americans with Disabilities Act ("ADA"), not just those with dyslexia, who take the Texas securities law examination. A related amendment is being proposed for §116.3, as well as a new form, §133.3, ADA Accommodations Request Form.

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

Ms. Loutherback also has determined that for each year of the first five years the rule is in effect the public benefits anticipated as a result of enforcing the rule will be to streamline the registration process, coordinate the Texas waiver provision with NASAA and FINRA, and accommodate examinees with ADA disabilities. There will be no effect on micro- or small businesses. There may be a minor economic cost to individuals required to comply with the rule in order to provide satisfactory documentation of a disability. There is no anticipated impact on local employment.

Comments on the proposal to be considered by the Board should be submitted in writing within 30 days after publication of the proposed section in the *Texas Register.* Comments should be sent to Kara L. Kennedy, General Counsel, State Securities Board, P.O. Box 13167, Austin, Texas 78711-3167, or sent by facsimile to (512) 305-8336.

The amendment is proposed under the Texas Occupations Code §54.003 and Texas Civil Statutes, Articles 581-13.D and 581-28-1. Occupations Code §54.003 provides that agencies shall adopt rules to provide reasonable examination accommodations to examinees diagnosed as having dyslexia for each licensing examination administered by the agency. Article 581-13.D provides the Board with authority to waive examination requirements for any applicant or class of applicants. Article 581-28-1 provides the Board with the authority to adopt

rules and regulations necessary to carry out and implement the provisions of the Texas Securities Act, including rules and regulations governing registration statements and applications; defining terms; classifying securities, persons, and matters within its jurisdiction; and prescribing different requirements for different classes.

The proposal affects Texas Occupations Code §54.003 and Texas Civil Statutes, Articles 581-13 and 581-19.

§115.3. Examination.

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

(c) Waivers of examination requirements.

(1) (No change.)

(2) A full waiver of the examination requirements of the Texas Securities Act, §13.D, is granted by the Board to the following classes of persons:

(A) - (F) (No change.)

(G) a person who completed the required examinations and[~~, but~~] whose registration with FINRA and with another state securities regulator has not lapsed for more than two years [~~and who has been continually registered during the period of the lapse (or unregistered for no more than 60 days when transferring from one employer to another) with FINRA and the state securities regulator in the state in which the person maintains its principal place of business~~].

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

(d) Texas securities law examination.

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

(4) Disability accommodations. The Texas securities law examination shall be administered to applicants with disabilities in compliance with the Americans with Disabilities Act ("ADA").

(A) Any applicant with a disability who wishes to request disability accommodations must submit to the Securities Commissioner a Form 133.3, ADA Accommodations Request Form, that has been completed and signed by the applicant and includes supporting documentation from a licensed or certified health professional appropriate for diagnosing and treating the disability, at least 60 days prior to the examination. A prior history of receiving disability accommodations, without demonstration of a current need, will not necessarily warrant approval of disability accommodations.

(B) The Securities Commissioner may request additional documentation to substantiate a request for disability accommodations.

(C) Documentation shall not be older than three years from the date of submission.

(D) All medical records provided to the Securities Commissioner are confidential under the Health Insurance Portability and Accountability Act ("HIPAA").

(E) The Securities Commissioner is not required to approve every request for disability accommodations or to provide every accommodation or service requested. The Securities Commissioner is not required to grant a request for disability accommodations if doing so would fundamentally alter the measurement of knowledge or the measurement of skill intended to be tested by the Texas securities law examination, would affect the security of the examination, or would create an undue financial or administrative burden.

(F) Once disability accommodations have been granted, they may not be altered during the examination unless prior approval of the Securities Commissioner is obtained.

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 30, 2011.

TRD-201104093
Benette L. Zivley
Securities Commissioner
State Securities Board
Earliest possible date of adoption: November 13, 2011
For further information, please call: (512) 305-8303

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CHAPTER 116. INVESTMENT ADVISERS AND INVESTMENT ADVISER REPRESENTATIVES

7 TAC §116.1

The Texas State Securities Board proposes an amendment to §116.1, concerning general provisions, to replace the definition of "within this state" found in Chapter 116 (Investment Advisers and Investment Adviser Representatives) with a similar definition of "in this state," which is the language used in relation to investment advisers in §12.B of the Texas Securities Act; and also replaces a reference to "within this state" with "in this state." The amendment would also add reference to an investment adviser, rather than just an investment adviser representative, to the definition of "solicitor."

Patricia Loutherback, Director, Registration Division, Ronak Patel, Director, Inspections and Compliance Division, and Joe Rotunda, Director, Enforcement Division, have determined that for the first five-year period the rule is in effect there will be no foreseeable fiscal implications for state or local government as a result of enforcing or administering the rule.

Ms. Loutherback, Mr. Patel, and Mr. Rotunda also have determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be that the regulated community will be informed of the meaning of terms used in the Texas Securities Act and Board rules and that terminology will be used consistently throughout the Board's rules. There will be no effect on micro- or small businesses. There is no anticipated economic cost to persons who are required to comply with the rule as proposed. There is no anticipated impact on local employment.

Comments on the proposal to be considered by the Board should be submitted in writing within 30 days after publication of the proposed section in the *Texas Register*. Comments should be sent to Kara L. Kennedy, General Counsel, State Securities Board, P.O. Box 13167, Austin, Texas 78711-3167, or sent by facsimile to (512) 305-8336.

The amendment is proposed under Texas Civil Statutes, Article 581-28-1. Section 28-1 provides the Board with the authority to adopt rules and regulations necessary to carry out and implement the provisions of the Texas Securities Act, including rules and regulations governing registration statements and applica-

tions; defining terms; classifying securities, persons, and matters within its jurisdiction; and prescribing different requirements for different classes.

The proposal affects Texas Civil Statutes, Articles 581-12, 581-12-1, 581-14, 581-18, and 581-19.

§116.1. General Provisions.

(a) Definitions. Words and terms used in this chapter are also defined in §107.2 of this title (relating to Definitions). The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

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

(5) In this state--[~~As used in the Texas Securities Act, §12, has the same meaning as the term "within this state" as defined in §107.2 of this title (relating to Definitions) and paragraph (10) of this subsection.~~]

(A) A person renders services as an investment adviser "in this state" as set out in the Texas Securities Act, §12.B, if either the person or the person's agent is present in this state or the client/customer or the client/customer's agent is present in this state at the time of the particular activity. A person can be an investment adviser in more than one state at the same time.

(B) Likewise, a person renders services as an investment adviser representative "in this state" as set out in the Texas Securities Act, §12.B, whether by direct act or through subagents except as otherwise provided, if either the person or the person's agent is present in this state or the client/customer or the client/customer's agent is present in this state at the time of the particular activity. A person can be an investment adviser representative in more than one state at the same time.

(C) Rendering services as an investment adviser or as an investment adviser representative can be made by personal contact, mail, telegram, telephone, wireless, electronic communication, or any other form of oral or written communication.

(6) - (8) (No change.)

(9) Solicitor--Any investment adviser or investment adviser representative who limits their activities to referring potential clients to an investment adviser for compensation.

[~~(10) Within this state--~~]

[~~(A) A person is an "investment adviser" who engages "within this state" in rendering services as an investment adviser as set out in the Texas Securities Act, §4.C, if either the person or the person's agent is present in this state or the client/customer or the client/customer's agent is present in this state at the time of the particular activity. A person can be an investment adviser in more than one state at the same time.~~]

[~~(B) Likewise, a person is an "investment adviser representative" who engages "within this state" in rendering services as an investment adviser as set out in the Texas Securities Act, §4.C, whether by direct act or through subagents except as otherwise provided, if either the person or the person's agent is present in this state or the client/customer or the client/customer's agent is present in this state at the time of the particular activity. A person can be an investment adviser representative in more than one state at the same time.~~]

(10) [~~(11)~~] Federal covered investment adviser--An investment adviser who is registered under the Investment Advisers Act of 1940 (15 U.S.C. §80b-1 et seq.), as amended. A federal covered investment adviser is not required to be registered pursuant to the Texas Securities Act.

(11) [~~(12)~~] Registered investment adviser--An investment adviser who has been issued a registration certificate by the Securities Commissioner under the Texas Securities Act, §15. (A federal covered investment adviser is not prohibited from being registered with the Securities Commissioner. If a federal covered investment adviser elects to register with the Securities Commissioner, it is subject to all of the registration requirements of the Act.)

(12) [~~(13)~~] Officer--A president, vice president, secretary, treasurer, or principal financial officer, comptroller, or principal accounting officer, or any other person occupying a similar status or performing similar functions with respect to any organization or entity, whether incorporated or unincorporated.

(b) Registration of investment advisers, investment adviser representatives, and branch offices.

(1) (No change.)

(2) Exemption from the registration requirements. The Board pursuant to the Texas Securities Act, §§12.C and 5.T, exempts from the registration provisions of the Act, §12, persons not required to register as an investment adviser or an investment adviser representative on or after July 8, 1997, by act of Congress in Public Law Number 104-290, Title III.

(A) Registration as an investment adviser is not required for the following:

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

(iv) an investment adviser who does not have a place of business located in [~~within~~] this state and, during the preceding 12-month period, has had fewer than six clients who are Texas residents.

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

(c) - (d) (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 30, 2011.

TRD-201104094
Benette L. Zivley
Securities Commissioner
State Securities Board
Earliest possible date of adoption: November 13, 2011
For further information, please call: (512) 305-8303

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7 TAC §116.3

The Texas State Securities Board proposes an amendment to §116.3, concerning examination. The amendment to subsection (c) would update the waiver of the reexamination requirements for an investment adviser or investment adviser representative whose prior Texas registration has lapsed more than two years, but who has nevertheless completed the required examinations and has been registered with another state securities regulator during the previous two years. The amendment would remove the conditions that the person may not have been unregistered for more than 60 days, and had to have been registered with the state in which the person maintains its principal place of business during the period of the lapse from Texas registration.

The "unregistered for no more than 60 days" provision of the existing rule is inconsistent with the changes being proposed to §115.3 for dealers and agents. Similarly, in light of the changes being proposed to §115.3 applicable to dealers and agents, the requirement that an investment adviser or investment adviser representative has been registered with the state in which it maintains its principal place of business during the lapse from Texas registration would be replaced with a requirement that the person has been registered with any state securities regulator during the previous two years. This proposed amendment to §116.3(c) was previously published in the August 12, 2011, issue of the *Texas Register* (36 TexReg 5062), which has been withdrawn so it could be combined with the proposed amendment to subsection (d) of that rule.

The amendment to subsection (d) would implement the requirements of Senate Bill 867, 82nd Legislature, Regular Session, requiring state agencies to provide reasonable examination accommodations to an examinee diagnosed as having dyslexia for each licensing examination administered by the agency. This amendment would take a broader approach and provide for accommodations to all persons with disabilities under the Americans with Disabilities Act ("ADA"), not just those with dyslexia, who take the Texas securities law examination. A related amendment is being proposed for §115.3, as well as a new form, §133.3, ADA Accommodations Request Form.

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

Ms. Loutherback also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be to streamline the registration process, provide consistency with a similar waiver applicable to dealers and agents, and accommodate examinees with ADA disabilities. There will be no effect on micro- or small businesses. There may be a minor economic cost to individuals required to comply with the rule in order to provide satisfactory documentation of a disability. There is no anticipated impact on local employment.

Comments on the proposal to be considered by the Board should be submitted in writing within 30 days after publication of the proposed section in the *Texas Register.* Comments should be sent to Kara L. Kennedy, General Counsel, State Securities Board, P.O. Box 13167, Austin, Texas 78711-3167, or sent by facsimile to (512) 305-8336.

The amendment is proposed under the Texas Occupations Code §54.003 and Texas Civil Statutes, Articles 581-13.D and 581-28-1. Occupations Code §54.003 provides that agencies shall adopt rules to provide reasonable examination accommodations to examinees diagnosed as having dyslexia for each licensing examination administered by the agency. Article 581-13.D provides the Board with authority to waive examination requirements for any applicant or class of applicants. Article 581-28-1 provides the Board with the authority to adopt rules and regulations necessary to carry out and implement the provisions of the Texas Securities Act, including rules and regulations governing registration statements and applications; defining terms; classifying securities, persons, and matters within its jurisdiction; and prescribing different requirements for different classes.

The proposal affects Texas Occupations Code §54.003 and Texas Civil Statutes, Articles 581-13 and 581-19.

§116.3. Examination.

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

(c) Waivers of examination requirements.

(1) (No change.)

(2) A full waiver of the examination requirements of the Texas Securities Act, §13.D, is granted by the Board to the following classes of persons:

(A) - (G) (No change.)

(H) a person who completed the required examinations and [~~, but~~] whose registration with another state securities regulator has not lapsed for more than two years [~~and who has been continually registered during the period of the lapse (or unregistered for no more than 60 days when transferring from one employer to another) with the state securities regulator in the state in which the person maintains its principal place of business~~].

(3) - (5) (No change.)

(d) Texas securities law examination.

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

(4) Disability accommodations. The Texas securities law examination shall be administered to applicants with disabilities in compliance with the Americans with Disabilities Act ("ADA").

(A) Any applicant with a disability who wishes to request disability accommodations must submit to the Securities Commissioner a Form 133.3, ADA Accommodations Request Form, that has been completed and signed by the applicant and includes supporting documentation from a licensed or certified health professional appropriate for diagnosing and treating the disability, at least 60 days prior to the examination. A prior history of receiving disability accommodations, without demonstration of a current need, will not necessarily warrant approval of disability accommodations.

(B) The Securities Commissioner may request additional documentation to substantiate a request for disability accommodations.

(C) Documentation shall not be older than three years from the date of submission.

(D) All medical records provided to the Securities Commissioner are confidential under the Health Insurance Portability and Accountability Act ("HIPAA").

(E) The Securities Commissioner is not required to approve every request for disability accommodations or to provide every accommodation or service requested. The Securities Commissioner is not required to grant a request for disability accommodations if doing so would fundamentally alter the measurement of knowledge or the measurement of skill intended to be tested by the Texas securities law examination, would affect the security of the examination, or would create an undue financial or administrative burden.

(F) Once disability accommodations have been granted, they may not be altered during the examination unless prior approval of the Securities Commissioner is obtained.

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 30, 2011.

TRD-201104095
Benette L. Zivley
Securities Commissioner
State Securities Board
Earliest possible date of adoption: November 13, 2011
For further information, please call: (512) 305-8303

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7 TAC §116.5

The Texas State Securities Board proposes an amendment to §116.5, concerning minimum records, to correct an internal cross-reference in subsection (b) and to require additional records be maintained by investment advisers as a result of the proposed new rule §116.17.

Ronak Patel, Director, Inspections and Compliance Division, has determined that for the first five-year period the rule is in effect there will be no foreseeable fiscal implications for state or local government as a result of enforcing or administering the rule.

Mr. Patel 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 industry will be better apprised of recordkeeping requirements. There will be no effect on micro- or small businesses. There is no anticipated economic cost to persons who are required to comply with the rule as proposed. There is no anticipated impact on local employment.

Comments on the proposal to be considered by the Board should be submitted in writing within 30 days after publication of the proposed section in the *Texas Register.* Comments should be sent to Kara L. Kennedy, General Counsel, State Securities Board, P.O. Box 13167, Austin, Texas 78711-3167, or sent by facsimile to (512) 305-8336.

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

The proposal affects Texas Revised Civil Statutes, Article 581-14.

§116.5. Minimum Records.

(a) Records to be made by investment advisers. Persons registered as investment advisers whose principal place of business is located in another state shall maintain records at least in accordance with the minimum record-keeping requirements of that state. Persons registered as investment advisers whose principal place of business is located in Texas shall make and keep current the following minimum records or the equivalent thereof:

(1) - (10) (No change.)

(11) The internal control report that an investment adviser is required to obtain or receive from its related person, pursuant to §116.17(b)(6)(B).

(12) A memorandum describing the basis upon which the investment adviser has determined that the presumption that any related person is not operationally independent under §116.17(a)(7) has been overcome.

(b) Records to be preserved by investment advisers.

(1) Persons registered as investment advisers in Texas shall preserve all records required pursuant to subsection (a) [~~(b)~~] of this section for a period of not less than five years from the end of the fiscal year during which the last entry was made on such record, the first two years in an easily accessible place.

(2) - (5) (No change.)

(c) - (d) (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.

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Benette L. Zivley
Securities Commissioner
State Securities Board
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For further information, please call: (512) 305-8303

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7 TAC §116.13

The Texas State Securities Board proposes an amendment to §116.13, concerning advisory fee requirements, to update the rule to conform to changes proposed by the Securities and Exchange Commission ("SEC") in Release No. IA 3198, published in May 13, 2011, issue of the *Federal Register* (76 FedReg 27959). In that release, the SEC proposed to increase the dollar amount thresholds from $750,000 to $1 million and from $1.5 million to $2 million to account for the effects of inflation and to exclude the value of a person's primary residence from the test of whether a person has sufficient net worth to be considered a "qualified client." The dollar amount thresholds were adopted by the SEC in an Order Approving Adjustment for Inflation of the Dollar Amount Tests in Rule 205-3 under the Investment Advisers Act of 1940 (SEC Release No. IA-3236), issued July 12, 2011, and effective September 19, 2011. If additional changes are made to the criteria in the SEC's adopting release, it is likely that corresponding changes may be made to this amendment at the time it is considered for adoption by the Board.

Ronak Patel, Director, Inspections and Compliance Division, has determined that for the first five-year period the rule is in effect there will be no foreseeable fiscal implications for state or local government as a result of enforcing or administering the rule.

Mr. Patel also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be that the rule will coordinate with federal standards and requirements. There will be no effect on micro- or small businesses. There is no anticipated economic cost to persons who are required to comply with the rule as proposed. There is no anticipated impact on local employment.

Comments on the proposal to be considered by the Board should be submitted in writing within 30 days after publication of the proposed section in the *Texas Register.* Comments should be sent to Kara L. Kennedy, General Counsel, State Securities Board,

P.O. Box 13167, Austin, Texas 78711-3167, or sent by facsimile to (512) 305-8336.

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

The proposal affects Texas Civil Statutes, Article 581-14.

§116.13. Advisory Fee Requirements.

(a) (No change.)

(b) Any registered investment adviser who wishes to charge a fee based on a share of the capital gains or the capital appreciation of the funds or any portion of the funds of a client must comply with SEC Rule 205-3 (17 Code of Federal Regulations §275.205-3), which permits [~~prohibits~~] the use of such fee if [~~unless~~] the client is a "qualified client." In general, a qualified client may include:

(1) a natural person or company who at the time of entering into such agreement has at least $1 million [~~$750,000~~] under the management of the investment adviser;

(2) a natural person or company who the adviser reasonably believes at the time of entering into the contract:

(A) has a net worth of jointly with his or her spouse of more than $2 million, excluding the value of the primary residence of such natural person, calculated by subtracting from the estimated fair market value of the property the amount of debt secured by the property, up to the estimated fair market value of the property [~~$1,500,000~~]; or

(B) (No change.)

(3) (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 30, 2011.

TRD-201104098
Benette L. Zivley
Securities Commissioner
State Securities Board
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For further information, please call: (512) 305-8303

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7 TAC §116.17

The Texas State Securities Board proposes new §116.17, concerning investment advisers' custody of clients' funds or securities, to provide the Agency and the public with better information about investment advisers' custodial practices. The new section is based on changes made to the federal investment adviser custody rule by the Securities and Exchange Commission ("SEC") last year and a similar rule recently proposed by the North American Securities Administrators Association ("NASAA").

In response to concerns raised by several state and federal enforcement actions, including the Madoff fraud, this new section would provide safeguards for clients' funds and securities in the custody of an investment adviser by requiring that, among other things: (1) a client's funds and securities be maintained by a qualified custodian; (2) a client's assets be verified by an independent public accountant in annual surprise examinations; (3) a client receive quarterly account statements directly from the qualified custodian maintaining the client's funds so the client can compare the statements with those received from the investment adviser; and (4) unless a client's assets are maintained by an independent custodian, the investment adviser obtain an annual written internal control report relating to the custody of the client's assets from an independent public accountant.

The new rule would provide some exceptions from the requirements for the following: (1) shares of mutual funds; (2) certain privately offered securities; (3) investment advisers or related persons whose only authority over client funds or securities is to make withdrawals for fees; (4) limited partnerships subject to an annual audit; (5) accounts of investment companies registered under the Investment Company Act of 1940; and (6) related persons who are operationally independent of the investment adviser.

Ronak Patel, Director, Inspections and Compliance Division, has determined that for the first five-year period the rule is in effect there will be no foreseeable fiscal implications for state or local government as a result of enforcing or administering the rule.

Mr. Patel 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 new rule will be to benefit investors by preventing client assets from being lost, misused, or misappropriated. While the provision would not prevent all fraudulent activities by investment advisers or custodians, the new rule, together with an increased focus on the safekeeping of client assets, will help deter fraudulent conduct, and increase the likelihood that fraudulent conduct will be detected earlier so that client losses will be minimized.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL AND MICRO-BUSINESSES

The Agency currently has approximately 1,352 registered investment advisers. Of those 1,352 registered investment advisers, approximately 99% are small businesses and approximately 95% are micro-businesses.

For those small or micro-investment advisers that are not subject to an exception from the requirements of this new rule, the projected economic impact of the rule amendment will be the costs of obtaining and maintaining (1) an annual "surprise audit" conducted by an accountant registered with the Public Company Accounting Oversight Board ("PCAOB Registered Accountant") and (2) an internal control report prepared by a PCAOB Registered Accountant.

Of those 1,352 registered investment advisers, approximately 99 (or less than 8.0%) have some level of custody of client funds or securities. The majority of those 99 have "indirect" custody solely as a result of the investment adviser's authority to withdraw its fees from the client's account for which the new rule provides an exception from the annual "surprise audit."

In addition, most of those 99 advise limited partnerships or pooled investment vehicles (i.e., hedge funds) for which there is also an exception from the annual "surprise audit" requirement if the pooled investment vehicle is subject to an annual audit by a PCAOB Registered Accountant and the adviser distributes

copies of the audited financials to each investor within 120 days of the pool's fiscal year end.

The Agency estimates the probable economic cost to those registered investment advisers that are required to comply with the "surprise audit" requirement of the new rule will be $25,000-$50,000 per annual audit depending on the size of the firm. However, the Agency further estimates that most of the investment advisers currently registered with the state fall within one of the six exceptions to the "surprise audit" requirement, including the two discussed above. In addition, any investment adviser who makes the switch from federal registration to state registration under the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") is already subject to similar requirements under the SEC's custody rule adopted in March 2010. Therefore, for those investment advisers, the Agency estimates there will be a continued cost, but no additional costs, as a result of the Board's adoption of a similar rule.

While the cost to prepare an internal control report relating to custody will vary based on the size and services offered by the qualified custodian, the Agency further estimates the probable economic cost to those registered investment advisers required to obtain an internal control report will be less than $250,000 per year for each adviser. The Agency further estimates that less than a handful, if any, of the investment advisers currently registered with the state act as a "qualified custodian" of their clients' funds or securities. Rather, only those investment advisers who have very large sums of assets under management take on such a role. Therefore, the Agency expects that less than three, if any, of the 1,352 investment advisers currently registered with Texas will be required to obtain an internal control report. In addition, any investment adviser who makes the switch from federal registration to state registration under the Dodd-Frank Act is already subject to the requirements of the SEC's custody rule adopted in March 2010. Therefore, the staff estimates there will be a continued cost, but no additional costs, to those investment advisers as a result of the Board's adoption of a similar rule.

There may be additional costs for those investment advisers who have not previously retained a PCAOB Registered Accountant. The Agency estimates that additional cost will be $25,000-$50,000 per annual audit depending on the size of the firm and the number of clients for which it has custody of funds or securities.

In preparing the proposal, the Agency considered several alternative methods for achieving the purposes of the new rule. One, the Agency considered exempting small or micro-investment advisers, but determined the investing public would benefit from the protections provided by the new rule, which is designed to provide independent third-party review and confirmation of the security of clients' assets when an investment adviser takes custody of clients' funds or securities. Two, the Agency considered implementing different requirements for small or micro-investment advisers, but decided that the risks for investors is the same, if not greater, when a small or micro-investment adviser has custody of clients' funds or securities. Finally, the Agency considered not adopting the new rule, but decided instead that varying from the uniform standards resulting from the Dodd-Frank Act, from current SEC regulations, and from a similar rule being considered by NASAA would not be consistent with the health, safety and economic welfare of the state. Diverging from uniform standards also could ultimately result in higher compliance costs for investment advisers registered in more than one state.

Mr. Patel also has determined that, except for the costs discussed above, there are no additional anticipated economic costs to persons who are required to comply with the new rule as proposed. There is no anticipated impact on local employment.

Comments on the proposal to be considered by the Board should be submitted in writing within 30 days after publication of the proposed section in the *Texas Register.* Comments should be sent to Kara L. Kennedy, General Counsel, State Securities Board, P.O. Box 13167, Austin, Texas 78711-3167, or sent by facsimile to (512) 305-8336.

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

The proposal affects Texas Civil Statutes, Articles 581-13-1 and 581-14.

§116.17. Custody of Funds or Securities of Clients by Registered Investment Advisers.

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

(1) Audit--when used in regard to financial statements, an examination of the financial statements by an independent accountant in accordance with generally accepted auditing standards, as may be modified or supplemented by the Board, for the purpose of expressing an opinion thereon.

(2) Control--the power, directly or indirectly, to direct the management or policies of a person, whether through ownership of securities, by contract, or otherwise. Control includes:

(A) each of the investment adviser's officers, partners, or directors exercising executive responsibility (or persons having similar status or functions) is presumed to control the firm;

(B) a person is presumed to control a corporation if the person:

(i) directly or indirectly has the right to vote 25% or more of a class of the corporation's voting securities; or

(ii) has the power to sell or direct the sale of 25% or more of a class of the corporation's voting securities;

(C) a person is presumed to control a partnership if the person has the right to receive upon dissolution, or has contributed, 25% or more of the capital of the partnership;

(D) a person is presumed to control a limited liability company if the person:

(i) directly or indirectly has the right to vote 25% or more of a class of the interests of the limited liability company;

(ii) has the right to receive upon dissolution, or has contributed, 25% or more of the capital of the limited liability company; or

(iii) is an elected manager of the limited liability company; or

(E) a person is presumed to control a trust if the person is a trustee or managing agent of the trust.

(3) Custody--holding, directly or indirectly, client funds or securities, or having any authority to obtain possession of them. The investment adviser has custody if a related person holds, directly or indirectly, client funds or securities, or has any authority to obtain possession of them, in connection with advisory services the investment adviser provides to clients. Custody includes:

(A) possession of client funds or securities (but not of checks drawn by clients and made payable to third parties) unless the investment adviser receives them inadvertently and returns them to the sender promptly but in any case within three business days of receiving them;

(B) any arrangement (including a general power of attorney) under which the investment adviser is authorized or permitted to withdraw client funds or securities maintained with a custodian upon the investment adviser's instruction to the custodian; and

(C) any capacity (such as general partner of a limited partnership, managing member of a limited liability company or a comparable position for another type of pooled investment vehicle, or trustee of a trust) that gives the investment adviser or its supervised person legal ownership of or access to client funds or securities.

(4) Independent public accountant--a public accountant that meets the standards of independence described in Securities and Exchange Commission, Rule 2-01(b) and (c) of Regulation S-X (17 CFR §210.2-01(b) and (c)) as existed on April 1, 2010.

(5) Independent representative--a person that:

(A) acts as agent for an advisory client, including in the case of a pooled investment vehicle, for limited partners of a limited partnership (or members of a limited liability company, or other beneficial owners of another type of pooled investment vehicle) and by law or contract is obliged to act in the best interest of the advisory client or the limited partners (or members, or other beneficial owners);

(B) does not control, is not controlled by, and is not under common control with the investment adviser; and

(C) does not have, and has not had within the past two years, a material business relationship with the investment adviser.

(6) Open-end company--an management company which is offering for sale or has outstanding any redeemable security of which it is the issuer.

(7) Operationally independent--for purposes of subsection (c)(6) of this section, a related person is presumed not to be operationally independent unless each of the following conditions is met and no other circumstances can reasonably be expected to compromise the operational independence of the related person:

(A) client assets in the custody of the related person are not subject to claims of the adviser's creditors;

(B) advisory personnel do not have custody or possession of, or direct or indirect access to client assets of which the related person has custody, or the power to control the disposition of such client assets to third parties for the benefit of the adviser or its related persons, or otherwise have the opportunity to misappropriate such client assets;

(C) advisory personnel and personnel of the related person who have access to advisory client assets are not under common supervision; and

(D) advisory personnel do not hold any position with the related person or share premises with the related person.

(8) Qualified custodian--

(A) a bank as defined in the Investment Advisers Act of 1940, §202(a)(2), or a savings association as defined in the Federal Deposit Insurance Act, §3(b)(1), that has deposits insured by the Federal Deposit Insurance Corporation under the Federal Deposit Insurance Act;

(B) a broker-dealer registered under the Securities Exchange Act of 1934, §15(b)(1), holding the client assets in customer accounts;

(C) a futures commission merchant registered under the Commodity Exchange Act, §4f(a), holding the client assets in customer accounts, but only with respect to clients' funds and security futures, or other securities incidental to transactions in contracts for the purchase or sale of a commodity for future delivery and options thereon; and

(D) a foreign financial institution that customarily holds financial assets for its customers, provided that the foreign financial institution keeps the advisory clients' assets in customer accounts segregated from its proprietary assets.

(9) Related person--any person, directly or indirectly, controlling or controlled by the investment adviser, and any person that is under common control with the investment adviser.

(b) Safekeeping required. No registered investment adviser may have custody of client funds or securities unless:

(1) Qualified custodian. A qualified custodian maintains those funds and securities:

(A) in a separate account for each client under that client's name; or

(B) in accounts that contain only the investment adviser's clients' funds and securities, under the investment adviser's name as agent or trustee for the clients.

(2) Notice to clients. If the investment adviser opens an account with a qualified custodian on behalf of the client, either under the client's name or under the investment adviser's name as agent, the investment adviser notifies the client in writing of the qualified custodian's name, address, and the manner in which the funds or securities are maintained, promptly when the account is opened and following any changes to this information. If the investment adviser sends account statements to a client to which the investment adviser is required to provide this notice, include in the notification provided to that client and in any subsequent account statement the investment adviser sends that client, a statement urging the client to compare the account statements from the custodian with those from the investment adviser.

(3) Account statements to clients. The investment adviser has a reasonable basis, after due inquiry, for believing that the qualified custodian sends an account statement, at least quarterly, to each of the investment adviser's clients for which it maintains funds or securities, identifying the amount of funds and of each security in the account at the end of the period and setting forth all transactions in the account during that period.

(4) Independent verification. The client funds and securities of which the investment adviser has custody are verified by actual examination at least once during each calendar year, except as provided below, by an independent public accountant, pursuant to a written agreement between the investment adviser and the accountant, at a time that is chosen by the accountant without prior notice or announcement to the investment adviser and that is irregular from year to year. The written agreement must provide for the first examination to occur within six months of becoming subject to this paragraph, except that, if the investment adviser maintains client funds or securities pursuant to this section as a qualified custodian, the agreement must provide for

the first examination to occur no later than six months after obtaining the internal control report. The written agreement must require the accountant to:

(A) file a certificate on Form ADV-E with the Securities Commissioner within 120 days of the time chosen by the accountant in paragraph (4) of this subsection, stating that it has examined the funds and securities and describing the nature and extent of the examination;

(B) upon finding any material discrepancies during the course of the examination, notify the Securities Commissioner within one business day of the finding, by means of a facsimile transmission or electronic mail, followed by first class mail, directed to the attention of the Director of the Inspections and Compliance Division; and

(C) upon resignation or dismissal from, or other termination of, the engagement, or upon removing itself or being removed from consideration for being reappointed, file with the Securities Commissioner within four business days Form ADV-E accompanied by a statement that includes:

(i) the date of such resignation, dismissal, removal, or other termination, and the name, address, and contact information of the accountant; and

(ii) an explanation of any problems relating to examination scope or procedure that contributed to such resignation, dismissal, removal, or other termination.

(5) Special rule for limited partnerships and limited liability companies. If the investment adviser or a related person is a general partner of a limited partnership (or managing member of a limited liability company, or holds a comparable position for another type of pooled investment vehicle), the account statements required under paragraph (3) of this subsection must be sent to each limited partner (or member or other beneficial owner).

(6) Investment advisers acting as qualified custodians. If the investment adviser maintains, or if the investment adviser has custody because a related person maintains, client funds or securities pursuant to this subsection as a qualified custodian in connection with advisory services the investment adviser provides to clients:

(A) the independent public accountant the investment adviser retains to perform the independent verification required by paragraph (4) of this subsection must be registered with, and subject to regular inspection as of the commencement of the professional engagement period, and as of each calendar year-end, by, the Public Company Accounting Oversight Board in accordance with its rules; and

(B) the investment adviser must obtain, or receive from the investment adviser's related person, within six months of becoming subject to this paragraph and thereafter no less frequently than once each calendar year a written internal control report prepared by an independent public accountant:

(i) the internal control report must include an opinion of an independent public accountant as to whether controls have been placed in operation as of a specific date, and are suitably designed and are operating effectively to meet control objectives relating to custodial services, including the safeguarding of funds and securities held by either the investment adviser or a related person on behalf of the investment adviser's clients, during the year;

(ii) the independent public accountant must verify that the funds and securities are reconciled to a custodian other than the investment adviser or the investment adviser's related person; and

(iii) the independent public accountant must be registered with, and subject to regular inspection as of the commencement of the professional engagement period, and as of each calendar year-end, by, the Public Company Accounting Oversight Board in accordance with its rules.

(7) Independent representatives. A client may designate an independent representative to receive, on his or her behalf, notices and account statements as required under paragraphs (2) and (3) of this subsection.

(c) Exceptions.

(1) Shares of an open-end company. With respect to shares of an open-end company (as defined in this section), the investment adviser may use the open-end company's transfer agent in lieu of a qualified custodian for purposes of complying with subsection (b) of this section.

(2) Certain privately offered securities.

(A) The investment adviser is not required to comply with subsection (b)(1) of this section with respect to securities that are:

(i) acquired from the issuer in a transaction or chain of transactions not involving any public offering;

(ii) uncertificated, and ownership thereof is recorded only on the books of the issuer or its transfer agent in the name of the client; and

(iii) transferable only with prior consent of the issuer or holders of the outstanding securities of the issuer.

(B) Notwithstanding subparagraph (A) of this paragraph, the provisions of this paragraph are available with respect to securities held for the account of a limited partnership (or a limited liability company, or other type of pooled investment vehicle) only if the limited partnership is audited, and the audited financial statements are distributed, as described in paragraph (4) of this subsection.

(3) Fee deduction. Notwithstanding subsection (b)(4) of this section, the investment adviser is not required to obtain an independent verification of client funds and securities maintained by a qualified custodian if:

(A) the investment adviser has custody of the funds and securities solely as a consequence of the investment adviser's authority to make withdrawals from client accounts to pay its advisory fee; and

(B) if the qualified custodian is a related person, the investment adviser can rely on paragraph (6) of this subsection.

(4) Limited partnerships subject to annual audit. The investment adviser is not required to comply with subsection (b)(2) and (b)(3) of this section and the investment adviser shall be deemed to have complied with subsection (b)(4) of this section with respect to the account of a limited partnership (or limited liability company, or another type of pooled investment vehicle) that is subject to audit (as defined in this section):

(A) at least annually and distributes its audited financial statements prepared in accordance with generally accepted accounting principles to all limited partners (or members or other beneficial owners) within 120 days of the end of its fiscal year;

(B) by an independent public accountant that is registered with, and subject to regular inspection as of the commencement of the professional engagement period, and as of each calendar year-end, by, the Public Company Accounting Oversight Board in accordance with its rules; and

(C) upon liquidation and distributes its audited financial statements prepared in accordance with generally accepted accounting principles to all limited partners (or members or other beneficial owners) promptly after the completion of such audit.

(5) Registered investment companies. The investment adviser is not required to comply with this section with respect to the account of an investment company registered under the Investment Company Act of 1940.

(6) Certain related persons. Notwithstanding subsection (b)(4) of this section, the investment adviser is not required to obtain an independent verification of client funds and securities if:

(A) the investment adviser has custody under this rule solely because a related person holds, directly or indirectly, client funds or securities, or has any authority to obtain possession of them, in connection with advisory services the investment adviser provides to clients; and

(B) the investment adviser's related person is operationally independent of the investment adviser.

(d) Delivery to related person. Sending an account statement under subsection (b)(5) of this section or distributing audited financial statements under subsection (c)(4) of this section shall not satisfy the requirements of this section if such account statements or financial statements are sent solely to limited partners (or members or other beneficial owners) that themselves are limited partnerships (or limited liability companies, or another type of pooled investment vehicle) and are the investment adviser's related persons.

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 30, 2011.

TRD-201104099
Benette L. Zivley
Securities Commissioner
State Securities Board
Earliest possible date of adoption: November 13, 2011
For further information, please call: (512) 305-8303

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CHAPTER 133. FORMS

7 TAC §133.3

The Texas State Securities Board proposes new §133.3, a form concerning an ADA accommodations request. The new section adopts by reference the form, referenced in §115.3 and §116.3, for an examinee with an ADA disability to request disability accommodations for the Texas Securities Law Examination administered by the agency.

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

Ms. Loutherback also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be that examinees with ADA disabilities will be apprised of how to request accommodations to take the Texas securities law examination. There will be no effect on micro- or small businesses. There may be a minor economic cost to individuals required to comply with the rule in order to provide satisfactory documentation of a disability. There is no anticipated impact on local employment.

Comments on the proposal to be considered by the Board should be submitted in writing within 30 days after publication of the proposed section *Texas Register.* Comments should be sent to Kara L. Kennedy, General Counsel, State Securities Board, P.O. Box 13167, Austin, Texas 78711-3167, or sent by facsimile to (512) 305-8336.

The new rule is proposed under the Texas Occupations Code §54.003 and Texas Civil Statutes, Article 581-28-1. Occupations Code §54.003 provides that agencies shall adopt rules to provide reasonable examination accommodations to examinees diagnosed as having dyslexia for each licensing examination administered by the agency. Article 581-28-1 provides the Board with the authority to adopt rules and regulations necessary to carry out and implement the provisions of the Texas Securities Act, including rules and regulations governing registration statements and applications; defining terms; classifying securities, persons, and matters within its jurisdiction; and prescribing different requirements for different classes.

The proposal affects Texas Occupations Code §54.003 and Texas Civil Statutes, Articles 581-13 and 581-19.

§133.3. The State Securities Board Adopts by Reference the ADA Accommodations Request Form.

This form is available from the State Securities Board, P.O. Box 13167, Austin, Texas 78711-3167.

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 30, 2011.

TRD-201104100
Benette L. Zivley
Securities Commissioner
State Securities Board
Earliest possible date of adoption: November 13, 2011
For further information, please call: (512) 305-8303

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7 TAC §133.33

The Texas State Securities Board proposes an amendment to §133.33, concerning uniform forms accepted, required, or recommended, to add Form ADV-E, required by proposed new §116.17, to the list of uniform forms accepted, required or recommended by the Board.

Ronak Patel, Director, Inspections and Compliance Division, has determined that for the first five-year period the rule is in effect there will be no foreseeable fiscal implications for state or local government as a result of enforcing or administering the rule.

Mr. Patel also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be to provide the form concerning accounting of client securities and funds in the possession of an investment adviser subject to an annual surprise examination. Form ADV-E also will assist regulators in conducting inspections by identifying such firms. There will be no effect on

micro- or small businesses. There is no anticipated economic cost to persons who are required to comply with the rule as proposed. There is no anticipated impact on local employment.

Comments on the proposal to be considered by the Board should be submitted in writing within 30 days after publication of the proposed section in the *Texas Register.* Comments should be sent to Kara L. Kennedy, General Counsel, State Securities Board, P.O. Box 13167, Austin, Texas 78711-3167, or sent by facsimile to (512) 305-8336.

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

The proposal affects Articles 581-13-1 and 581-14.

§133.33. Uniform Forms Accepted, Required, or Recommended.

(a) (No change.)

(b) The following "Uniform Forms" may be filed with this agency as appropriate.

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

(3) ADV-E. Certificate of Accounting of Client Securities and Funds in the Possession or Custody of an Investment Adviser.

(c) (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 30, 2011.

TRD-201104097
Benette L. Zivley
Securities Commissioner
State Securities Board
Earliest possible date of adoption: November 13, 2011
For further information, please call: (512) 305-8303

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TITLE 16. ECONOMIC REGULATION

PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

CHAPTER 26. SUBSTANTIVE RULES APPLICABLE TO TELECOMMUNICATIONS SERVICE PROVIDERS

The Public Utility Commission of Texas (commission) proposes amendments to §26.74, relating to Reports on Sale of Property and Mergers, and §26.101, relating to Certificate of Convenience and Necessity Criteria. Pursuant to House Bill 1753 of the 82nd Legislature, Regular Session in 2011 (HB 1753), the amendments increase 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.

Slade Cutter, Senior Financial Analyst, Rate Regulation Division, has determined that for each year of the first five-year period the amendments are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the amendments.

Mr. Cutter has determined that for each year of the first five years the amendments are in effect, the public benefit anticipated as a result of enforcing the amendment will be compliance with HB 1753. There will be no adverse economic effect on small businesses or micro-businesses as a result of enforcing the amendments. Therefore, no regulatory flexibility analysis is required. There is no anticipated economic cost to persons who are required to comply with the amendments as proposed.

Mr. Cutter has also determined that for each year of the first five years the amendments are in effect, there should be no effect on a local economy, and therefore no local employment impact statement is required under Administrative Procedure Act (APA), Texas Government Code §2001.022.

Initial comments on the amendments may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, within 20 days after publication in the *Texas Register.* Reply comments may be submitted within 27 days after publication. Sixteen copies of initial and reply comments on the amendment are required to be filed pursuant to §22.71(c) of this title. Comments should be organized in a manner consistent with the organization of the amended rules. All comments should refer to Project Number 39623.

The commission staff will conduct a public hearing on this rulemaking, if requested pursuant to the Administrative Procedure Act, Texas Government Code §2001.029, at the commission's offices located in the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78711. The request for a public hearing must be received within 20 days after publication in the *Texas Register.*

SUBCHAPTER D. RECORDS, REPORTS, AND OTHER REQUIRED INFORMATION

16 TAC §26.74

These amendments are proposed 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 §14.002 and HB 1753 §1 (which amends PURA §14.101(a)).

§26.74. Reports on Sale of Property and Mergers.

(a) Except for a local exchange company exempted in subsection (e) of this section a dominant carrier shall not sell, acquire, lease or rent any plant as an operating unit or system in the State of Texas for a total consideration in excess of $10 million [~~$100,000~~] unless the public utility reports such transaction to the commission while pending or within 30 days after closing.

(b) - (f) (No change.)

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

Filed with the Office of the Secretary of State on September 30, 2011.

TRD-201104138
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: November 13, 2011
For further information, please call: (512) 936-7223

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SUBCHAPTER E. CERTIFICATION, LICENSING AND REGISTRATION

16 TAC §26.101

These amendments are proposed 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 §14.002 and HB 1753 §1 (which amends PURA §14.101(a)).

§26.101. Certificate of Convenience and Necessity Criteria.

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

(f) Sale, transfer, merger. A notice must be filed for the sale, transfer, or merger (STM) of at least 50% of the utility, or sale, acquisition or lease of facilities as an operating unit or system for a total consideration of more than $10 million [~~$100,000~~].

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

(g) (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 October 3, 2011.

TRD-201104150
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: November 13, 2011
For further information, please call: (512) 936-7223

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PART 8. TEXAS RACING COMMISSION

CHAPTER 301. DEFINITIONS

16 TAC §301.1

The Texas Racing Commission proposes an amendment to 16 TAC §301.1, Definitions, concerning the words and terms used in the Commission's rules. The proposed changes implement House Bill (HB) 2271, 82nd Legislature, Regular Session, which in part requires the Commission to specify the number of races in a greyhound performance and adopts definitions of active and inactive racetrack licenses.

Chuck Trout, Executive Director, has determined that for the first five-year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing the amendment.

Mr. Trout has also determined that for each year of the first five years the amendment is in effect the anticipated public benefit will be conformity with HB 2271.

The rule will have no adverse economic effect on small or micro-businesses, and therefore preparation of an economic impact statement and a regulatory flexibility analysis is not required.

There are no negative impacts upon employment conditions in this state as a result of the proposed amendment.

All comments or questions regarding the proposed amendment may be submitted in writing within 30 days following publication of this notice in the *Texas Register* to Carolyn Weiss, Assistant to the Executive Director for the Texas Racing Commission, at P.O. Box 12080, Austin, Texas 78711-2080, telephone (512) 833-6699, or fax (512) 833-6907.

The amendment is proposed under Texas Revised Civil Statutes Annotated, Article 179e, §3.02, which authorizes the Commission to make rules relating exclusively to horse and greyhound racing.

The amendment implements Texas Revised Civil Statutes Annotated, Article 179e.

§301.1. Definitions.

(a) (No change.)

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

(1) - (50) (No change.)

(51) Performance--the schedule of horse or greyhound races run consecutively as one program. A greyhound performance consists of fifteen or fewer races unless approved by the executive secretary.

(52) - (89) (No change.)

(90) Active license--a racetrack license designated by the commission as active.

(91) Inactive license--a racetrack license designated by the commission as inactive.

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 October 3, 2011.

TRD-201104143
Mark Fenner
General Counsel
Texas Racing Commission
Earliest possible date of adoption: November 13, 2011
For further information, please call: (512) 833-6699

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CHAPTER 309. RACETRACK LICENSES AND OPERATIONS
SUBCHAPTER A. RACETRACK LICENSES

16 TAC §309.8

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

The Texas Racing Commission proposes the repeal of 16 TAC §309.8, Racetrack License Fees, concerning the fees paid by the racetracks to pay for the administration and enforcement of the Act. The repeal is proposed in conjunction with the simultaneous proposal of new 16 TAC §309.8, which is published elsewhere in this issue of the *Texas Register.* The proposed changes are the result of changes in the Texas Racing Act under House Bill (HB) 2271, 82nd Legislature, Regular Session. House Bill 2271 eliminates outstanding pari-mutuel tickets and vouchers as a source of revenue to the Commission and authorizes the Commission to adjust fees under Texas Racing Act §5.01 to recover that lost revenue. Through this repeal and adoption of a new §309.8, the Commission will eliminate all simulcasting fees and most live racing fees. Instead, the changes propose to fund most agency operations through annual fees paid by each licensed racetrack.

Chuck Trout, Executive Director, has determined that for the first five-year period the repeal is in effect there will be no fiscal implications for state or local government as a result of enforcing the repeal.

Mr. Trout has also determined that for each year of the first five years the repeal is in effect the anticipated public benefit will be conformity with HB 2271 while providing sufficient operating funds for the Commission to administer and enforce the Texas Racing Act.

The rule will have no adverse economic effect on small or micro-businesses, and therefore preparation of an economic impact statement and a regulatory flexibility analysis is not required.

There are no negative impacts upon employment conditions in this state as a result of the proposed repeal.

All comments or questions regarding the proposed repeal may be submitted in writing within 30 days following publication of this notice in the *Texas Register* to Carolyn Weiss, Assistant to the Executive Director for the Texas Racing Commission, at P.O. Box 12080, Austin, Texas 78711-2080, telephone (512) 833-6699, or fax (512) 833-6907.

The repeal is proposed under Texas Revised Civil Statutes Annotated, Article 179e, §3.02, which authorizes the Commission to make rules relating exclusively to horse and greyhound racing, and §5.01, which authorizes the Commission to set fees to cover the costs of regulating, overseeing, and licensing live and simulcast racing at racetracks.

The repeal implements Texas Revised Civil Statutes Annotated, Article 179e.

§309.8. Racetrack License Fees.

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 October 3, 2011.

TRD-201104146
Mark Fenner
General Counsel
Texas Racing Commission
Earliest possible date of adoption: November 13, 2011
For further information, please call: (512) 833-6699

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16 TAC §309.8

The Texas Racing Commission proposes new 16 TAC §309.8, Racetrack License Fees, concerning the fees paid by the racetracks to pay for the administration and enforcement of the Act. The new rule is proposed in conjunction with the simultaneous repeal of existing 16 TAC §309.8, which is published elsewhere in this issue of the *Texas Register.* The proposed changes are the result of changes in the Texas Racing Act under House Bill (HB) 2271, 82nd Legislature, Regular Session. House Bill 2271 eliminates outstanding pari-mutuel tickets and vouchers as a source of revenue to the Commission and authorizes the Commission to adjust fees under Texas Racing Act §5.01 to recover that lost revenue. Through the repeal and adoption of a new §309.8, the Commission will eliminate all simulcasting fees and most live racing fees. Instead, the changes propose to fund most agency operations through annual fees paid by each licensed racetrack.

Chuck Trout, Executive Director, has determined that for the first five-year period the new rule is in effect there will be no fiscal implications for state or local government as a result of enforcing the new rule.

Mr. Trout has also determined that for each year of the first five years the new rule is in effect the anticipated public benefit will be conformity with HB 2271 while providing sufficient operating funds for the Commission to administer and enforce the Texas Racing Act.

The rule will have no adverse economic effect on small or micro-businesses, and therefore preparation of an economic impact statement and a regulatory flexibility analysis is not required.

There are no negative impacts upon employment conditions in this state as a result of the proposed new rule.

All comments or questions regarding the proposed new rule may be submitted in writing within 30 days following publication of this notice in the *Texas Register* to Carolyn Weiss, Assistant to the Executive Director for the Texas Racing Commission, at P.O. Box 12080, Austin, Texas 78711-2080, telephone (512) 833-6699, or fax (512) 833-6907.

The new rule is proposed under Texas Revised Civil Statutes Annotated, Article 179e, §3.02, which authorizes the Commission to make rules relating exclusively to horse and greyhound racing, and §5.01, which authorizes the Commission to set fees to cover the costs of regulating, overseeing, and licensing live and simulcast racing at racetracks.

The new rule implements Texas Revised Civil Statutes Annotated, Article 179e.

§309.8. Racetrack License Fees.

(a) Purpose of Fees. An association shall pay a license fee to the Commission to pay the Commission's costs to administer and enforce the Act, and to regulate, oversee, and license live and simulcast racing at racetracks.

(b) Annual License Fee.

(1) A licensed racing association shall pay an annual license fee. The annual license fee for each license type is as follows:

(A) for a Class 1 racetrack, $500,000;

(B) for a Class 2 racetrack, $230,000;

(C) for a Class 3 or 4 racetrack, $70,000; and

(D) for a Greyhound racetrack, $360,000.

(2) An association that is conducting live racing or simulcasting shall pay its annual license fee by remitting to the Commission 1/12th of the fee on the first business day of each month. For the State Fiscal Year that begins on September 1, 2011, the monthly remittance shall begin in the month of January.

(3) An association that is not conducting live racing or simulcasting shall pay its annual license fee on September 1 of each fiscal year. For the State Fiscal Year that begins on September 1, 2011, the annual license fees shall be paid in two separate payments. The first payment will be of $100,000 and is due on September 1, 2011. The second payment will be of the remaining unpaid balance and shall be paid on January 1, 2012.

(c) Adjustment of Fees.

(1) Annual fees are calculated using a projected base of 143 days of live horse racing and 270 performances of live greyhound racing per calendar year. To cover the additional regulatory cost in the event additional days or performances are requested by the associations the executive secretary may:

(A) recalculate a horse racetrack's annual fee by adding $3,750 for each live day added beyond the base;

(B) recalculate a greyhound racetrack's annual fee by adding $750 for each live performance added beyond the base; and

(C) review the original or amended race date request submitted by each association to establish race date baselines for specific associations if needed.

(2) If at any point the executive secretary determines the total revenue from the annual fees is insufficient to pay the Commission's costs during a fiscal year, the executive secretary shall recommend to the Commission a supplemental fee, in addition to the license fee, that each association would be required to pay to generate the necessary revenue to pay the Commission's costs.

(3) If the executive secretary determines that the total revenue from the annual fees exceeds the amount needed to pay those costs, the executive secretary may order a moratorium on all or part of the annual license fees remitted monthly by any or all of the associations. Before entering a moratorium order, the executive secretary shall develop a formula for providing the moratorium in an equitable manner among the associations. In developing the formula, the executive secretary shall consider the amount of excess revenue received by the Commission, the source of the revenue, the Commission's costs associated with regulating each association, the Commission's projected receipts for the next fiscal year, and the Commission's projected expenses during the next fiscal year.

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 October 3, 2011.

TRD-201104147

Mark Fenner
General Counsel
Texas Racing Commission
Earliest possible date of adoption: November 13, 2011
For further information, please call: (512) 833-6699

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SUBCHAPTER B. OPERATIONS OF RACETRACKS
DIVISION 2. FACILITIES AND EQUIPMENT

16 TAC §309.129

The Texas Racing Commission proposes an amendment to 16 TAC §309.129, Automatic Banking Machines, concerning the use of automatic banking machines on the grounds of a racetrack. The proposed change implements House Bill (HB) 2271, 82nd Legislature, Regular Session, which in part eliminates the $200 daily cap on the withdrawals that a customer may make from each account.

Chuck Trout, Executive Director, has determined that for the first five-year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing the amendment.

Mr. Trout has also determined that for each year of the first five years the amendment is in effect the anticipated public benefit will be conformity with HB 2271.

The rule will have no adverse economic effect on small or micro-businesses, and therefore preparation of an economic impact statement and a regulatory flexibility analysis is not required.

There are no negative impacts upon employment conditions in this state as a result of the proposed amendment.

All comments or questions regarding the proposed amendment may be submitted in writing within 30 days following publication of this notice in the *Texas Register* to Carolyn Weiss, Assistant to the Executive Director for the Texas Racing Commission, at P.O. Box 12080, Austin, Texas 78711-2080, telephone (512) 833-6699, or fax (512) 833-6907.

The amendment is proposed under Texas Revised Civil Statutes Annotated, Article 179e, §3.02, which authorizes the Commission to make rules relating exclusively to horse and greyhound racing.

The amendment implements Texas Revised Civil Statutes Annotated, Article 179e.

§309.129. Automatic Banking Machines.

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

(c) Configuration. An automatic banking machine placed on association grounds must be configured with the following restrictions:

(1) A customer using the machine may withdraw funds only from his or her checking account at a bank or other financial institution. A customer may not use the machine to withdraw funds from a savings account.

~~[(2) A customer may withdraw no more than $200 per day per account. For purposes of this paragraph, a "day" is the 24-hour period beginning at 12:00 midnight.]~~

(2) [~~(3)~~] For each transaction at a machine, a statutory fee of $1.00 must be withdrawn from the customer's account in addition to

the amount delivered to the customer and any other fees authorized and imposed by the bank or other financial institution, by the association, or by the vendor.

(3) [~~(4)~~] Before the customer authorizes the transaction, the machine must display a screen that notifies the customer of the statutory fee and permits the customer to cancel the transaction. The notice must state the following or its equivalent: UNDER TEXAS RACING ACT, §11.04(E), A $1 FEE MUST BE COLLECTED ON EACH TRANSACTION AT THIS MACHINE FOR DEPOSIT INTO THE TEXAS STATE TREASURY.

(d) - (f) (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 October 3, 2011.

TRD-201104148
Mark Fenner
General Counsel
Texas Racing Commission
Earliest possible date of adoption: November 13, 2011
For further information, please call: (512) 833-6699

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CHAPTER 311. OTHER LICENSES
SUBCHAPTER A. LICENSING PROVISIONS
DIVISION 1. OCCUPATIONAL LICENSES

16 TAC §311.3

The Texas Racing Commission proposes an amendment to 16 TAC §311.3, Information for Background Investigation, concerning the requirement to submit fingerprints for a criminal history check in order to apply for an occupational license. The proposed changes implement House Bill (HB) 2271, 82nd Legislature, Regular Session, which in part requires the Commission to review fingerprints both new and renewed licenses. It also increases the fingerprinting fee from $12.00 to $44.20 in order to fully reimburse the Texas Department of Public Safety for its costs in conducting the background checks.

Chuck Trout, Executive Director, has determined that for the first five-year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing the amendment.

Mr. Trout has also determined that for each year of the first five years the amendment is in effect the anticipated public benefit will be conformity with HB 2271 and full reimbursement to the Texas Department of Public Safety for its expenses in conducting background checks.

The rule will have no adverse economic effect on small or micro-businesses, and therefore preparation of an economic impact statement and a regulatory flexibility analysis is not required.

There may be negative impacts upon employment conditions in this state as a result of the proposed amendment because the increase in the fingerprint fee may deter some individuals from seeking or renewing a license. However, any negative impact will be mitigated by an additional change in HB 2271 that amends the Texas Racing Act to no longer require all racetrack employees to be licensed.

All comments or questions regarding the proposed amendment may be submitted in writing within 30 days following publication of this notice in the *Texas Register* to Carolyn Weiss, Assistant to the Executive Director for the Texas Racing Commission, at P.O. Box 12080, Austin, Texas 78711-2080, telephone (512) 833-6699, or fax (512) 833-6907.

The amendment is proposed under Texas Revised Civil Statutes Annotated, Article 179e, §3.02, which authorizes the Commission to make rules relating exclusively to horse and greyhound racing, and §7.05, which authorizes the Commission to recover the costs of criminal history checks.

The amendment implements Texas Revised Civil Statutes Annotated, Article 179e.

§311.3. Information for Background Investigation.

(a) Fingerprint Requirements and Procedure.

(1) Except as otherwise provided by this section, an applicant for a license or license renewal must submit with the application documents a set of the applicant's fingerprints in a form prescribed by the Department of Public Safety. If the applicant is not an individual, the applicant must submit a set of fingerprints on the above-referenced forms for each individual who:

(A) serves as a director, officer, or partner of the applicant;

(B) holds a beneficial ownership interest in the applicant of 5.0% or more; or

(C) owns any interest in the applicant, if requested by the Department of Public Safety.

(2) - (5) (No change.)

(6) If an applicant for a license or license renewal is required to submit fingerprints under this section, the applicant must also submit a fingerprinting fee of $44.20 [~~$12.00~~].

(b) (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 October 3, 2011.

TRD-201104149
Mark Fenner
General Counsel
Texas Racing Commission
Earliest possible date of adoption: November 13, 2011
For further information, please call: (512) 833-6699

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CHAPTER 319. VETERINARY PRACTICES AND DRUG TESTING
SUBCHAPTER A. GENERAL PROVISIONS

16 TAC §319.3

The Texas Racing Commission proposes an amendment to 16 TAC §319.3, Medication Restricted, concerning the prohibition of most drugs, chemicals, and other substances in a horse or greyhound while participating in racing. The proposed change reduces the maximum permissible plasma or serum concentration of phenylbutazone in horses from 5.0 micrograms per milli-

liter to 2.0 micrograms per milliliter. This change is being made in accordance with recent changes to the model rules adopted by the Association of Racing Commissioners International.

Chuck Trout, Executive Director, has determined that for the first five-year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing the amendment.

Mr. Trout has also determined that for each year of the first five years the amendment is in effect the anticipated public benefit will be to increase the safety of horseracing by reducing the potential for phenylbutazone to interfere with the pre-race inspections conducted by the Commission's veterinarians.

The rule will have no adverse economic effect on small or micro-businesses, and therefore preparation of an economic impact statement and a regulatory flexibility analysis is not required.

There are no negative impacts upon employment conditions in this state as a result of the proposed amendment.

All comments or questions regarding the proposed amendment may be submitted in writing within 30 days following publication of this notice in the *Texas Register* to Carolyn Weiss, Assistant to the Executive Director for the Texas Racing Commission, at P.O. Box 12080, Austin, Texas 78711-2080, telephone (512) 833-6699, or fax (512) 833-6907.

The amendment is proposed under Texas Revised Civil Statutes Annotated, Article 179e, §3.02, which authorizes the Commission to make rules relating exclusively to horse and greyhound racing.

The amendment implements Texas Revised Civil Statutes Annotated, Article 179e.

§319.3. Medication Restricted.

(a) (No change.)

(b) The maximum permissible plasma or serum concentration of phenylbutazone in horses is 2.0 [~~5.0~~] micrograms per milliliter.

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

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

Filed with the Office of the Secretary of State on October 3, 2011.

TRD-201104153
Mark Fenner
General Counsel
Texas Racing Commission
Earliest possible date of adoption: November 13, 2011
For further information, please call: (512) 833-6699

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SUBCHAPTER D. DRUG TESTING
DIVISION 2. TESTING PROCEDURES

16 TAC §319.335, §319.336

The Texas Racing Commission proposes amendments to 16 TAC §319.335 and §319.336. These rules relate to the auditing, approval, and payment of drug testing costs by the racetrack associations. The proposed changes implement House Bill (HB) 2271, 82nd Legislature, Regular Session, which in part eliminates outstanding pari-mutuel tickets and vouchers as a source of revenue to the Commission. The current rules allow the associations to pay drug testing costs out of the outstanding tickets and vouchers, and require the associations to pay any remaining amounts to the Commission. The proposed changes eliminate the Commission's auditing of drug testing charges and allow the associations to retain any remaining amounts.

Chuck Trout, Executive Director, has determined that for the first five-year period the amendment is in effect there will be an annual loss of approximately $1.4 million to the state, which will be compensated for through increased annual fees on the racetracks. There are no fiscal implications for local government as a result of enforcing the amendments.

Mr. Trout has also determined that for each year of the first five years the amendments are in effect the anticipated public benefit will be conformity with HB 2271.

The amendments will have no adverse economic effect on small or micro-businesses, and therefore preparation of an economic impact statement and a regulatory flexibility analysis is not required.

There are no negative impacts upon employment conditions in this state as a result of the proposed amendments.

All comments or questions regarding the proposed amendments may be submitted in writing within 30 days following publication of this notice in the *Texas Register* to Carolyn Weiss, Assistant to the Executive Director for the Texas Racing Commission, at P.O. Box 12080, Austin, Texas 78711-2080, telephone (512) 833-6699, or fax (512) 833-6907.

The amendments are proposed under Texas Revised Civil Statutes Annotated, Article 179e, §3.02, which authorizes the Commission to make rules relating exclusively to horse and greyhound racing, and §5.01, which authorizes the Commission to set fees to cover the costs of regulating, overseeing, and licensing racing.

The amendments implement Texas Revised Civil Statutes Annotated, Article 179e.

§319.335. [~~Auditing and~~] Approval of Testing Costs.

(a) All charges for conducting tests under this subchapter must be reconciled with the number of tests actually conducted [~~audited~~] and be approved by the executive secretary before payment. [~~The executive secretary shall audit the charges as to the reasonableness of the charges in accordance with industry standards for comparable testing procedures.~~]

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

§319.336. Payment of Testing Costs.

(a) Responsibility for Payment. Immediately on receipt of approved charges for conducting tests under this subchapter, an association shall pay the charges.

(b) Authority to Use Outstanding Tickets and Pari-mutuel Vouchers. An association may use money held by the association to pay outstanding tickets and outstanding pari-mutuel vouchers to pay for charges under this section. If the money held is insufficient to pay the charges, the association shall pay the remainder of the charges.

~~[(c) Accounting and Payment of Remainder.]~~

~~[(1) The accounting and payment of remainder of outs and vouchers to the Commission shall be done in accordance with §321.36.]~~

~~[(2) The executive secretary will review the accounting submitted by the association. If the executive secretary determines the~~

~~accounting is in error, the executive secretary may adjust the amount due to the Commission from outstanding tickets and either demand payment of the additional amount owed or reimburse the association for the excess amount paid to the Commission.]~~

~~[(d) Pooling of Drug Testing Costs. The executive secretary may establish a procedure to pay drug testing costs by pooling the amounts held by all associations to pay outstanding tickets. If the amount held by an association does not cover the full costs of drug testing for that association, the executive secretary may pay those costs using funds paid to the Commission under subsection (c)(1) 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 October 3, 2011.

TRD-201104151
Mark Fenner
General Counsel
Texas Racing Commission
Earliest possible date of adoption: November 13, 2011
For further information, please call: (512) 833-6699

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CHAPTER 321. PARI-MUTUEL WAGERING
SUBCHAPTER A. MUTUEL OPERATIONS
DIVISION 3. MUTUEL TICKETS AND VOUCHERS

16 TAC §321.36

The Texas Racing Commission proposes an amendment to 16 TAC §321.36, Unclaimed Outs and Vouchers, concerning funds held by racetrack associations for the payment of outstanding pari-mutuel tickets and vouchers. The proposed changes implement House Bill (HB) 2271, 82nd Legislature, Regular Session, which in part eliminates outstanding tickets and vouchers as a source of revenue to the Commission. The current rule requires the associations to pay any retained funds from expired tickets and vouchers to the Commission on a quarterly basis. The proposed changes eliminate the requirement to pay the amounts to the Commission, and instead specifies that the racetracks may retain these amounts.

Chuck Trout, Executive Director, has determined that for the first five-year period the amendment is in effect there will be an annual loss of approximately $1.4 million to the state, which will be compensated for through increased fees on the racetracks. There are no fiscal implications for local government as a result of enforcing the amendment.

Mr. Trout has also determined that for each year of the first five years the amendment is in effect the anticipated public benefit will be conformity with HB 2271.

The rule will have no adverse economic effect on small or micro-businesses, and therefore preparation of an economic impact statement and a regulatory flexibility analysis is not required.

There are no negative impacts upon employment conditions in this state as a result of the proposed amendment.

All comments or questions regarding the proposed amendment may be submitted in writing within 30 days following publication of this notice in the *Texas Register* to Carolyn Weiss, Assistant to the Executive Director for the Texas Racing Commission, at P.O. Box 12080, Austin, Texas 78711-2080, telephone (512) 833-6699, or fax (512) 833-6907.

The amendment is proposed under Texas Revised Civil Statutes Annotated, Article 179e, §3.02, which authorizes the Commission to make rules relating exclusively to horse and greyhound racing.

The amendment implements Texas Revised Civil Statutes Annotated, Article 179e.

§321.36. [~~Remittance of~~] Unclaimed Outs and Vouchers.

[~~(a)~~] Pursuant to the Act, §3.07, to pay the charges associated with the medication or drug testing, an association may use the money held by the association to pay outstanding tickets and pari-mutuel vouchers. If additional amounts are needed to pay the charges, the association shall pay those additional amounts. If the amount of outstanding tickets and pari-mutuel vouchers held exceeds the amount needed to pay the charges, the association may retain the excess amount as outstanding tickets and pari-mutuel vouchers expire. [~~shall pay the excess to the commission.~~]

~~[(b) The association shall file a quarterly report, on a form prescribed by the executive director, that reports:]~~

~~[(1) the amount of outstanding tickets and pari-mutuel vouchers that have expired during the quarter as outlined under §321.33;]~~

~~[(2) the amount needed to reimburse the association for payments made by the association to cover charges associated with the medication or drug testing pursuant to §3.07 of the Act; and]~~

~~[(3) the amount of excess expired tickets and pari-mutuel vouchers, if any, due to the commission.]~~

~~[(c) The association shall file the quarterly reports and make payments when applicable on the following schedule:]~~

~~[(1) September, October and November will constitute the first quarter and shall be filed with the commission no later than December 15;]~~

~~[(2) December, January and February will constitute the second quarter and shall be filed with the commission no later than March 15;]~~

~~[(3) March, April and May will constitute the third quarter and shall be filed with the commission no later than June 15; and]~~

~~[(4) June, July and August shall constitute the fourth quarter and shall be filed with the commission no later than September 15.]~~

~~[(d) The reports and payments submitted by the association are subject to audit by the Commission.]~~

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 October 3, 2011.

TRD-201104152
Mark Fenner
General Counsel
Texas Racing Commission
Earliest possible date of adoption: November 13, 2011
For further information, please call: (512) 833-6699

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SUBCHAPTER D. SIMULCAST WAGERING
DIVISION 1. GENERAL PROVISIONS

16 TAC §321.407

The Texas Racing Commission proposes an amendment to 16 TAC §321.407, Approval of Wagering on Simulcast Import Races, concerning the Commission's review and approval of racetrack requests to import and wager on simulcast races. The proposed change defines a simulcast import race to include a race of Thoroughbreds, Quarter Horses, Arabians, Paint Horses, Appaloosas, Standardbreds, or a mixture of these breeds.

The Commission's current policy restricts a Texas racetrack from importing Standardbred (harness) races for simulcast wagering unless a meet-for-meet reciprocal agreement exists between the Standardbred racetrack and the Texas racetrack. This proposal eliminates the reciprocal meet-for-meet arrangement for Standardbred racing. This solution mirrors the policy in place for all other imported horse or greyhound races.

Chuck Trout, Executive Director, has determined that for the first five-year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing the amendment.

Mr. Trout has also determined that for each year of the first five years the amendment is in effect the anticipated public benefit will be to place all Texas racetracks on an equal footing by ensuring that each is eligible to import Standardbred races.

The rule will have no adverse economic effect on small or micro-businesses, and therefore preparation of an economic impact statement and a regulatory flexibility analysis is not required.

There are no negative impacts upon employment conditions in this state as a result of the proposed amendment.

All comments or questions regarding the proposed amendment may be submitted in writing within 30 days following publication of this notice in the *Texas Register* to Carolyn Weiss, Assistant to the Executive Director for the Texas Racing Commission, at P.O. Box 12080, Austin, Texas 78711-2080, telephone (512) 833-6699, or fax (512) 833-6907.

The amendment is proposed under Texas Revised Civil Statutes Annotated, Article 179e, §3.02, which authorizes the Commission to make rules relating exclusively to horse and greyhound racing, and §11.011, which authorizes the Commission to adopt rules to license and regulate pari-mutuel wagering on simulcast races.

The amendment implements Texas Revised Civil Statutes Annotated, Article 179e.

§321.407. Approval of Wagering on Simulcast Import Races.

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

(f) For the purposes of this section, a simulcast import horse race can be a race of Thoroughbreds, Quarter Horses, Arabians, Paint Horses, Appaloosas, Standardbreds, or a mixture of the aforementioned breeds of horses.

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 October 3, 2011.

TRD-201104154

Mark Fenner
General Counsel
Texas Racing Commission
Earliest possible date of adoption: November 13, 2011
For further information, please call: (512) 833-6699

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TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 61. SCHOOL DISTRICTS
SUBCHAPTER CC. COMMISSIONER'S RULES CONCERNING SCHOOL FACILITIES

19 TAC §61.1034

The Texas Education Agency (TEA) proposes an amendment to §61.1034, concerning school facilities. The section establishes provisions related to the allotment for new instructional facilities. The proposed amendment would modify the rule to reflect statutory changes, implement a recent TEA policy decision to allow open-enrollment charter schools to apply for the allotment, amend the application process, and establish in rule a requirement for applicants to complete a survey after receiving funds.

The Texas Education Code (TEC), §42.158, allows the commissioner by rule to establish procedures and adopt guidelines for the administration of the New Instructional Facility Allotment (NIFA). Through 19 TAC §61.1034, last amended to be effective September 23, 2004, the commissioner exercised rulemaking authority to establish definitions, explain the application process, and describe costs and payments related to the allotment.

House Bill 2237, 80th Texas Legislature, 2007, amended the TEC, §42.158, to allow the appropriation of an additional $1 million for the NIFA each school year. This additional amount must first be applied to prevent any reduction in NIFA funding for eligible high school facilities if the total amount of allotments exceeds the regular NIFA appropriation of $25 million. Any remaining funds may be applied proportionally to prevent reductions in NIFA funding for other instructional facilities.

The proposed amendment to 19 TAC §61.1034 would modify the rule to reflect this statutory change by adding new subsection (d)(3) to include an explanation of how the additional NIFA appropriation is to be allocated.

The proposed amendment would also modify the rule to allow open-enrollment charter schools to apply for the allotment, in accordance with a recent TEA policy decision. Specifically, subsection (a) would be revised to state that open-enrollment charter schools are eligible for the allotment and to include facility provisions specific to open-enrollment charter schools. It would also be revised to state explicitly that leased facilities are not eligible for the allotment. New subsection (d)(2)(B) would be added to explain what property value would be used for an open-enrollment charter school if proration of the allotment were necessary. New subsection (e) would be added to specify that property purchased with NIFA funds by an open-enrollment charter school would be considered public property.

In addition, subsection (b)(1)(B) would be amended to expand the list of supporting documents required to be submitted with an initial application and specify that the supporting documents must be submitted electronically.

New subsection (c) would be added to require applicants that have received funding to complete a survey in the year after funding is received stating the number of days of instruction held at the facility for which funding was received.

The section would also be restructured to allow for the new provisions, and minor technical edits and changes in word usage would be made throughout.

The current rule requires a school district that wishes to receive an allotment to complete and submit an application requesting funding. The proposed amendment would require an open-enrollment charter school that wished to receive an allotment to follow the same process. The application requires the name and campus number of the facility for which the allotment is being requested, applicable student count information, and estimates of the number of days of instruction at the new facility for the applicable year. Initial applications also require the electronic submission of a photograph and description of the new facility, a legal document describing the new construction, site and floor plans, and, if applicable, a demolition plan.

Under current NIFA procedures, school districts are required to submit a survey in the year after funding is received stating the number of days of instruction held at the facility for which funding was received. The proposed amendment would adopt the survey requirement in rule for school districts and open-enrollment charter schools. The survey requires the actual number of days of instruction held at the new facility.

Any locally maintained paperwork requirements resulting from the proposed amendment would correspond with and support the stated procedural and reporting implications.

Shirley Beaulieu, associate commissioner for finance/chief financial officer, has determined that for the first five-year period the amendment is in effect there will be no additional costs for the state as a result of enforcing or administering the amendment. The rule action will have fiscal implications for local government. An open-enrollment charter school that builds a new instructional facility and chooses to apply for the allotment will receive $250 (or a prorated amount, if proration is necessary) per student in average daily attendance at the new facility for up to two years, provided the school's application is approved. The total increase in revenue will depend on how much funding is appropriated for the allotment for a biennium, the number of charter schools submitting applications, and the number of students in average daily attendance at eligible facilities. No funding for the allotment has been appropriated for the 2012-2013 biennium.

Ms. Beaulieu has determined that for each year of the first five years the amendment is in effect the public benefit anticipated as a result of enforcing the amendment will be modifications to the NIFA program that will help school districts and open-enrollment charter school accommodate growth by providing funding to build new instructional facilities. There is no anticipated economic cost to persons who are required to comply with the proposed amendment.

There is no direct adverse economic impact for small businesses and microbusinesses; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

The public comment period on the proposal begins October 14, 2011, and ends November 14, 2011. Comments on the proposal may be submitted to Cristina De La Fuente-Valadez, Rulemaking, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701, (512) 475-1497. Comments may also be submitted electronically to *rules@tea.state.tx.us* or faxed to (512) 463-0028. A request for a public hearing on the proposal submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 14 calendar days after notice of the proposal has been published in the *Texas Register* on October 14, 2011.

The amendment is proposed under the TEC, §42.158, which authorizes the commissioner of education to adopt rules as necessary to implement the new instructional facilities allotment.

The amendment implements the TEC, §42.158.

§61.1034. New Instructional Facility Allotment.

(a) Eligibility [~~Definitions and eligibility~~]. The following [~~definitions and~~] eligibility criteria apply to the new instructional facility allotment (NIFA) in accordance with the Texas Education Code (TEC), §42.158.

(1) Both school districts and open-enrollment charter schools are eligible to apply for the NIFA for eligible facilities.

(2) The facility for which NIFA funds are requested must meet the following requirements.

(A) [~~(1)~~] The [~~A~~] facility must be [~~eligible for the NIFA is~~] a newly constructed instructional facility [~~site (campus)~~] used for teaching the curriculum required by the TEC, Chapter 28. To qualify for first-year funding, a new facility must [~~campus will~~] not have been occupied in the prior school year. To qualify for follow-up funding, the facility must [~~campus will~~] have been occupied for the first time in the prior school year and funded for the NIFA for that first year. A special case of one-year funding pertains to a facility [~~facilities~~] that was [~~were~~] occupied for the first time in the prior school year but did not receive NIFA funds because of a failure to apply. Any such eligible facility [~~campus~~] will receive funds for one year of operation only.

(B) The facility must have its own assigned instructional staff and instructional program distinct from other facilities, and this program cannot be a program for students enrolled in another public school (summer school, evening school, etc.).

(C) With the exception of a covered walkway connecting the new facility to another building, the new facility must be physically separate from other existing school structures.

(D) [~~(2)~~] The facility must have its own principal or [~~will~~] receive an accountability rating through the standard or the optional alternative rating procedures as described in the most current accountability manuals[~~,~~] published by the Texas Education Agency (TEA).

(E) [~~(3)~~] The facility must have its own unique campus ID number as designated by the TEA, its own record of expenditures that is not a subset of another school budget, and attendance data that can be reported for those students who are assigned to its campus.

(F) If the applicant is an open-enrollment charter school, the facility must be a charter school site approved for instructional use either in the original open-enrollment charter as granted by the State Board of Education or in an amendment granted under §100.1033(c)(5) of this title (relating to Charter Amendment), as described in §100.1011(3)(D) of this title (relating to Definitions).

[~~(4) With the exception of a covered walkway connecting the new facility to another building, the new facility must be physically separate from other existing school structures.~~]

[~~(5) The facility must have its own assigned instructional staff and instructional program distinct from other facilities, and cannot~~

be a program for students enrolled in another public school (summer school, evening school, etc.).]

(3) [(6)] Expansion or renovation of existing facilities, as well as portable and temporary structures, are not eligible for the NIFA.

(4) A facility leased by the school district or by the open-enrollment charter school or open-enrollment charter holder is not eligible for the NIFA.

(b) Application process. To apply for the NIFA, school districts and open-enrollment charter schools [School districts] must complete the TEA's online [on-line] application process requesting funding pursuant to the NIFA.

(1) The initial (first-year) application, or an application for one-year funding only, must be submitted electronically no later than July 15. The application must include the following:

(A) the electronic submission of the TEA's online [on-line] application for initial funding; and

(B) the electronic submission of the following materials [by certified mail through the U.S. Postal Service or other common postal carrier]:

(i) a brief description and photograph of the newly constructed instructional site; [and]

(ii) a copy of a legal document that clearly describes the nature and dates of the new construction;[.]

(iii) a site plan;

(iv) a floor plan; and

(v) if applicable, a demolition plan.

[(2) On-line applications must be submitted electronically no later than July 15 and supporting documents must be postmarked no later than July 15 of the year preceding the applicable school year.]

(2) [(3)] Second-year applications require only the electronic submission of the TEA's online [on-line] application for follow-up funding no later than July 15 of the year preceding the applicable school year.

(c) Survey on days of instruction. In the fall of the school year after a school year for which an applicant received NIFA funds, the school district or open-enrollment charter school that received the funds must complete an online survey on the number of instructional days held in the new facility and submit the completed survey electronically. The TEA will use submitted survey information in determining the final (settle-up) amount earned by each eligible school district and open-enrollment charter school, as described in subsection (d)(6) of this section.

(d) [(c)] Costs and payments. The costs [cost] and payments for the NIFA are determined by the commissioner of education.

(1) The allotment for the NIFA is a part of the cost of the first tier of the Foundation School Program (FSP). This allotment is not counted in the calculation of weighted average daily attendance [(WADA)] for the second tier of the FSP.

(2) If, for all eligible applicants [districts] combined, the total cost of the NIFA exceeds the amount appropriated, each allotment is reduced so that the total amount to be distributed equals the amount appropriated. [Reductions to allotments are made by applying the same number of cents of tax rate in each district to the district's taxable value of property so that the reduced total for all districts equals the amount appropriated. For each district, the taxable value of property is the property value certified by the Comptroller of Public Accounts for the preceding school year as determined under Government Code, Chapter 403, Subchapter M, or, if applicable, a reduced property value that reflects either a rapid decline pursuant to TEC, §42.2521, or a grade level adjustment pursuant to TEC, §42.106.]

(A) For eligible school districts, reductions to allotments are made by applying the same number of cents of tax rate in each school district to the school district's taxable value of property so that the reduced total for all school districts equals the amount appropriated. For each school district, the taxable value of property is the property value certified by the Texas Comptroller of Public Accounts for the preceding school year as determined under the Texas Government Code, Chapter 403, Subchapter M, or, if applicable, a reduced property value that reflects a rapid decline pursuant to the TEC, §42.2521.

(B) For eligible open-enrollment charter schools, reductions to allotments are made in the same way as for school districts, as described in subparagraph (A) of this paragraph, except that the value used as the taxable value of property for each charter school is calculated by determining the statewide taxable value of property for all school districts in the state, dividing that number by the number of non-charter-school students in average daily attendance (ADA) in the state, and multiplying the result by the charter school's total number of ADA.

(3) If an additional $1 million is appropriated for the NIFA for a school year under the TEC, §42.158(d-1), and if proration as described in paragraph (2) of this subsection is necessary for the school year, the additional appropriation must first be applied to prevent a reduction in the NIFA for eligible high school facilities. Any funds remaining after preventing all reductions in the NIFA for eligible high school facilities will be prorated as described in paragraph (2) of this subsection.

(4) [(3)] Allocations will be made in conjunction with allotments for the FSP in accordance with the school district's or open-enrollment charter school's payment class. For school districts that are not subject to the requirements of the TEC, Chapter 41, and do not receive payments from the Foundation School Fund, NIFA distributions will correspond to the schedule for payment class 3.

(5) [(4)] For school districts that are required to reduce wealth pursuant to the TEC, Chapter 41, any NIFA funds for which the school district is eligible are applied as credits to the amounts owed to equalize wealth.

(6) [(5)] For all school districts and open-enrollment charter schools receiving the NIFA, a final (settle-up) amount earned is determined by the commissioner when information reported through the survey described in subsection (c) of this section is available in the fall of the school year after the school year for which NIFA funds were received. The final amount earned is determined using the submitted survey information and final counts of ADA for the school year for which NIFA funds were received, as reported through the Public Education Information Management System [(PEIMS), are available for the eligible campus at the close of business for the school year].

(7) [(6)] The amount of funds to be distributed for the NIFA to a school district or open-enrollment charter school is in addition to any other state aid entitlements.

(e) Ownership of property purchased with NIFA funds. Property purchased with NIFA funds by an open-enrollment charter school is presumed to be public property under the TEC, §12.128, and remains public property in accordance with that 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 29, 2011.

TRD-201104086
Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
Earliest possible date of adoption: November 13, 2011
For further information, please call: (512) 475-1497

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CHAPTER 89. ADAPTATIONS FOR SPECIAL POPULATIONS

SUBCHAPTER C. TEXAS CERTIFICATE OF HIGH SCHOOL EQUIVALENCY

The State Board of Education (SBOE) proposes amendments to §§89.41-89.47 and new §89.48 and the repeal of §89.48, concerning the Texas certificate of high school equivalency. The sections proposed for amendment and repeal provide for administration of the General Educational Development (GED) test in accordance with requirements set forth by the American Council on Education. The proposed rule actions would incorporate changes resulting from Senate Bill (SB) 1094, 82nd Texas Legislature, 2011, and recent board discussion.

In addition to providing for administration of the GED test in accordance with requirements set forth by the American Council on Education, the current rules in 19 TAC Chapter 89, Subchapter C, provide for the establishment of testing centers and address applicant eligibility, retesting, examinees with disabilities, and standard fees for the issuance of GED certificates and scores.

The Texas Education Code (TEC), §7.111, was amended by SB 1094, 82nd Texas Legislature, 2011, relating to the availability of online testing for high school equivalency examinations. SB 1094 directed the SBOE to by rule develop and deliver the examinations and provide for the administration of the examinations online. Accordingly, the option to obtain examination certificates online will necessitate an additional fee.

Additionally, during the April 2011 meeting, the SBOE Committee of the Full Board was provided with a status report on the high school equivalency program and examinations. Given the SBOE's authority under the TEC, §7.111, to provide for the administration of a high school equivalency examination, the board discussed the development of a high school equivalency examination aligned with Texas curriculum standards.

In response to recent legislation and SBOE discussion, the proposed rule actions would clarify and update the current rules as follows.

Section 89.41, Policy, would be amended to remove references to the GED and the American Council on Education.

Section 89.42, Official Testing Centers, would be amended to remove references to the GED and the American Council on Education and to change the educational requirements for chief examiners from a master's degree to a bachelor's degree. The proposed amendment would also provide clarification about the amount of the fee to cover the costs for test administration.

Section 89.43, Eligibility for a Texas Certificate of High School Equivalency, would be amended to remove references to the GED and the American Council on Education and correct a reference to ChalleNGe Corps.

Section 89.44, Identification, would incorporate minor technical edits.

Section 89.45, Retesting, would be amended to remove the requirement to wait six months or present a letter from an adult preparation program or a certified teacher verifying that the individual is prepared to retest.

Section 89.46, Examinees with Disabilities, would be amended to remove references to the GED and the ability of examiners to test individuals at home. In addition, language relating to people with disabilities would be modified to reflect person first respectful language as required by House Bill 1481, 82nd Texas Legislature, 2011.

Section 89.47, Issuance of the Certificate, would be amended to remove references to the GED and establish in rule a convenience fee of no more than $2.00 to print all certificates online.

New §89.48, Online Testing, would be added to provide for development and administration of online examinations for persons 18 years of age and older. The proposed new rule would also provide for verification of student identity and establish in rule a $200 fee to cover costs of administering the examinations online and a convenience fee of no more than $2.00 to print certificates online.

Current §89.48, State Administrator, would be repealed as the designation of a state administrator is not required to be specified in rule.

In addition, the subchapter title would be changed from "General Educational Development" to "Texas Certificate of High School Equivalency."

The proposed rule actions would have procedural and reporting implications. If an eligible entity wishes to establish a new testing center, the entity must submit an official request to the commissioner of education for authorization to do so. The request to open a new center is initiated by the eligible district, institution of higher education, or education service center. It is a requirement of the high school equivalency program that an eligible entity follow the process established by the TEA to request authorization to open a new testing center. This includes submitting a standard request form outlining staffing, location, fees, and need. In addition, individuals will be able to access and print certificates and copies of test scores online. Eligible examinees will also be able to take the high school equivalency examination online.

The proposed rule actions would have no new locally maintained paperwork requirements.

Michele Harkrider, senior policy advisor for policy and programs, has determined that for the first five-year period the rule actions are in effect there will be fiscal implications for state and local government as a result of enforcing or administering the rule actions. For state government (Texas Online and testing centers), fiscal implications are associated with a convenience fee and a test battery fee. The costs to provide the ability to access and print certificates from the online database will be offset by the convenience fee to be paid by the individual and is revenue neutral. The online test battery is planned to be provided under con-

tract with vendor(s). A fee of $200 will be collected from each student for the entire test battery and paid to the vendor(s). This fee includes the cost of the test as well as the related staffing costs of the vendor(s). There is not a cost or savings to state government.

The total estimated increase in revenue to state government is $79,670 for fiscal year 2012; $75,200 for fiscal year 2013; $72,730 for fiscal year 2014; $76,260 for fiscal year 2015; and $75,200 for fiscal year 2016. The total estimated increase in revenue to local government is $3.675 million for fiscal year 2012, $3.525 million for fiscal year 2013, $3.450 million for fiscal year 2014, $3.6 million for fiscal year 2015, and $3.525 million for fiscal year 2016.

The average fee collected currently is $125 per test battery. Each testing center must pay a total of $37.50 to the TEA for printing and The University of Texas for scoring. Each testing center currently must also pay a one-time battery fee of $12.50 to the GED Testing Service.

Based on the average fee collected per test battery, each testing center is estimated to receive $87.50 per full battery to apply to the center's expenses. With the increase in the test battery fee, if other costs remain the same, each testing center will receive $162.50 for an increase of $75 per test battery. The total estimated increase in revenue is based on an estimate of 46,000 to 49,000 students projected to take the high school equivalency test online each year during fiscal years 2012-2016. The fees collected only cover the actual costs of administering the tests.

The state increase in revenue will be the difference between the $2.00 convenience fee and the amount necessary to pay Texas Online for the ability of students to print their certificates from the online database. Costs reflect a built-in, estimated increase in convenience fees over the upcoming years of 2.0% per year for an increase that is solely the amount of the convenience fee, not including the $5.00 standard fee currently in effect that will continue. Any state increase will be used to defray the costs of administering the testing program, including staffing, overhead, and other related expenses.

Amounts estimated as state government revenue increases equal the amount collected through the $2.00 convenience fee per certificate printed minus the costs associated with the online printing of the certificates.

Ms. Harkrider has determined that for each year of the first five years the rule actions are in effect the public benefit anticipated as a result of enforcing the rule actions would be updates to current rules to reflect statutory changes and the addition of clarifying language. The public will benefit from the availability of online testing for high school equivalency examinations. In addition, obtaining certificates and copies of scores online will increase the accessibility of the information for examinees. There are anticipated economic costs to persons who are required to comply with the proposed rule actions.

The total estimated costs to persons is $18,330 for fiscal year 2012; $18,800 for fiscal year 2013; $19,270 for fiscal year 2014; $19,740 for fiscal year 2015; and $20,210 for fiscal year 2016.

The student fee for printing certificates online will be the current $5.00 plus the new $ .39 convenience fee for online access. Costs reflect a built-in, estimated increase in convenience fees over the upcoming years of 2.0% per year that is solely the amount of the convenience fee, not including the $5.00 standard fee currently in effect for copies of certificates. The convenience fee is a fee paid on a voluntary basis by an applicant.

In addition, there is no direct adverse economic impact for small businesses and microbusinesses; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

Comments on the proposal may be submitted to Cristina De La Fuente-Valadez, Rulemaking, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701, (512) 475-1497. Comments may also be submitted electronically to *rules@tea.state.tx.us* or faxed to (512) 463-0028. A request for a public hearing on the proposed rule actions submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 14 calendar days after notice of the proposal has been published in the *Texas Register.*

19 TAC §§89.41 - 89.48

The amendments and new section are proposed under the Texas Education Code, §7.111, which authorizes the SBOE to provide for the administration of high school equivalency examinations and to by rule establish and require payment of a fee as a condition to the issuance of a high school equivalency certificate and a copy of the scores of the examinations. The statute further states that the fee must be reasonable and designed to cover the administrative costs of issuing the certificate and a copy of the scores. In addition, the Texas Education Code, §7.111, as amended by Senate Bill 1094, 82nd Texas Legislature, 2011, authorizes the SBOE to by rule develop and deliver high school equivalency examinations and provide for the administrations of the examinations online.

The amendments and new section implement the Texas Education Code, §7.111.

§89.41. Policy.

The Texas Education Agency [~~(TEA)~~] shall be the only agency in Texas authorized to issue a certificate of high school equivalency [~~on the basis of the General Educational Development (GED) Tests~~]. Tests shall be administered by authorized contracted testing centers under applicable state law and rules of the [~~American Council on Education and the~~] State Board of Education [~~(SBOE)~~].

§89.42. Official Testing Centers.

(a) When authorized by the Texas Education Agency (TEA), official testing centers shall be established by annual contract with an accredited school district, an institution of higher education (IHE) [~~learning~~], or an education service center (ESC). The testing center must be located at a high school in an accredited district, an accredited IHE [~~institution of higher learning~~], or an ESC. The chief administrative officer of a school, an IHE [~~institution of higher learning~~], or an ESC desiring to provide the [~~General Educational Development (GED)~~] testing service to residents in the community must request authorization to do so from the TEA. If the need for a testing center in the location exists, the appropriate entity [~~agency~~] official, in writing, shall inform the commissioner of education [~~American Council on Education~~] that the establishment of an official testing center is requested [~~authorized~~] at that particular entity [~~institution~~]. The center shall be sent an annual contract, together with order forms and other material, relating to the operation of the testing center. [~~The contract forms must be signed by the chief administrative officer of the school, institution of higher learning, or ESC, and the chief examiner.~~]

(b) The chief administrative officer of the entity [~~school, institution of higher learning, or ESC~~] at which an official testing center

is established must agree to provide appropriate storage for restricted test materials and to provide a suitable place for administering the test. Each center is responsible for selecting and ordering test materials.

(c) The administrative officer of a testing center must designate [school district or ESC must designate a certified counselor, and the administrative officer of an institution of higher learning must designate] a professional person with a bachelor's [master's] degree and [with] a background in teaching, training, testing, or counseling[,] to serve as chief examiner. [The person designated as chief examiner shall not be involved in preparing persons for the examinations.] The chief administrative officer must obtain prior authorization from the TEA to change the chief examiner or the location of a testing center. The person designated as chief examiner must attend annual training conducted by the TEA.

(d) A testing center may transport restricted test material to correctional facilities, health facilities, or schools if authorization to do so has been obtained. The chief administrative officer of an entity [institution] housing an official testing center and the administrator of the correctional facility, health facility, or school must request authorization to provide the testing services from the TEA. Only the exact number of tests plus one needed at a test session may be transported to the addendum site. Testing services at correctional or health facilities shall be limited to inmates or patients of the facility, and the tests must be administered by an employee of an official testing [the school district, institution of higher learning, or ESC housing the test] center. To maintain the integrity of the test, a complete inventory of all secure testing materials shall be conducted:

(1) before leaving the official [GED] testing center;

(2) upon arrival at the addendum site;

(3) immediately before and after the test administration;

(4) before departure from the addendum site; and

(5) upon return to the official [GED] testing center.

(e) The authorization to function as an official testing center may be withdrawn by the TEA when a center has failed to maintain the integrity of the testing program. The TEA may suspend testing at a center if restricted test material is reported missing or if conditions reported by the TEA site visit indicate that the testing center is in violation of State Board of Education [(SBOE)] rules [or requirements of the American Council on Education].

(f) An official testing center may charge a fee to cover the costs for test administration. The amount of the fee shall be determined by the administration or board of the entity housing the testing center and be approved by the TEA [school district, institution of higher learning, or ESC].

(g) The administration or board of an entity [institution] housing an official testing center shall have a written policy concerning the operation of the center, a written emergency plan, and a testing schedule. Each official testing center must provide the following assurances [to the GED Testing Service]:

(1) appropriate resources;

(2) suitable physical facilities;

(3) adequate staffing;

(4) full testing support services;

(5) cooperation with the TEA [GEDTS];

(6) financial management; and

(7) test security.

§89.43. Eligibility for a Texas Certificate of High School Equivalency.

(a) An applicant for a certificate of high school equivalency shall meet the following requirements.

(1) Residence. The applicant must be a resident of Texas or a member of the United States armed forces stationed at a Texas installation.

(2) Age.

(A) The applicant must be 18 years old.

(B) An applicant who is 17 years of age is eligible with parental or guardian consent. An applicant who is 17 years of age must present written permission signed by the applicant's parent or guardian. An applicant who is 17 years of age and married, who has entered military service, who has been declared an adult by the court, or who has otherwise legally severed the child/parent relationship is not required to present parent or guardian permission to be tested.

(C) An applicant who is at least 16 years of age may test if recommended by a public agency having supervision or custody under a court order. Recommendations must include the applicant's name and date of birth and must be signed by an official of the public agency having supervision or custody of the person under a court order. An applicant who is at least 16 years old may also test if:

(i) required to take the examination under a justice or municipal court order issued under the Code of Criminal Procedure, Article 45.054(a)(1)(C) (formerly codified as Family Code, §54.021(d)(1)(B));

(ii) enrolled in a Job Corps training program under the Workforce Investment Act of 1998 (29 United States Code, §§2801 et seq.) and its subsequent amendments; or

(iii) enrolled in the adjutant general's department's [Seaborne] ChalleNGe Corps.

(3) Educational status. The applicant must not have received a high school diploma from an accredited high school in the United States. The applicant must not be enrolled in school, unless the applicant is enrolled in a High School Equivalency Program (HSEP) approved by the Texas Education Agency (TEA). A student who is 17 years of age is eligible to test if the student is enrolled in an HSEP approved by the TEA. The student must comply with the provisions of the HSEP.

(4) Minimum test scores. An applicant must achieve the appropriate minimum standard scores in effect at the time the applicant tested as established by the TEA [American Council on Education's General Educational Development Testing Service].

(b) Test centers shall verify that any person being tested meets the eligibility requirements in this section.

§89.44. Identification.

Test centers shall require each examinee to present a driver's license or Texas Department of Public Safety [(DPS)] identification card, or a government issued identification card (both national and foreign), provided that the identification includes date of birth, photograph, address, and signature. The examinee must also meet the age, residency, and other requirements of this subchapter [chapter].

§89.45. Retesting.

An examinee who fails to achieve a minimum passing score on one or more of the tests may retest on the tests he or she failed, except for instances in which the American Council on Education establishes that

scores may not be combined across a General Educational Development test series, in which case the examinee must successfully complete the full battery of tests in a series. [~~A person desiring to retest must wait six months to do so unless he or she presents a letter from an adult preparation program or a certified teacher verifying that the individual is prepared to retest.~~] Each retest must be on a different form of the test.

§89.46. Examinees with Disabilities.

(a) An applicant with a physical disability [~~A physically disabled person~~] who is unable to mark an answer sheet may be assisted by the chief examiner or proctor. The examinee must read the questions without assistance and indicate the answer for the proctor to mark.

[~~(b) A severely handicapped or ill person who cannot travel to the test center may be administered the tests at home. Prior approval to transport the tests shall be requested of the Texas Education Agency (TEA) by the chief examiner.~~]

(b) [~~(c)~~] An applicant who is unable to take the printed form of the test may be administered a taped version of the test upon written authorization of the Texas Education Agency [~~TEA~~]. A request by the chief examiner must be accompanied by certification by a physician that verifies a medical diagnosis of the disability that renders the potential examinee unable to take the printed form of the test.

(c) [~~(d)~~] An applicant with a visual impairment [~~who is visually handicapped~~] may take the test in a Braille, large print, or taped version. [~~Versions of the test in these forms are available from the General Educational Development Testing Service.~~]

§89.47. Issuance of the Certificate.

[~~(a) Test scores shall be accepted as official only when reported directly by official testing centers, the Defense Activity for Nontraditional Education Support, directors of Veterans Administration hospitals, and, in special cases, by the General Educational Development Testing Service (GEDTS).~~]

(a) [~~(b)~~] Following review for eligibility and approval, certificates will be issued directly to clients. A nonrefundable fee of $15 will be assessed for issuance of a certificate and a copy of test scores. An additional convenience fee of no more than $2.00 per transaction shall be charged to cover the cost of printing certificates online. A permanent file shall be maintained for all certificates issued.

(b) [~~(c)~~] Duplicate certificates will be issued upon request from the client. The client is required to pay a nonrefundable fee of $5.00 for each request for a duplicate certificate. An additional convenience fee of no more than $2.00 per transaction shall be charged to cover the cost of printing certificates online.

(c) [~~(d)~~] The certificate of high school equivalency shall indicate the version of the test taken by the applicant: audiotape, large print, Braille, English, French, or Spanish.

(d) [~~(e)~~] The state [~~General Educational Development (GED)~~] administrator may disapprove issuance of a certificate or may cancel a certificate under the following conditions:

(1) an applicant does not meet eligibility requirements under §89.43 of this title (relating to Eligibility for a Texas Certificate of High School Equivalency);

(2) the applicant in any way violates security of the restricted test material;

(3) the applicant presents fraudulent identification or is not who he or she purports to be;

(4) the applicant uses another person's certificate or test scores in an attempt to defraud; or

(5) the applicant willingly allows another person to use his or her certificate or test scores in an attempt to defraud.

(e) [~~(f)~~] In the case of nonissuance or cancellation of a certificate, the applicant shall be notified in writing by the state [~~GED~~] administrator that the certificate will not be issued or may be canceled.

(f) [~~(g)~~] An applicant who has been notified that his or her certificate will not be issued or may be canceled may appeal to the state [~~GED~~] administrator within 30 days of receiving written notification.

(g) [~~(h)~~] If, after further review, the state [~~GED~~] administrator does not approve issuance of the certificate or cancels a certificate, this decision may be appealed to the commissioner of education under Chapter 157 of this title (relating to Hearings and Appeals).

§89.48. Online Testing.

(a) The State Board of Education shall develop and approve high school equivalency examinations and provide for the administration of the examinations online.

(b) An examinee must be 18 years of age or older to take the high school equivalency examination online. The examinee must also meet the residency and other requirements of this subchapter.

(c) Test centers shall require each examinee to present a driver's license or Texas Department of Public Safety identification card, or a government issued identification card (both national and foreign), provided that the identification includes date of birth, photograph, address, and signature.

(d) A fee of $200 will be assessed for each complete test battery to cover costs of administering the examinations online. An additional convenience fee of no more than $2.00 per transaction shall be charged to cover the cost of printing certificates online.

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 30, 2011.

TRD-201104124
Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
Earliest possible date of adoption: November 13, 2011
For further information, please call: (512) 475-1497

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19 TAC §89.48

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

The repeal is proposed under the Texas Education Code, §7.111, which authorizes the SBOE to provide for the administration of high school equivalency examinations and to by rule establish and require payment of a fee as a condition to the issuance of a high school equivalency certificate and a copy of the scores of the examinations. The statute further states that the fee must be reasonable and designed to cover the administrative costs of issuing the certificate and a copy of the scores. In addition, Texas Education Code, §7.111, as amended by Senate Bill 1094, 82nd Texas Legislature, 2011, authorizes the SBOE to by rule

develop and deliver high school equivalency examinations and provide for the administrations of the examinations online.

The repeal implements the Texas Education Code, §7.111.

§89.48. State Administrator.

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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Cristina De La Fuente-Valadez
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CHAPTER 97. PLANNING AND ACCOUNTABILITY
SUBCHAPTER A. ACCOUNTABILITY

19 TAC §§97.1 - 97.4

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

The State Board of Education (SBOE) proposes the repeal of §§97.1-97.4, concerning accountability. The sections address accountability, define accountability ratings, present criteria for accountability, and address sanctions authorized under federal law. The proposed repeals are necessary to reflect statutory changes resulting from House Bill (HB) 3, 81st Texas Legislature, 2009, which transferred authority to adopt student achievement indicators from the SBOE to the commissioner of education.

In June 2009, the 81st Texas Legislature enacted HB 3, which made significant changes to the Texas public school accountability system, including requiring the commissioner of education to adopt a set of indicators of the quality of learning on a campus and to review the indicators for consideration of appropriate revisions. This change in statute requires the repeal of SBOE rules in 19 TAC Chapter 97, Subchapter A.

The proposed repeals would have no procedural and reporting implications. The proposed repeals would have no locally maintained paperwork requirements.

Criss Cloudt, associate commissioner for assessment and accountability, has determined that for the first five-year period the repeals are in effect there will be no additional costs for state or local government as a result of enforcing or administering the repeals.

Dr. Cloudt has determined that for each year of the first five years the repeals are in effect the public benefit anticipated as a result of enforcing the repeals would be updates to the Texas Administrative Code to reflect new requirements in statute and to help ensure that these requirements are clearly defined for students, school districts, and the public. There is no anticipated economic cost to persons who are required to comply with the proposed repeals.

In addition, there is no direct adverse economic impact for small businesses and microbusinesses; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

Comments on the proposal may be submitted to Cristina De La Fuente-Valadez, Rulemaking, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701, (512) 475-1497. Comments may also be submitted electronically to *rules@tea.state.tx.us* or faxed to (512) 463-0028. A request for a public hearing on the proposed repeals submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 14 calendar days after notice of the proposal has been published in the *Texas Register.*

The repeals are proposed under the Texas Education Code, §§39.051-39.054, as amended and added by House Bill 3, 81st Texas Legislature, 2009, which authorize the commissioner of education to determine the criteria for accreditation statuses, to adopt indicators of quality of learning and student achievement, and to adopt rules to evaluate school district and campus performance.

The repeals implement the Texas Education Code, §§39.051-39.054, as amended and added by House Bill 3, 81st Texas Legislature, 2009.

§97.1. Accountability.
§97.2. Accountability Ratings.
§97.3. Accountability Criteria.
§97.4. Accountability Sanctions Authorized under Federal Law.

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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Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
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For further information, please call: (512) 475-1497

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CHAPTER 105. FOUNDATION SCHOOL PROGRAM
SUBCHAPTER B. USE OF STATE FUNDS

19 TAC §105.11

The State Board of Education (SBOE) proposes an amendment to §105.11, concerning the Foundation School Program (FSP). The section prescribes the maximum allowable indirect cost for school district use of FSP funds. The proposed amendment would update the rule to reflect a change to the use of special program allotments for indirect or administrative expenses, in accordance with Senate Bill (SB) 1, 82nd Texas Legislature, First Called Session, 2011.

In accordance with 19 TAC §105.11, no more than 45% of each school district's FSP special allotments under the Texas

Education Code (TEC), Chapter 42, Subchapter C, may be expended for indirect costs related to compensatory education, gifted and talented education, bilingual education and special language programs, and special education and no more than 40% may be expended for indirect costs related to career and technical education. The rule also specifies the expenditure function codes to which the indirect costs may be attributed, as defined in the Texas Education Agency (TEA) bulletin *Financial Accountability System Resource Guide.*

SB 1, 82nd Texas Legislature, First Called Session, 2011, added the TEC, §42.1541, directing the SBOE by rule to increase the indirect cost allotments established for special education, compensatory education, bilingual education or special language programs, and career and technical education programs. SB 1 directs the SBOE to take action not later than the date that permits the increased indirect cost allotments to apply beginning with the 2011-2012 school year.

In accordance with the TEC, §§42.152(c), 42.151(h), 42.153(b), and 42.154(a-1) and (c), as authorized by SB 1, the proposed amendment to 19 TAC §105.11 would increase the FSP special allotment for indirect costs for the compensatory education program, bilingual education and special language programs, and special education program from 45% to 48%. The proposed amendment would also increase the FSP special allotment for indirect costs for career and technical education programs from 40% to 42%. The FSP special allotment for indirect costs for the gifted and talented program would remain set at 45%.

In addition, the proposed amendment would add a new provision beginning with the 2012-2013 school year to allow a school district to choose to use a greater indirect cost allotment for special education, bilingual education and special language programs, career and technology education, and gifted and talented education, proportionate to the extent the district receives less funding per weighted student in state and local maintenance and operations revenue than in the 2011-2012 school year. The proposed new provision would also require the commissioner of education to develop a methodology for a school district to make such a determination.

The proposed amendment would have no procedural and reporting requirements. The proposed amendment would have no locally maintained paperwork requirements.

Nora Hancock, associate commissioner for grants and fiscal compliance, has determined that for the first five-year period the amendment is in effect there will be additional costs for state government as a result of enforcing or administering the amendment. The total estimated cost is $4,000 for fiscal year 2012 and $3,000 each year for fiscal years 2013-2016 for personnel costs associated with the development and administration of a methodology for school districts to determine whether to use a greater indirect cost allotment. There will be no additional costs for local government. The proposed amendment would allow schools to reallocate their special revenue funds with a different indirect cost rate. The change would not increase or decrease the amount of funds available to the schools.

Dr. Hancock has determined that for each year of the first five years the amendment is in effect the public benefit anticipated as a result of enforcing the amendment would be implementation of the statutory change on the use of state funds for special program allotments. There is no anticipated economic cost to persons who are required to comply with the proposed amendment.

In addition, there is no direct adverse economic impact for small businesses and microbusinesses; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

Comments on the proposal may be submitted to Cristina De La Fuente-Valadez, Rulemaking, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701, (512) 475-1497. Comments may also be submitted electronically to *rules@tea.state.tx.us* or faxed to (512) 463-0028. A request for a public hearing on the proposed amendment submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 14 calendar days after notice of the proposal has been published in the *Texas Register.*

The amendment is proposed under the Texas Education Code, §§42.151(h), 42.152(c), 42.153(b), 42.154(a-1) and (c), and 42.156(b), which authorize the SBOE to establish rules relating to funding allocations for special education, compensatory education, bilingual education and special language programs, career and technology education, and gifted and talented education. In addition, the Texas Education Code, §42.1541, authorizes the SBOE to by rule increase the indirect cost allotments established for special education, compensatory education, bilingual education and special language programs, and career and technical education programs.

The amendment implements the Texas Education Code, §§42.151(h), 42.152(c), 42.153(b), 42.154(a-1) and (c), 42.1541, and 42.156(b).

§105.11. Maximum Allowable Indirect Cost.

(a) No more than 48% [~~45%~~] of each school district's Foundation School Program (FSP) special allotments under the Texas Education Code, Chapter 42, Subchapter C, may be expended for indirect costs related to the following programs: compensatory education, [~~gifted and talented education,~~] bilingual education and special language programs, and special education. No more than 45% of each school district's FSP special allotments under the Texas Education Code, Chapter 42, Subchapter C, may be expended for indirect costs related to gifted and talented education programs. No more than 42% [~~40%~~] of each school district's FSP special allotments under the Texas Education Code, Chapter 42, Subchapter C, may be expended for indirect costs related to career and technical education programs. Indirect costs may be attributed to the following expenditure function codes: 34--Student Transportation; 41--General Administration; 81--Facilities Acquisition and Construction; and the Function 90 series of the general fund, as defined in the Texas Education Agency publication, Financial Accountability System Resource Guide.

(b) For the 2012-2013 school year and each year thereafter, a school district may choose to use a greater indirect cost allotment under the Texas Education Code, §§42.151, 42.153, 42.154, and 42.156, to the extent the school district receives less funding per weighted student in state and local maintenance and operations revenue than in the 2011-2012 school year. The commissioner of education shall develop a methodology for a school district to make a determination under this section and may require any information necessary to implement this subsection.

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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Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
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For further information, please call: (512) 475-1497

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TITLE 22. EXAMINING BOARDS

PART 16. TEXAS BOARD OF PHYSICAL THERAPY EXAMINERS

CHAPTER 321. DEFINITIONS

22 TAC §321.1

The Texas Board of Physical Therapy Examiners proposes amendments to §321.1, Definitions. The amendments would update the definition of "foreign-trained applicant" to reflect the changes in physical therapy education in the last 20 years and would correct an error in alphabetization.

John P. Maline, Executive Director, has determined that for the first five-year period the amendments are in effect there will be no additional costs to state or local governments as a result of enforcing or administering the amendment.

Mr. Maline has also determined that for each year of the first five-year period the amendment is in effect the public benefit will be clarification of the status of "foreign-trained applicant." Mr. Maline has determined that there will be no costs or adverse economic effects to small or micro businesses, therefore an economic impact statement or regulatory flexibility analysis is not required for the amendment. There are no anticipated costs to individuals who are required to comply with the amendment as proposed.

Comments on the proposed amendments may be submitted to Nina Hurter, PT Coordinator, Texas Board of Physical Therapy Examiners, 333 Guadalupe, Suite 2-510, Austin, Texas 78701; email: nina.hurter@ptot.texas.gov. Comments must be received no later than 30 days from the date the proposed amendments are published in the *Texas Register.*

The amendments are proposed under the Physical Therapy Practice Act, Title 3, Subtitle H, Chapter 453, Texas 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.

Title 3, Subtitle H, Chapter 453, Texas Occupations Code is affected by the amendments.

§321.1. Definitions.

The following words, terms, and phrases, when used in the rules of the Texas Board of Physical Therapy Examiners, shall have the following meanings, unless the context clearly indicates otherwise.

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

(9) Evidence satisfactory to the board--Should all official school records be destroyed, sworn affidavits satisfactory to the board must be received from three persons having personal knowledge of the applicant's physical therapy education. These affidavits will not be used when official school records are available.

(10) [~~(9)~~] Examination--A comprehensive screening and specific testing process leading to diagnostic classification or, as appropriate, to a referral to another practitioner. The examination has three components: the patient/client history, the systems review, and tests and measures.

[~~(10) Evidence satisfactory to the board--Should all official school records be destroyed, sworn affidavits satisfactory to the board must be received from three persons having personal knowledge of the applicant's physical therapy education. These affidavits will not be used when official school records are available.~~]

(11) Foreign-trained applicant--Any applicant whose entry-level professional physical therapy education was obtained at a physical therapy program outside the U.S., its territories, or the District of Columbia. [~~Any applicant whose education is from a country outside the United States, the District of Columbia, or Territories of the United States.~~]

(12) - (16) (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.

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TRD-201104158
John P. Maline
Executive Director
Texas Board of Physical Therapy Examiners
Earliest possible date of adoption: November 13, 2011
For further information, please call: (512) 305-6900

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CHAPTER 341. LICENSE RENEWAL

22 TAC §341.6

The Texas Board of Physical Therapy Examiners proposes amendments to §341.6, regarding License Restoration. The amendments add a subsection that establishes a process by which the spouse of a person serving on active duty as a member of the armed forces of the U.S. could restore a physical therapy license and include alternative methods of establishing competence.

John P. Maline, Executive Director, has determined that for the first five-year period these amendments are in effect there will be no additional costs to state or local governments as a result of enforcing or administering these amendments.

Mr. Maline has also determined that for each year of the first five-year period these amendments are in effect the public benefit will be elimination of licensure barriers for the spouses of active military personnel. Mr. Maline has determined that there will be no costs or adverse economic effects to small or micro businesses, therefore an economic impact statement or regulatory flexibility analysis is not required for the amendment. There are no anticipated costs to individuals who are required to comply with the rule as proposed.

Comments on the proposed amendments may be submitted to Nina Hurter, PT Coordinator, Texas Board of Physical Therapy Examiners, 333 Guadalupe, Suite 2-510, Austin, Texas 78701; email: nina.hurter@ptot.texas.gov. Comments must be received no later than 30 days from the date this proposed amendment is published in the *Texas Register.*

The amendments are proposed under the Physical Therapy Practice Act, Title 3, Subtitle H, Chapter 453, Texas 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.

Title 3, Subtitle H, Chapter 453, Texas Occupations Code is affected by these amendments.

§341.6. License Restoration.

(a) Eligibility. A person whose license has been expired for one year or longer may restore the license without reexamination if she or he holds a current license in another state, and has actively practiced in another state, for the two years preceding the application for restoration.

(b) Duration. The original expiration date of a restored license will be adjusted so that the license will expire two years after the month of restoration.

(c) Requirements. The components required for restoration of a license are:

(1) a notarized restoration application;

(2) a passing score on the jurisprudence examination;

(3) a fee equal to the cost of the license examination fee;

(4) Verification of Licensure from all states in which the applicant holds or has held a license; and

(5) a history of employment for the two years preceding the application.

(d) The board may restore the license to an applicant who is the spouse of a person serving on active duty as a member of the armed forces of the U.S., who has, within the five years preceding the application date, held the license in this state that expired while the applicant lived outside of this state for at least six months. In addition to the requirements listed in paragraph (3) of this subsection, the application for restoration shall include:

(1) official documentation of current active duty of the applicant's spouse;

(2) official documentation of residence outside of Texas for a period of no less than six months, including the date the applicant's license expired; and

(3) demonstration of competency. Competency may be demonstrated in one of the following ways:

(A) verification of current licensure in good standing in another state, district or territory of the U.S.;

(B) reexamination with a passing score on the national physical therapy exam;

(C) completion of an advanced degree in physical therapy within the last five years; or

(D) successful completion of a practice review tool and continuing competence activities as specified by the board.

(e) [~~(d)~~] Renewal of a restored license. To renew a license that has been restored, a licensee must comply with all requirements in §341.1 of this title (relating to Requirements for Renewal).

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 October 3, 2011.

TRD-201104159
John P. Maline
Executive Director
Texas Board of Physical Therapy Examiners
Earliest possible date of adoption: November 13, 2011
For further information, please call: (512) 305-6900

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CHAPTER 346. PRACTICE SETTINGS FOR PHYSICAL THERAPY

22 TAC §346.1

The Texas Board of Physical Therapy Examiners proposes amendments to §346.1, regarding Educational Settings. The amendments eliminate the specific requirement that a PT review the Individual Education Program every 30 days and require PTs and PTAs to follow the rules in Chapter 322 of this title, regarding reevaluation, documentation and supervision if a student is receiving physical therapy treatment in the school setting.

John P. Maline, Executive Director, has determined that for the first five-year period these amendments are in effect there will be no additional costs to state or local governments as a result of enforcing or administering these amendments.

Mr. Maline has also determined that for each year of the first five-year period these amendments are in effect the public benefit will be efficient provision of physical therapy services. Mr. Maline has determined that there will be no costs or adverse economic effects to small or micro businesses, therefore an economic impact statement or regulatory flexibility analysis is not required for the amendment. There are no anticipated costs to individuals who are required to comply with the rule as proposed.

Comments on the proposed amendments may be submitted to Nina Hurter, PT Coordinator, Texas Board of Physical Therapy Examiners, 333 Guadalupe, Suite 2-510, Austin, Texas 78701; email: nina.hurter@ptot.texas.gov. Comments must be received no later than 30 days from the date this proposed amendment is published in the *Texas Register.*

The amendments are proposed under the Physical Therapy Practice Act, Title 3, Subtitle H, Chapter 453, Texas 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.

Title 3, Subtitle H, Chapter 453, Texas Occupations Code is affected by these amendments.

§346.1. Educational Settings.

(a) In the educational setting, the physical therapist conducts appropriate screenings, evaluations, and assessments to determine needed services to fulfill educational goals. When a student is determined by the physical therapist to be eligible for physical therapy as a related service defined by Special Education Law, the physical therapist provides written recommendations to the Admissions Review and Dismissal Committee as to the amount of specific services needed by the student (i.e., consultation or direct services and the frequency and duration of services).

(b) The physical therapist implements physical therapy services in accordance with the recommendations accepted by the school committee members and as reflected in the student's Admission Review and Dismissal Committee reports.

(c) The physical therapist may provide general consultation or other physical therapy program services for school administrators, educators, assistants, parents and others to address district, campus, classroom or student-centered issues. For the student who is eligible to receive physical therapy as a related service in accordance with the student's Admission Review and Dismissal Committee reports, the physical therapist will also provide the consultation and direct types of specific services needed to implement specially designed goals and objectives included in the student's Individualized Education Program.

(d) The types of services which may require a physician's referral in the educational setting include the provision of individualized specially designed instructions and the direct physical modeling or hands-on demonstration of activities with a student who has been determined eligible to receive physical therapy as a related service. Additionally, they may include the direct provision of activities which are of such a nature that they are only conducted with the eligible student by a physical therapist or physical therapist assistant. The physical therapist should refer to §322.1 of this title (relating to Provision of Services).

(e) Evaluation and reevaluation in the educational setting will be conducted in accordance with federal mandates under Part B of the Individuals with Disabilities Education Act (IDEA), 20 USC §1414, or when warranted by a change in the child's condition, and include onsite reexamination of the child. Treatment provided by a PT or PTA is subject to the provisions of §322.1 of this title. [~~The Plan of Care (Individual Education Program) must be reviewed by the PT every 30 days to determine if revisions are 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 October 3, 2011.

TRD-201104156
John P. Maline
Executive Director
Texas Board of Physical Therapy Examiners
Earliest possible date of adoption: November 13, 2011
For further information, please call: (512) 305-6900

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22 TAC §346.3

The Texas Board of Physical Therapy Examiners proposes amendments to §346.3, regarding Early Childhood (ECI) Setting. The amendments delete references to Developmental Services, which are not part of the physical therapy scope of practice.

John P. Maline, Executive Director, has determined that for the first five-year period these amendments are in effect there will be no additional costs to state or local governments as a result of enforcing or administering these amendments.

Mr. Maline has also determined that for each year of the first five-year period these amendments are in effect the public benefit will be elimination of references to services outside the scope of physical therapy practice. Mr. Maline has determined that there will be no costs or adverse economic effects to small or micro businesses, therefore an economic impact statement or regulatory flexibility analysis is not required for the amendment. There are no anticipated costs to individuals who are required to comply with the rule as proposed.

Comments on the proposed amendments may be submitted to Nina Hurter, PT Coordinator, Texas Board of Physical Therapy Examiners, 333 Guadalupe, Suite 2-510, Austin, Texas 78701; email: nina.hurter@ptot.texas.gov. Comments must be received no later than 30 days from the date this proposed amendment is published in the *Texas Register.*

The amendments are proposed under the Physical Therapy Practice Act, Title 3, Subtitle H, Chapter 453, Texas 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.

Title 3, Subtitle H, Chapter 453, Texas Occupations Code is affected by these amendments.

§346.3. Early Childhood (ECI) Setting.

(a) In the provision of early childhood services through the Early Childhood Intervention (ECI) program, the physical therapist conducts appropriate screenings, evaluations, and assessments to determine needed services to fulfill family-centered goals. When a child is determined by the PT to be eligible for physical therapy, the PT provides written recommendations to the Interdisciplinary Team as to the amount of specific services needed by the child.

(b) Subject to the provisions of §322.1 of this title, the PT implements physical therapy services in accordance with the recommendations accepted by the Interdisciplinary Team, as stated in the Individual Family Service Plan (IFSP).

(c) The types of services which require a referral from a qualified licensed healthcare practitioner include the provision of individualized specially designed instructions, direct physical modeling or hands-on demonstration of activities with a child who has been determined eligible to receive physical therapy. Additionally, a referral is required for services that include the direct provision of treatment and/or activities which are of such a nature that they are only conducted with the child by a physical therapist or physical therapist assistant.

(d) The physical therapist may provide general consultation or other program services, including developmental services [~~(DS),~~] to address child/family-centered issues[~~, and as such, developmental services are not physical therapy. Supervision by the PT in the provision of developmental services refers to case supervision, i.e., monitoring the needs of the child/family, not supervision of the personnel providing those services, and as such, developmental services are not physical therapy~~].

(e) Evaluation and reevaluation in the educational setting will be conducted in accordance with federal mandates under Part C of the Individuals with Disabilities Education Act (IDEA), 20 USC §1436, or when warranted by a change in the child's condition, and include onsite reexamination of the child. The Plan of Care (Individual Family Service Plan) must be reviewed by the PT every 30 days to determine if revisions are 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 October 3, 2011.

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John P. Maline
Executive Director
Texas Board of Physical Therapy Examiners
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For further information, please call: (512) 305-6900

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CHAPTER 347. REGISTRATION OF PHYSICAL THERAPY FACILITIES

22 TAC §347.6

The Texas Board of Physical Therapy Examiners proposes amendments to §347.6, regarding Exemptions to Registration. The amendment will exempt locations where Early Childhood Intervention (ECI) services take place from the facility registration requirement.

John P. Maline, Executive Director, has determined that for the first five-year period these amendments are in effect there will be no additional costs to state or local governments as a result of enforcing or administering these amendments.

Mr. Maline has also determined that for each year of the first five-year period these amendments are in effect the public benefit will be greater access to services for families who are eligible for physical therapy services provided by the ECI program. Mr. Maline has determined that there will be no costs or adverse economic effects to small or micro businesses, therefore an economic impact statement or regulatory flexibility analysis is not required for the amendment. There are no anticipated costs to individuals who are required to comply with the rule as proposed.

Comments on the proposed amendments may be submitted to Nina Hurter, PT Coordinator, Texas Board of Physical Therapy Examiners, 333 Guadalupe, Suite 2-510, Austin, Texas 78701; email: nina.hurter@ptot.texas.gov. Comments must be received no later than 30 days from the date this proposed amendment is published in the *Texas Register.*

The amendments are proposed under the Physical Therapy Practice Act, Title 3, Subtitle H, Chapter 453, Texas 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.

Title 3, Subtitle H, Chapter 453, Texas Occupations Code is affected by these amendments.

§347.6. Exemptions to Registration.

A facility licensed under the Health and Safety Code, Title 4, Subtitle B, is exempt from this definition, i.e., hospitals, nursing homes, ambulatory surgical centers, birthing centers, abortion, continuing care, personal care, and special care facilities. Colleges, universities, schools, [~~and~~] home health settings, and settings where Early Childhood Intervention (ECI) services take place are exempted from registration. These types of facilities are automatically exempt and are not required to obtain a formal exemption from 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 October 3, 2011.

TRD-201104155
John P. Maline
Executive Director
Texas Board of Physical Therapy Examiners
Earliest possible date of adoption: November 13, 2011
For further information, please call: (512) 305-6900

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TITLE 25. HEALTH SERVICES

PART 1. DEPARTMENT OF STATE HEALTH SERVICES

CHAPTER 146. PROMOTORES AND COMMUNITY HEALTH WORKERS

25 TAC §146.1, §146.2

The Executive Commissioner of the Texas Health and Human Services Commission, on behalf of the Department of State Health Services (department), proposes amendments to §146.1 and §146.2, concerning promotores and community health workers.

BACKGROUND AND PURPOSE

Health and Safety Code, Chapter 48, requires the department to establish a program designed to train and educate persons who act as promotores and community health workers. This chapter also requires minimum standards for the certification of promotores and community health workers. These rules are reasonable and necessary to accomplish the legislative mandate under House Bill 2610, 82nd Legislature, Regular Session, 2011, in relationship to definitions, purpose and tasks of the advisory committee, and appointment of advisory committee members and officers.

The Promotor(a) and Community Health Worker Training and Certification Program (program) provides leadership to enhance the development and implementation of statewide training and certification standards and administrative rules for the program. The Promotor(a) and Community Health Worker Training and Certification Advisory Committee (advisory committee) has provided advice to the Texas Health and Human Services Commission (commission) and the department related to the recommendation of qualifying applicants as sponsoring institutions of training programs. The committee has also provided advice to the commission and the department related to recommendations for new or amended rules for the program. This committee is established under the Health and Safety Code, §48.101. The committee is governed by the Government Code, Chapter 2110, concerning state agency advisory committees.

SECTION BY SECTION SUMMARY

The amendment to §146.1 adds the definitions of commissioner and compensation; and clarifies the definitions of the advisory committee and the commission. The amendment to §146.2 reflects changes to purpose and tasks of the advisory committee, clarifies the appointment of advisory committee members and officers, and revises the references to the statutes.

FISCAL NOTE

Sam Cooper, Director, Office of Title V and Family Health, has determined that for each year of the first five years the sections are in effect, there will be no fiscal implications for state and local governments as a result of the sections as proposed.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

Mr. Cooper has also determined that there is no adverse impact on small businesses or micro-businesses required to comply with the sections as proposed because small businesses and micro-businesses will not be required to alter their business practices.

ECONOMIC COSTS TO PERSONS AND IMPACT ON LOCAL EMPLOYMENT

There are no economic costs to persons who are required to comply with the sections as proposed. There is no anticipated negative impact on local employment.

PUBLIC BENEFIT

Mr. Cooper has also determined that for each year of the first five years the sections are in effect, the public health benefits of the proposed rules include increased clarity of the rules and better conformance to Health and Safety Code, Chapter 48.

REGULATORY ANALYSIS

The department has determined that this proposal is not a "major environmental rule" as defined by Government Code, §2001.0225. "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

The department has determined that the proposed amendments do 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, do not constitute a taking under Government Code, §2007.043.

PUBLIC COMMENT

Comments may be submitted to Beatrice Smith at the Promotor(a)/Community Health Worker Training and Certification Program, Office of Title V and Family Health, Department of State Health Services, Mail Code 1922, P.O. Box 149347, Austin, Texas 78714-9347, telephone (512) 458-2208, or chw@dshs.state.tx.us. Comments on the proposed sections will be accepted for 30 days following publication in the *Texas Register.*

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the proposed rules have been reviewed by legal counsel and found to be within the state agencies' authority to adopt.

STATUTORY AUTHORITY

The amendments are authorized by Health and Safety Code, §48.053, which requires the Executive Commissioner to adopt rules that for the administration of Health and Safety Code, Chapter 48 and §48.101, which directs the establishment of the Promotor(a) and Community Health Worker Training and Certification Advisory Committee; Government Code, §2110.005, which requires a state agency to develop tasks and methods of reporting for advisory committees that report to that agency; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

The amendments affect Health and Safety Code, Chapters 48 and 1001; and Government Code, Chapters 531 and 2110.

§146.1. Definitions.

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

(1) (No change.)

(2) Advisory Committee--Promotor(a) or Community Health Worker Training and Certification Advisory Committee.

(3) [~~(2)~~] Applicant--A promotor(a) or community health worker who applies to the Department of State Health Services for a certificate of competence; an instructor who applies to the department to train promotores or community health workers; or a sponsoring organization who applies to the department to offer training approved by the department to train promotores or community health workers.

[~~(3) HHSC--The Texas Health and Human Services Commission.~~]

(4) (No change.)

(5) Commission--The Texas Health and Human Services Commission.

(6) Commissioner--The Commissioner of the Department of State Health Services.

(7) Compensation--Includes receiving payment or receiving reimbursement for expenses.

[~~(5) Committee--The Promotor(a) or Community Health Worker Training and Certification Advisory Committee established by §146.2 of this title.~~]

(8) [~~(6)~~] Core Competencies--Key skills for promotores or community health workers required for certification by the department, including communication skills, interpersonal skills, knowledge base on specific health issues, service coordination skills, capacity-building skills, advocacy skills, teaching skills, and organizational skills.

(9) [~~(7)~~] Department--The Department of State Health Services.

(10) [~~(8)~~] Distance Learning--The acquisition of knowledge and skills through mediated information and instruction, encompassing all technologies and other forms of learning at a distance.

(11) [~~(9)~~] Executive Commissioner--Executive Commissioner of the Health and Human Services Commission.

(12) [~~(10)~~] Health--A state of complete physical, mental and social well-being where an individual or group is able to realize aspirations and satisfy needs, and to change or cope with the environment. Health is a resource for everyday life, not the objective of living; it is a positive concept emphasizing social and personal resources as well as physical capabilities. This definition is from the World Health Organization, "Ottawa Charter for Health Promotion, 1986."

(13) [~~(11)~~] Certified Instructor--An individual approved by the department to provide instruction and training in one or more core competencies to promotores or community health workers.

(14) [~~(12)~~] "Promotor(a)" or "Community Health Worker"--A person who, with or without compensation is a liaison and provides cultural mediation between health care and social services, and the community. A promotor(a) or community health worker: is a trusted member, and has a close understanding of, the ethnicity, language, socio-economic status, and life experiences of the community served. A promotor(a) or community health worker assists people to gain access to needed services and builds individual, community, and system capacity by increasing health knowledge and self-sufficiency through a

range of activities such as outreach, patient navigation and follow-up, community health education and information, informal counseling, social support, advocacy, and participation in clinical research.

(15) [~~(13)~~] Sponsoring organization--An organization approved by the department to deliver a certified training curriculum to promotores or community health workers or instructors.

(16) [~~(14)~~] Certified Training Curriculum--An educational, community health training curriculum approved by the department for the purpose of training promotores or community health workers or instructors.

§146.2. Promotor(a) or Community Health Worker Training and Certification Advisory Committee.

(a) The committee. An advisory committee shall be appointed under and governed by this section.

(1) (No change.)

(2) The committee is established under the Health and Safety Code, §48.101. [~~§11.016, which allows the Executive Commissioner of HHSC to establish advisory committees.~~]

(b) (No change.)

(c) Purpose and tasks.

(1) The committee shall advise the department and the commission on the implementation of [~~Executive Commissioner concerning rules to implement~~] standards, guidelines, and requirements adopted under the Health and Safety Code, Chapter 48, relating to the training and regulation of persons working as promotores or community health workers.

(2) The committee shall advise the department on matters related to the employment and funding of promotores and community health workers.

(3) The committee shall provide to the department recommendations for a sustainable program for promotores and community health workers consistent with the purposes of Health and Safety Code, Chapter 48, Subchapter C.

[~~(2) The committee shall advise the department concerning guidelines and requirements relating to training and certification of promotores or community health workers, instructors, and sponsoring organizations.~~]

(4) [~~(3)~~] The committee shall review applications from sponsoring organizations, and recommend certification to the department if program requirements are met.

(5) [~~(4)~~] The committee shall carry out any other tasks given to the committee by the Commissioner or Executive Commissioner.

(d) (No change.)

(e) Composition. The committee shall be composed of nine members appointed by the [~~Executive~~] Commissioner. The composition of the committee shall include:

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

(f) (No change.)

(g) Officers. The Commissioner shall appoint members of the advisory committee as presiding officer and [~~The committee shall elect a presiding officer and an~~] assistant presiding officer [~~at its first meeting~~] after August 31st of each year.

(1) Each officer shall serve until the next appointment [~~regular election~~] of officers.

(2) (No change.)

(3) The assistant presiding officer shall perform the duties of the presiding officer in case of the absence or disability of the presiding officer. In case the office of presiding officer becomes vacant, the assistant presiding officer will serve until the Commissioner appoints a successor [~~is elected~~] to complete the unexpired portion of the term of the office of presiding officer.

[~~(4) A vacancy which occurs in the offices of presiding officer or assistant presiding officer may be filled at the next committee meeting.~~]

(4) [~~(5)~~] A member shall serve no more than two consecutive terms as presiding officer and/or assistant presiding officer.

(5) [~~(6)~~] The committee may reference its officers by other terms, such as chairperson and vice-chairperson.

(h) (No change.)

(i) Attendance. Members shall attend committee meetings as scheduled. Members shall attend meetings of subcommittees to which the member is assigned.

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

(4) The attendance records of the members shall be reported to the [~~Executive~~] Commissioner. The report shall include attendance at committee and subcommittee meetings.

(j) - (m) (No change.)

(n) Reports to the Executive Commissioner. The committee shall file an annual written report with the Executive Commissioner.

(1) The report shall list the meeting dates of the committee and any subcommittees, the attendance records of its members, a brief description of actions taken by the committee, a description of how the committee has accomplished the tasks given to the committee by the department and the commission [~~Executive Commissioner~~], the status of any rules which were recommended by the committee to the department and the commission [~~Executive Commissioner~~], anticipated activities of the committee for the next year, and any amendments to this section requested by the committee.

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

(o) (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 30, 2011.

TRD-201104135
Lisa Hernandez
General Counsel
Department of State Health Services
Earliest possible date of adoption: November 13, 2011
For further information, please call: (512) 776-6990

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CHAPTER 289. RADIATION CONTROL
SUBCHAPTER D. GENERAL

25 TAC §289.204

The Executive Commissioner of the Health and Human Services Commission, on behalf of the Department of State Health Services (department), proposes an amendment to §289.204, concerning radiation fees.

BACKGROUND AND PURPOSE

The department is directed in House Bill (HB) 1, the General Appropriations Act (82nd Legislature, Regular Session, 2011) Rider 59, to evaluate regulatory programs in Consumer Protection Services, which includes the Radiation Control Program, to determine whether new fees can be assessed or existing fees increased in order to equal or exceed the appropriations to these programs and the associated "other direct and indirect costs" appropriated in this Act. The department collects fees to recover the costs of implementing the radiation control regulatory program, in accordance with Health and Safety Code, §401.301(b), and is directed to recover 100% of those regulatory costs, but not to exceed actual expenses. It is also authorized to collect fees under §401.302 from each nuclear reactor or other fixed nuclear facility in the state that uses special nuclear material.

The radiation control program was evaluated to determine the level of increase in fees based on the following criteria: the date of the last fee increase for the specific program area; the percentage of costs above revenue for the specific program; and the cost of impacted permits compared to other similar permits.

Additional costs of administration and enforcement of the program, were also evaluated to determine the direct and indirect costs imposed on the Licensing, Inspection, Incident and Investigation, Policy/Standards/Quality Assurance (PSQA), and Enforcement Programs due to a United States Nuclear Regulatory Commission (NRC) mandated implementation of increased controls (IC) requirements in June 2006, for all licensees that possess risk-sensitive quantities of radioactive material, resulting in a significant increase in direct and indirect costs and program workloads. As an agreement state, Texas must adopt rules that are compatible with the NRC. The following criteria and tasks were evaluated to determine what increase in fees would be necessary to recover 100% of the additional time required and increased costs incurred by the affected department program areas: Entire Radiation Program to draft and obtain approval for new regulations that had to be compatible with NRC requirements; Radiation Program to review, comment and prepare for additional rules and requirements being developed by the NRC; Licensing Program to provide guidance to all affected licensees; draft appropriate license conditions, amend affected licenses and mail amended licenses; Inspection Program to conduct and document separate and ongoing inspections to establish compliance with the IC regulations for source security, the completion of personnel background checks and fingerprinting requirements for materials users, and for the protection of sensitive information from unauthorized access; Inspection Program to complete pre-licensing inspections; Licensing Program to complete verifications in NRC's National Source Tracking System; Inspection Program to complete pre-licensing security inspections; Incident and Investigation Program to investigate complaints and incidents involving the use or storage of risk-sensitive quantities; PSQA to process and review the IC reports, mail compliance correspondence, and refer significant violations to the Enforcement Unit with a proposal to assess administrative penalties; and Enforcement Unit to evaluate individual situations, draft and mail preliminary reports, schedule and conduct informal conferences with licensees, and draft and mail agreed orders.

The amendment increases the fees for certification of mammography systems and mammography machines used in interventional breast radiography to be commensurate with comparable United States Food and Drug Administration (FDA) fees.

The rule revision increases the fees for mammography accreditation to reflect an increase in the amount the American College of Radiology charges the department to perform image reviews.

Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Section 289.204 has been reviewed and the department has determined that the reasons for adopting this section continues to exist because a rule on this subject is needed.

SECTION-BY-SECTION SUMMARY

Amendments to §289.204 contain increases in fees for radioactive material licenses, evaluation of a sealed source and/or device, certification of mammography systems and mammography machines used for interventional breast radiography, accreditation of mammography facilities, and certificates of registration. In addition, the fees in §289.204(e) - (g) and (j) have been adjusted for administrative convenience.

The $5,920 fee contained in §289.204(e) for a two-year sealed neutron generator target radioactive material license is a 191.75% fee increase to recover department costs for the extensive time required for the technical review of additional requirements placed on neutron generators which is a category of radioactive material license that is comparable to the well logging license category.

The fees contained in §289.204(e) for radioactive materials licenses are increased by 100% for these categories of license: two-year fee of $1,410 for gauge general license acknowledgement (GLA) and two-year fee of $5,970 for research and development. Including overhead expenses per employee, the entire revenue from GLA fees are currently allocated to the Licensing and GLA Self-Inspection program leaving nothing to cover costs associated with Inspection, PQSA, Incident and Investigation, and Enforcement. The license review for a research and development license is part of the Advanced Technology Licensing Program and is generally more technically challenging to review and administer, therefore requiring substantial time.

In addition, the fees contained in §289.204(e) for radioactive materials licenses are increased by 50% for these categories of license that must comply with NRC's increased controls requirements: gauge (fixed), industrial radiography (fixed facility and temporary field site), self-contained and unshielded irradiator, medical therapy (sealed and unsealed source), diagnostic nuclear medicine, remote controlled brachytherapy device (includes low dose-rate and high dose-rate remote afterloaders and intravenous brachytherapy), well logging, and other specific licenses, ranging from a two-year fee of $2,980 for an "other specific license" to a two-year fee of $17,870 for an industrial radiography temporary field site license.

The fees contained in §289.204(e) for radioactive materials licenses are increased by 15% for these categories of license: accelerator (used for production of radioactive material), agency-accepted training course (involving possession of radioactive material), bone mineral analyzer, broad license, survey instrument calibration service, calibration/reference source, fixed and mobile decontamination service, demonstra-

tion/sales, environmental laboratory, eye applicator, fine leak testing device, fixed multi-beam teletherapy, x-ray fluorescence, hand-held light intensifying imaging device, gas chromatograph, gauge (spinning pipe-thickness/portable), installer, repair, or maintenance, in-vitro use of radioactive material, in-vitro test kit manufacturer, leak test service, manufacturing and commercial distribution (processor of radioactive material, other manufacturing and commercial distribution, commercial distribution only, limited manufacturing for loose material), mineral recovery (byproduct material), mobile scanning service, naturally occurring radioactive material (commercial processing), nuclear pharmacy, pacemaker, pipe joint collar marker, radiopharmaceutical manufacturing, source material, special nuclear material, teletherapy, tracer studies (used in other than oil and gas industry wellbores), and tracer studies (used in oil and gas industry wellbores), ranging from a two-year fee of $1,090 for an in-vitro use of radioactive material license to a two-year fee of $76,930 for a mineral recovery (byproduct material) license.

In §289.204(e), the license fee categories for civil defense and waste processing (Class I exempt, Class I, Class II, and Class III) have been deleted because they are obsolete and/or the department no longer has the authority to regulate.

Fees contained in §289.204(f) for evaluation of a sealed source and/or device are increased by 15%, ranging from $2,660 for an amendment requiring re-evaluation of a sealed source to $10,650 for an initial evaluation of a device. In addition, a new $1,000 record maintenance fee, beginning one year after initial sealed source and device authorization listing and every two years thereafter, is added to §289.204(f)(3).

The fees in §289.204(g) for certification of mammography systems and mammography machines used in interventional breast radiography are increased by 15% for a one-year fee of $2,010 for mammography systems, one-year fee of $490 for mammography machines used in interventional breast radiography, and one-year fee of $240 for each additional machine for mammography systems and mammography machines used in interventional breast radiography.

The fees for accreditation of mammography facilities in §289.204(h)(2)(A) - (C) and (F) are increased to reflect an increase in the amount the American College of Radiology charges the department to perform image reviews. The accreditation fee for the first mammography machine is increased from $980 to $1025. The accreditation fee for each additional mammography machine is increased from $585 to $610. The fee for re-evaluation of clinical images is increased from $305 to $330. The fee for reinstatement of a mammography machine is increased from $585 to $610. A new $330 fee is added in §289.204(h)(2)(H) to recover department costs for the review of clinical images for dual modality mammography machines, if registrants choose to utilize this type of machine. Subsequent subparagraphs are renumbered.

In §289.204(h)(2)(D), the fee for re-evaluation of phantom images is decreased from $340 to $300 because the department no longer performs thermoluminescent dosimeter replacements.

Section §289.204(j) adds language to clarify that the fees specified in this section are the applicable fees for persons using only dental radiographic machines and for persons using veterinary radiographic machines, including computerized tomography, fluoroscopy, and accelerators.

The $1,910 fee contained in §289.204(j) for a two-year certificate of registration for accelerators is reflective of a 225% fee increase to recover department costs for a steady increase in the number of applications and the extensive time required for the technical review of operating and safety procedures and shielding calculations for this category of radiation machine which is a category of radiation machine that is comparable to the computerized tomography radiation machine category.

The fees contained in §289.204(j) for certificates of registration are increased by 15% for these categories of machine type or use: computerized tomography, fluoroscopy, radiographic machines only, industrial radiography, other industrial machines, morgues and educational facilities with machines for non-human use, laser (medical/research/academic and industrial/services/entertainment), and other radiation machine services. The fees for these categories range from a two-year fee of $230 for laser (medical/research/academic) to a two-year fee of $3,280 for industrial radiography temporary job sites.

The fees contained in §289.204(j) for certificates of registration are increased by 10% for these categories of machine type or use: podiatric radiographic only, dental radiographic only, veterinary, and minimal threat machines. The fees for these categories range from a two-year fee of $290 for minimal threat machines to $420 for podiatric radiographic machines.

Section 289.204(m) is deleted and replaced with new language to provide the updated references for electronic payment transactions.

FISCAL NOTE

Susan E. Tennyson, Section Director, Environmental and Consumer Safety Section, has determined that for each fiscal year of the first five years that the section will be in effect, there will be fiscal implications to state or local governments as a result of enforcing and administering the section as proposed. The effect on state government will be an increase in revenue to the state of approximately $1,392,776 in 2012 and approximately $2,089,165 in 2013 - 2016. The department provides the estimated increase in revenue based on the following assumptions: (1) proposed fee increases become effective January 1, 2012; (2) half of the radioactive material licenses and half of the certificates of registration will be billed each year; (3) although the proposed rule includes fee increases for mammography certification and accreditation, these fees are dedicated general revenue which means that the fees collected will remain with the department; (4) although the proposed rule decreases the mammography accreditation fee for re-evaluation of phantom images, this fee is dedicated general revenue which means that the fees collected will remain with the department; and (5) proposed rule does not include increases for industrial radiographer certification and exam administration because these fees are not assessed on a two-year basis like the other licenses and certificates of registration issued by the department and the fees collected from these regulatory efforts are not necessarily recurring. These additional revenues will ensure the department is recovering 100% of regulatory costs to continue implementation of the Radiation Control Program. State and local government entities that are licensed or registered with the department for possession of radioactive material or radiation machines will be required to pay the increased fee as specified in the rule.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

Ms. Tennyson has also determined that there will be adverse economic impact to small businesses, micro-businesses, or persons required to comply with the section as proposed. The impact will be the same as for larger businesses listed in the Sec-

tion-by-Section Summary and will range from 10 - 225% increase in fees depending on the type of radioactive material license or certificate of registration. As a general rule, small and micro-businesses will possess radioactive material licenses, certification of mammography systems and mammography machines used for interventional breast radiography, accreditation of mammography facilities, certificates of registration, and/or request evaluation of a sealed source and/or device, expected to increase in the 10 - 50% range.

IMPACT ON LOCAL EMPLOYMENT

There is no anticipated negative impact on local employment.

REGULATORY FLEXIBILITY ANALYSIS

HB 1, the General Appropriations Act, Rider 59, directs the department to evaluate regulatory programs in Consumer Protection Services, which includes the Radiation Control Program, to determine whether new fees can be assessed or existing fees increased in order to equal or exceed the appropriations to these programs and the associated "other direct and indirect costs" appropriated in this Act. Rider 59 directs the department to adopt rules to implement the provisions of the bill. The department collects fees to recover the costs of implementing the radiation control regulatory program, in accordance with Health and Safety Code, §401.301(b), and is directed to recover 100% of those regulatory costs but not to exceed actual expenses. To allow exceptions to the fees for small businesses or micro-businesses would cause the department either to fail to collect 100% of actual regulatory costs or shift a disproportionate burden to larger businesses. Chapter 401 makes no exceptions from the permitting requirements based on business size of the entity. As a general rule, small and micro-businesses will possess radioactive material licenses, certification of mammography systems and mammography machines used for interventional breast radiography, accreditation of mammography facilities, certificates of registration, and/or request evaluation of a sealed source and/or device, expected to increase in the 10 - 50% range.

Concerning the mammography certification and accreditation fee increases, small businesses or micro-businesses, have to be certified and accredited, per Title 21, Code of Federal Regulations, Part 900, if they choose to provide mammography services. Mammography certification can only be obtained through the department for Texas facilities under the United States Food and Drug Administration, Mammography Quality Standards Act (MQSA) States as Certifiers (SAC) provision. However, mammography accreditation can be obtained through the department or the American College of Radiology. Although the department's accreditation fees are less than those of the American College of Radiology, small businesses or micro-businesses, have the option to obtain mammography accreditation through the American College of Radiology.

Therefore, small businesses or micro-businesses will incur the costs of complying with the fees in §289.204(e) - (h) and (j).

PUBLIC BENEFIT

In addition, Ms. Tennyson has also determined that for each year of the first five years the section is in effect, the public will benefit from adoption of the section. The public benefit anticipated as a result of enforcing or administering the section is to generate funding to operate the radiation control program to ensure continued protection of the public, workers, and the environment from unnecessary exposure to radiation.

REGULATORY ANALYSIS

The department has determined that this proposal is not a "major environmental rule" as defined by Government Code, §2001.0225. "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.

TAKINGS IMPACT ASSESSMENT

The department has determined that the proposed amendment 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 Government Code, §2007.043.

PUBLIC COMMENT

Comments on the proposal may be submitted to Barbara J. Taylor, Radiation Group, Policy/Standards/Quality Assurance Unit, Division of Regulatory Services, Environmental and Consumer Safety Section, Department of State Health Services, Mail Code 1987, P.O. Box 149347, Austin, Texas 78714-9347, (512) 834-6770, extension 2010, or by email to BarbaraJ.Taylor@dshs.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

PUBLIC HEARING

A public hearing to receive comments on the proposal will be scheduled after publication in the *Texas Register* and will be held at the Department of State Health Services, Exchange Building, 8407 Wall Street, Austin, Texas 78754. The meeting date will be posted on the Radiation Control website (www.dshs.state.tx.us/radiation). Please contact Barbara J. Taylor at (512) 834-6770, extension 2010, or BarbaraJ.Taylor@dshs.state.tx.us if you have questions.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the proposed rule has been reviewed by legal counsel and found to be within the state agencies' authority to adopt.

STATUTORY AUTHORITY

The amendment is authorized by HB 1, the General Appropriations Act (82nd Legislature, Regular Session), Rider 59; Health and Safety Code, §401.301, which allows the department to collect fees for radiation control licenses and registrations that it issues; Health and Safety Code, §401.302, which allows the department to collect fees from each nuclear reactor or other fixed nuclear facility in the state that uses special nuclear material; Health and Safety Code, §401.051, which provides the Executive Commissioner of the Health and Human Services Commission with authority to adopt rules and guidelines relating to the control of radiation; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. The review of the rule implements Government Code, §2001.039.

The amendment affects the Health and Safety Code, Chapters 401 and 1001; and Government Code, Chapter 531.

§289.204. Fees for Certificates of Registration, Radioactive Material Licenses, Emergency Planning and Implementation, and Other Regulatory Services.

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

(e) Schedule of fees for radioactive material licenses. The following schedule contains the fees for radioactive material licenses:
Figure: 25 TAC §289.204(e)
[~~Figure: 25 TAC §289.204(e)~~]

(f) Fee for evaluation of a sealed source and/or device.

(1) Each time a manufacturer submits a request for evaluation of a unique sealed source, one of the following fees shall be paid:

(A) for an initial evaluation, a fee of $5,320 [~~$4,626~~]; or

(B) for an amendment requiring re-evaluation, a fee of $2,660 [~~$2,309~~].

(2) Each time a manufacturer submits a request for evaluation of a unique device, one of the following fees shall be paid:

(A) for an initial evaluation, a fee of $10,650 [~~$9,258~~]; or

(B) for an amendment requiring re-evaluation, a fee of $5,330 [~~$4,632~~].

(3) A manufacturer shall pay a $1,000 record maintenance fee, beginning one year after initial sealed source and device authorization listing and every two years thereafter.

(4) [~~(3)~~] No request for evaluation will be processed prior to payment of the full amount specified.

(g) Fees for certification of mammography systems and mammography machines used for interventional breast radiography. No application will be accepted for filing or processed prior to payment of the full amount specified in paragraph (1) of this subsection.

(1) An application for certification of mammography systems shall be accompanied by a nonrefundable fee of $2,010 [~~$1,745~~]. Additional mammography systems that have not been assigned a separate United States Food and Drug Administration (FDA) identification number shall be authorized on the same certification. A nonrefundable fee of $240 [~~$204~~] for each additional mammography system on the same certification shall be included in the nonrefundable application fee.

(2) The annual fee for mammography systems is $2,010 [~~$1,745~~]. A fee of $240 [~~$204~~] for each additional mammography system on the same certification shall be included in the annual fee.

(3) Fees for mammography machines used for interventional breast radiography shall be as follows:

(A) An application for certification of machines used for interventional breast radiography shall be accompanied by a nonrefundable fee of $490 [~~$422~~]. A nonrefundable fee of $240 [~~$204~~] for each machine used for interventional breast radiography on the same certification shall be included in the nonrefundable application fee.

(B) The annual fee for machines used for interventional breast radiography is $490 [~~$422~~]. A fee of $240 [~~$204~~] for each additional machine used for interventional breast radiography on the same certification shall be included in the annual fee.

(h) Fees for accreditation of mammography facilities.

(1) (No change.)

(2) Fees for accreditation of mammography facilities are as follows.

(A) The accreditation fee for the first mammography machine is $1,025 [~~$980~~].

(B) The accreditation fee for each additional mammography machine is $610 [~~$585~~].

(C) The fee for re-evaluation of clinical images due to failure during the accreditation process is $330 [~~$305~~] per mammography machine.

(D) The fee for re-evaluation of phantom images due to failure during the accreditation process is $300 [~~$340~~] per machine.

(E) (No change.)

(F) The fee for reinstatement of a mammography machine is $610 [~~$585~~].

(G) (No change.)

(H) The fee for the review of clinical images for dual modality mammography machines, if utilized, is $330 for the alternative modality.

(I) [~~(H)~~] Each facility for which an on-site visit due to three denials of accreditation is required will be charged for actual expenses to the agency arising from such visit.

(J) [~~(I)~~] Payment of the fees in subparagraphs (G) and (I) [~~(G) and (H)~~] of this paragraph shall be made within 60 days following the date of invoice.

(i) (No change.)

(j) Schedule of fees for certificates of registration for radiation machines, lasers, and services. The following schedule contains the fees for certificates of registration for radiation machines, lasers, and services. As of January 1, 2012, the fees for the dental radiographic only category and the veterinary category, as specified in the following schedule, are the applicable fees for those categories.
Figure: 25 TAC §289.204(j)
[~~Figure: 25 TAC §289.204(j)~~]

(k) - (l) (No change.)

(m) Electronic fee payments. Renewal payments may be processed through texas.gov or another electronic payment system specified by the agency. For all types of electronic fee payments, the agency will collect additional fees, in amounts determined by texas.gov or the agency, to recover costs associated with electronic payment processing.

[~~(m) Fees for Texas Online participation. For all applications and renewal applications, the department is authorized to collect subscription and convenience fees, in amounts determined by the Texas Online Authority, to recover costs associated with application and renewal application processing through Texas Online.~~]

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 30, 2011.

TRD-201104137

Lisa Hernandez
General Counsel
Department of State Health Services
Earliest possible date of adoption: November 13, 2011
For further information, please call: (512) 776-6990

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TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 5. PROPERTY AND CASUALTY INSURANCE

SUBCHAPTER E. TEXAS WINDSTORM INSURANCE ASSOCIATION

DIVISION 4. CONSUMER ASSISTANCE; CLAIM PROCESSES

28 TAC §5.4201

The Texas Department of Insurance (Department) proposes new Division 4, §5.4201. Section 5.4201 establishes the Coastal Outreach and Assistance Services Team (COAST) Program. The COAST Program satisfies the requirement of the Insurance Code §2210.582, which was adopted in House Bill 3 (HB 3), 82nd Legislature, 2011, First Called Session, to establish an ombudsman program. The COAST Program will provide information and educational programs to assist persons insured by the Texas Windstorm Insurance Association (Association) with claim processes.

The Legislature has stated in the Insurance Code §2210.001 its finding that the provision of windstorm and hail insurance is necessary for the economic welfare of this state, and without that insurance, the orderly growth and development of this state would be severely impeded. The designated catastrophe area, which consists of the 14 Texas coastal counties and parts of Harris County, has been determined to be underserved for windstorm and hail insurance coverage by the Commissioner under the Insurance Code §2210.005. Under the Insurance Code Chapter 2210, the Association offers windstorm and hail insurance coverage (Association insurance coverage) in the designated catastrophe area as a residual insurer of last resort. Thus, persons who obtain windstorm and hail insurance coverage from the Association have few, if any, other sources from which they may obtain such insurance coverage; and the ability to obtain insurance coverage from the Association has a direct effect on the welfare of persons living and working in the designated catastrophe area. Failure to understand the coverage, rights, and remedies applicable to Association insurance coverage affects the ability of people to select the proper coverage and pursue their Association insurance coverage claims in an efficient and cost-effective manner.

Section 2210.582 of the Insurance Code directs the Department to establish an ombudsman program to provide information and educational programs to assist Association policyholders with the claim processes under the Insurance Code Chapter 2210, Subchapter L-1 (Association's claim processes). The Insurance Code §2210.580 does not directly reference §2210.582; however, §2210.580 states legislative intent that all rules adopted under §2210.580 to implement the Association's claim processes must promote the fairness of the process, protect the rights of aggrieved policyholders, and ensure that policyholders may participate in the claims review process without the necessity of engaging legal counsel. The Department considers the ombudsman program essential to implementing that intent. The proposed section will function as described in the following paragraphs.

Section 5.4201(a) establishes the COAST Program to fulfill the requirement to establish an ombudsman program as required in the Insurance Code §2210.582(a). Section 5.4201(b) provides that the COAST Program shall be administered by the Department as required by the Insurance Code §2210.582(f). As an administered program, the Department will retain managerial control over the operations of the COAST Program. Section 5.4201(c) addresses COAST Program staffing. The COAST Program will rely on an ombudsman and a staff person hired by the Department on a permanent full-time basis to provide the educational and information outreach services to Association policyholders. Following a catastrophic event, the number of COAST Program staff may be increased through an amended budget process authorized in the Insurance Code §2210.582(d).

Section 5.4201(d) sets forth the funding year, budget submission and funding dates, and the procedure and time period for funding an amended budget following a catastrophic event. Consistent with the Insurance Code §2210.582(b) - (c), the funding year shall be from May 1 of each year to April 30 of the following year; the Department shall prepare and submit to the Commissioner a budget for the COAST Program not later than March 1 of each year; the Commissioner shall adopt the budget, or modify the budget before adopting it, not later than April 1 of each year; and the Association shall then transfer the budgeted amount adopted by the Commissioner to the Department for the COAST Program not later than May 1 of each year.

As required by the Insurance Code §2210.582(d), this proposal sets forth in §5.4201(d)(2) and (4) procedures and requirements implementing the amended budget process, including the transfer of additional money from the Association to the Department for the COAST Program. Section 5.4201(d)(2) directs the Department to include expenses for ongoing ombudsman catastrophe operations in its annual budget submissions. This will provide for funding transparency and recognizes that the need for COAST Program information and educational programs may continue into subsequent years. Section 5.4201(d)(4) addresses the procedures and requirements implementing the amended budget process immediately following a catastrophic event, including the transfer of additional money from the Association to the Department for the COAST Program.

Consistent with the Insurance Code §2210.582(d), §5.4201(d)(4)(A) and (B) provide that the Department must, not later than 60 days following a catastrophic event, submit an amended budget to the Commissioner for approval and report to the Commissioner on the approximate number of claimants eligible for COAST Program services. Section 5.4201(d)(4)(C) provides that the Commissioner may modify the amended budget before adopting it. Section 5.4201(d)(4)(D) requires the Association to fund the amended COAST Program budget within 15 days of receiving notice of the Commissioner's adoption of the amended budget. The Department considers 15 days to be reasonable because the Association will have begun determining claims liability and coverage before the 60th day following a catastrophic event and the information and educational programs offered by the COAST Program should

be available as soon as possible to reach the policyholders with claims.

Section 5.4201(e) sets forth that the COAST Program may provide information and educational programs through the means that the COAST Program determines to be appropriate. Section 5.4201(e)(1) provides a list of potential means for providing COAST Program information and educational programs that is consistent with the Insurance Code §2210.582(e). The Insurance Code §2210.582(h) requires the Association to notify each of its policyholders about the ombudsman program as prescribed by the Commissioner by rule. Section 5.4201(f)(1) prescribes that the Association must notify its policyholders about the COAST Program when the Association issues or renews the policy. Section 5.4201(f)(1) requires the Association to use both the English and Spanish notices set forth in §5.4201(g). Section 5.4201(f)(2) and (3) prescribe that the Association must also notify its policyholders about the COAST Program when the Association acknowledges receipt of a claim, and when the Association sends written notice to a policyholder that it has accepted or denied coverage for a claim. The required COAST Program notice may be incorporated into documents being sent at those times, including the Important Notice required by §1.601 of this title (relating to Notice of Toll-Free Telephone Numbers and Information and Complaint Procedures) and the written notice accepting or denying coverage for a claim required by the Insurance Code §2210.573(d). Section 5.4201(g) provides the notice required by §5.4201(f) in both English and Spanish.

FISCAL NOTE. Audrey Selden, Deputy Commissioner of the Compliance Division, has determined that for each year of the first five years the proposed sections will be in effect, there will be no fiscal impact to state and local governments as a result of the enforcement or administration of the proposal. There will be no measurable effect on local employment or the local economy as a result of the proposal.

PUBLIC BENEFIT/COST NOTE. Ms. Selden also has determined that for each year of the first five years the proposed sections are in effect, there will be public benefits resulting from the proposal and there will be costs to persons required to comply with the proposal.

Anticipated Public Benefits. The anticipated public benefit is the establishment and implementation of the ombudsman program required by the Insurance Code §2210.582 to provide information and educational programs to assist people insured by the Association with the Association's claim processes. The ombudsman program requirement will be fulfilled by the COAST Program.

Estimated Costs for Persons Required to Comply with the Proposal. The Association will incur costs for compliance with the proposal. The Department has determined that costs to the Association will result from the Insurance Code §2210.582 requirements (i) that the Association fund the ombudsman program; and (ii) that the Association provide notice of the COAST Program to each person the Association insures. The expected expenses and estimated costs in this analysis are set forth in the following paragraphs and are based on the Department's experience implementing other statutory requirements.

Funding. Under the Insurance Code §2210.582(f), the COAST Program is administratively attached to the Department. The Department provides the staff, services, and facilities necessary for the COAST Program to operate. As required by the Insurance Code §2210.582(b), the Department must propose the COAST Program budget (budget) not later than March 1 of each year. The budget must include all expenditures incurred in administering and operating the COAST Program. The Insurance Code §2210.582(b) further requires the Commissioner to adopt, or modify and adopt, the budget not later than April 1 of the year in which the budget is submitted. The Insurance Code §2210.582(c) requires the Association to fund the adopted budget not later than May 1 of each year.

The Department estimates that the overall cost associated with funding the COAST Program will be $250,000 in the first year and $187,700 in each subsequent year for the first five years of the COAST Program's existence.

The Department has determined that the COAST Program will require a staff of the ombudsman and one additional person. The ombudsman position will serve as team lead and will conduct outreach. The ombudsman position qualifies as an Information Specialist IV in the state's current employee classification system. The Department estimates that the ombudsman position would cost approximately $65,000 annually, including salary and benefits. The additional staff member would conduct outreach and perform other related functions. The staff position qualifies as an Information Specialist III in the state's current employee classification system. The Department estimates that the staff position would cost approximately $52,000 annually, including salary and benefits. The benefits included in these estimated costs include employee retirement, old age and survivors insurance, and group insurance. The state salary classification schedule does not indicate any scheduled increases for Information Specialist IV or Information Specialist III positions through fiscal year 2013. The Legislature has not established a salary schedule beyond fiscal year 2013. The Department estimates that the annual staffing cost of the COAST Program will be approximately $117,000 through the first five years of the COAST Program.

The Department expects that the COAST Program will incur regular operating expenses, including travel, educational campaigns, toll-free telephone usage, and supplies. The Department expects that the ombudsman and staff will make approximately 30 educational trips annually to various locations in the catastrophe area to provide educational presentations, at an estimated cost of $500 per trip. Thus, the Department estimates the cost of travel to be $15,000 in each year of the first five years the COAST Program is in existence. The COAST Program will also require publications, fliers, newspaper and online advertising, and exhibit fees for educational campaigns. The Department estimates the cost of the educational campaigns to be $50,000 in each year of the first five years of the COAST Program. The Department expects that the COAST Program telephone expenses will include the set up of a toll-free help line at $2,300. Annual call charges are estimated to be approximately $2,700 based on 100 calls per week. The Department estimates the cost of the COAST Program's telephone expense to be $5,000 in the first year of the COAST Program and $2,700 for each year of the next four years of the COAST Program. The Department also expects that the COAST Program will use an estimated $3,000 in office supplies in each year of the first five years of the COAST Program.

The Department expects that the COAST Program will incur charges for office equipment and design of a website in the COAST Program's first year of operation. These costs are not expected to be recurring during the next four years. The Department estimates that the cost of website design for the

COAST Program will be $50,000. The Department estimates the cost of office equipment, including desks, chairs, computers, and printers, will be $10,000.

Insurance Code §2210.582(d) also provides that the Department may submit and the Commissioner may adopt an amended budget following a catastrophic event. The occurrence of a catastrophic event is speculative, and any additional cost necessary for the COAST Program will depend in part on the location of the event, the number of policyholders affected, and the need for additional resources or equipment. The additional costs that might be incurred following a catastrophic event are not part of the implementation or establishment of the COAST Program and are not included in this analysis.

Notice. The Department further expects that the Association will incur a cost for providing notice of the operation of the COAST Program required by §5.4201(f). The additional cost is estimated to be less than $5,000 annually. Although the Association is required to provide the notice under the Insurance Code §2210.582(h), the cost is not simply attributable to the statutory requirement because the Commissioner must determine the manner of notice.

The Department has attempted to minimize the cost of providing the notice by requiring it to be distributed only with other written communications from the Association. Thus the Association should not need to incur additional costs for postage or other delivery means. Further, the Association may also incorporate the notice into existing forms or communications which should eliminate the need for additional paper cost in providing the notice. If the Association should choose to comply with §5.4201(f) by printing or mailing a separate notice, it will be the Association's business decision and not an additional cost imposed by this section.

The Department has estimated the cost of ink at approximately one cent per page in previous analyses of printing expenses. The required notices set forth in §5.4201(g) are significantly less than one page; however, based on the estimated one cent cost, the Department estimates that printing the notice for the Association's approximately 250,000 current policyholders will be $2,500 over the course of the first year that policies are delivered, issued for delivery, or renewed on or after November 27, 2011. This amount will change in subsequent years as the number of policyholders changes; however, the result overall effect on cost should be minimal. The additional cost of ink with respect to claims will depend on the number of claims made against the Association. As each claim would both be acknowledged and at some point accepted or denied, the estimated cost is two cents per claim. For example, Hurricane Ike resulted in approximately 90,000 claims. That level of claims activity would result in an additional estimated printing expense of $1,800. Thus, §5.4201(f) is reasonably estimated to result in less than $5,000 of additional costs to the Association annually.

Because the Association is the only entity required to implement the proposed notice requirement, the Department also sent the Association an inquiry as to any additional costs that the Association expected might be incurred, including costs relating to modifying forms or implementing the notice distribution requirement. The Association responded that it did not expect any additional costs from providing the notice in the manner described by §5.4201(f).

Any other costs required to establish and implement the COAST program are not a result of the adoption, enforcement, or administration of this proposal, but result from the legislative enactment of the Insurance Code Chapter 2210 and the amendments to Chapter 2210 in HB 3.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL AND MICRO BUSINESSES. The Government Code §2006.002(c) requires that if a proposed rule may have an economic impact on small businesses or micro businesses, state agencies must prepare as part of the rulemaking process an economic impact statement that assesses the potential impact of the proposed rule on these businesses and a regulatory flexibility analysis that considers alternative methods of achieving the purpose of the rule. The Government Code §2006.001(2) defines "small business" as a legal entity, including a corporation, partnership, or sole proprietorship, that is formed for the purpose of making a profit; is independently owned and operated; and has fewer than 100 employees or less than $6 million in annual gross receipts. The Government Code §2006.001(1) defines "micro-business" similarly to "small business" but specifies that such a business may not have more than 20 employees. The Government Code §2006.001(1) does not specify a maximum level of gross receipts for a "micro-business." The Texas Windstorm Insurance Association is the only individual or entity that must be analyzed to determine whether it is subject to the Government Code §2006.002 small and micro business analysis as a result of this proposal.

The Association does not meet the definition of a *small business* under Government Code §2006.001(2). The Association is an *association. . . composed of all property insurers authorized to engage in the business of property insurance in this state,* formed under the authority of the Insurance Code §2210.051. It is not a corporation, partnership, nor sole proprietorship. It is not formed for the purpose of making a profit, but to provide a method by which adequate windstorm and hail insurance may be made available in certain designated portions of this state, as mandated by the Insurance Code §2210.001.

Under the Insurance Code §2210.056, the net earnings of the Association may not inure to the benefit of private shareholders or individuals; and the assets of the Association may not be used, except to satisfy claims on policies, make investments authorized under applicable law, pay reasonable and necessary administrative expenses, satisfy the obligations of the Association, including public securities and financial instruments, purchase reinsurance, or prepare for or mitigate the effects of catastrophic natural events. Under the Insurance Code §2210.452, the net gain from operations of the Association, including all premium and other revenue of the Association in excess of incurred losses, operating expenses, and public security obligations and administrative expenses, is paid to a catastrophe reserve trust fund or used to procure reinsurance. Further, under the Insurance Code §2210.056 and §2210.452, upon dissolution of the Association, all assets other than assets pledged for the repayment of public securities revert to the state.

The Association is not *independently owned and operated.* In addition to not being owned by its members, under the Insurance Code §2210.101 and §2210.102, the Association operates with a board of directors, which is responsible and accountable to the Commissioner. The Association provides windstorm and hail insurance according to a plan of operation as specified by the Insurance Code §2210.152 and adopted by the Commissioner by rule pursuant to Insurance Code §2210.151. Further, the Association has approximately 150 employees (including employees who are providing services by contract to the FAIR Plan) and

net receipts of over $6 million. Therefore, based on these factors, the Association does not meet the definition of a small or micro business under the Government Code §2006.001(1) and (2), and an analysis of the economic impact of this proposal on the Association pursuant to the Government Code §2006.002(c) is not required.

TAKINGS IMPACT ASSESSMENT. The Department has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking or require a takings impact assessment under the Government Code §2007.043.

REQUEST FOR PUBLIC COMMENT. To be considered, written comments on the proposal must be submitted no later than 5:00 p.m. on November 14, 2011, to Sara Waitt, Acting General Counsel, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. Any request for a public hearing must be submitted separately to the Office of Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104 before the close of the public comment period. If a hearing is held, written and oral comments presented at the hearing will be considered.

STATUTORY AUTHORITY. Section 5.4201 is proposed under §§2210.008, 2210.580, 2210.582, and 36.001 of the Insurance Code. The Insurance Code §2210.008 authorizes the Commissioner to adopt reasonable and necessary rules in the manner prescribed in Subchapter A, Chapter 36, of the Insurance Code. Section 2210.580 of the Insurance Code authorizes the Commissioner to adopt rules regarding the provisions of the Insurance Code Chapter 2210, Subchapter L-1, including rules concerning any other matters regarding the handling of claims that are not inconsistent with Subchapter L-1. Section 2210.580(b) requires that all rules adopted under this §2210.580 shall promote the fairness of the process, protect the rights of aggrieved policyholders, and ensure that policyholders may participate in the claims review process without the necessity of engaging legal counsel.

Section 2210.582(a) of the Insurance Code directs the Department to establish an ombudsman program to provide information and educational programs to assist persons insured under Chapter 2210 of the Insurance Code with the claim processes under Subchapter L-1, Chapter 2210. Section 2210.582(d) provides that the Commissioner shall adopt rules as necessary to implement an amended budget submitted under this section, including rules regarding the transfer of additional money from the Association to the ombudsman program. Section 2210.582(h) provides that the Association, in the manner prescribed by the Commissioner by rule, shall notify each person insured under this chapter concerning the operation of the ombudsman program. Section 2210.582(i) provides that the Commissioner may adopt rules as necessary to implement §2210.582. Section 36.001 of the Insurance Code provides that the Commissioner of Insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of the state.

CROSS-REFERENCE TO STATUTE. The following statute is affected by this proposal: Insurance Code §2210.582.

§5.4201. Coastal Outreach and Assistance Services Team (COAST) Program.

(a) Establishment. The Texas Department of Insurance (department) establishes the Coastal Outreach and Assistance Services Team (COAST) Program to provide information and educational programs to assist persons insured under Chapter 2210 of the Insurance Code. Areas of assistance include the claim processes prescribed under Subchapter L-1, Chapter 2210 of the Insurance Code.

(b) Administration. The COAST Program is administratively attached to the department and will be administered by the department.

(c) Staffing. The COAST Program will include an ombudsman familiar with the claim processes prescribed under Subchapter L-1, Chapter 2210, of the Insurance Code, as well as sufficient staff to support its purpose. If a catastrophic event occurs, the COAST Program may expand as necessary to support the increased number of policyholders requiring assistance.

(d) Funding. The COAST Program will be funded on a yearly basis by the Texas Windstorm Insurance Association (the Association).

(1) The funding year shall be from May 1 of each year to April 30 of the following year.

(2) Not later than March 1 of each year, the department shall prepare and submit to the Commissioner of Insurance (commissioner) a budget for the COAST Program, including approval of all expenditures incurred to administer and operate the COAST Program. The department may include ongoing ombudsman activities related to a prior catastrophic event in the annual budget request. The commissioner will adopt or modify and adopt the budget not later than April 1 of each year.

(3) Not later than May 1 of each year, the Association shall transfer the budgeted amount adopted by the commissioner to the department for the COAST Program.

(4) Following a catastrophic event:

(A) not later than 60 days after the event, the department shall prepare and submit an amended budget to the commissioner for approval, including staffing requirements and expenditures necessary to administer and operate the COAST Program;

(B) not later than 60 days after the event, the department shall report to the commissioner the number of claimants eligible for COAST Program services;

(C) the commissioner may modify the amended budget before adopting it; and

(D) within 15 days of receiving notice of the adopted amended budget, the Association shall transfer the amended budget amount adopted by the commissioner to the department for the COAST Program.

(e) Services.

(1) The COAST Program may provide to persons insured under Chapter 2210 of the Insurance Code information and educational programs through means the COAST Program determines to be necessary and appropriate. Possible means include:

(A) informational materials;

(B) toll-free telephone numbers;

(C) public meetings;

(D) outreach centers;

(E) the Internet; and

(F) other reasonable means.

(2) The COAST Program shall prepare and make available to each person insured under Chapter 2210 of the Insurance Code information describing the functions of the COAST Program.

(f) Notice Requirement. The Association must provide each person insured by the Association on or after November 27, 2011, notice of the operation of the COAST Program. The Association shall fulfill this requirement by complying with paragraphs (1), (2), and (3) of this subsection.

(1) The Association must include the notices set forth in subsection (g)(1) and (2) of this section with each policy delivered, issued for delivery, renewed, or otherwise processed by the Association. Notwithstanding §1.601(a)(3) of this title (relating to Notice of Toll-Free Telephone Numbers and Information and Complaint Procedures), the Association must fulfill this requirement by printing the notices on a separate piece of paper to be included with the policy or by incorporating the notice into the Important Notice required to be attached to the policy under §1.601 of this title.

(2) The Association must include the notice set forth in subsection (g)(1) of this section with each written communication acknowledging receipt of a claim. The Association must fulfill this requirement by printing the notice on a separate piece of paper to be included with the communication acknowledging receipt of a claim or by incorporating the notice into the acknowledgement.

(3) The Association must include the notice set forth in subsection (g)(1) of this section with each written communication accepting or denying coverage of a claim, in whole or in part, that is required to be provided to the claimant under the Insurance Code §2210.573(d). The Association must fulfill this requirement by printing the notice on a separate piece of paper to be included with the acceptance or denial communication or by incorporating the notice into the acceptance or denial document.

(g) Notice. The notice required by subsection (f) of this section must include the following text and be in at least 10 point type.

(1) "The Texas Department of Insurance has established the Coastal Outreach and Assistance Services Team (COAST) Program to assist consumers with understanding the TWIA claim process. To obtain assistance from the COAST Program, please refer to the COAST Program website at www.tdi.texas.gov/COAST; email ConsumerProtection@tdi.state.tx.us; call toll-free 1-855-352-6278; or write to COAST Program - MC 111-1A, Texas Department of Insurance, P.O. Box 149104, Austin, TX 78714-9104."

(2) "El Departamento de Seguros de Texas ha establecido el Programa de Alcance Comunitario y Servicios de Asistencia para el Área Costera (Coastal Outreach and Assistance Services Team (COAST) Program, por su nombre y siglas en inglés) para ayudar a los consumidores a entender el proceso de las reclamaciones de TWIA. Para obtener ayuda del Programa COAST, visite el sitio Web del Programa COAST en www.tdi.texas.gov/COAST; por medio de correo electrónico a ConsumerProtection@tdi.state.tx.us; o llame gratis al 1-855-352-6278; o escriba al Programa COAST - MC 111-1A, Texas Department of Insurance, P.O. Box 149104, Austin, TX 78714-9104."

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 October 3, 2011.

TRD-201104145

Sara Waitt
Acting General Counsel
Texas Department of Insurance
Earliest possible date of adoption: November 13, 2011
For further information, please call: (512) 463-6327

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DIVISION 10. ELIGIBILITY AND FORMS

28 TAC §5.4903, §5.4905

The Texas Department of Insurance (Department) proposes amendments to §5.4903 and §5.4905, to implement legislative changes to the Insurance Code Chapter 2210 and amend the plan of operation of the Texas Windstorm Insurance Association (Association). These sections concern declination of coverage and minimum retained premium. Because the Department is implementing additional legislative changes, the Department also proposes a conforming amendment to the title of Title 28 Texas Administrative Code (28 TAC) Chapter 5, Subchapter E, Division 10.

Under §2210.001 of the Insurance Code, the Legislature has determined that the provision of windstorm and hail insurance is necessary for the economic welfare of the state and its inhabitants; and that the lack of such insurance in the state's seacoast territories would severely impede the orderly growth and development of the state. The Association was created by the Legislature and serves as a residual insurer of last resort for windstorm and hail insurance coverage (insurance coverage) in the catastrophe area designated by the Commissioner under the Insurance Code §2210.005. The catastrophe area is underserved for insurance coverage and consists of the 14 Texas coastal counties and parts of Harris County. Persons seeking insurance coverage from the Association are unable to obtain comparable insurance coverage in the voluntary insurance market. The ability to obtain insurance coverage is crucial to the financial welfare of persons living and working in the designated catastrophe area, and its absence results in the lack of an important element for economic stability in the region. Thus, adoption of these proposed rules will affect the economic welfare of the state and its inhabitants, and positively impact the orderly growth and development of the state.

The Association operates under a plan of operation which is adopted by rule. The Insurance Code §2210.151 provides that the Commissioner shall adopt by rule the Association's plan of operation to provide windstorm and hail insurance in the catastrophe area. The Insurance Code §2210.152(a) sets out the requirements of the plan of operation and specifies that the plan of operation must provide for the efficient, economical, fair, and nondiscriminatory administration of the Association. Further, the Insurance Code §2210.152(a)(2)(G) provides that the plan of operation may include other provisions considered necessary by the Department to implement the purposes of Chapter 2210.

House Bill 3 (HB 3), 82nd Legislature, First Called Session, effective September 28, 2011, amends insurance coverage eligibility requirements in the Insurance Code §2210.202 concerning declination, and it is necessary that the new requirement for a declination on renewal every third year be integrated into the plan of operation in §5.4903. Additionally, HB 3 amends the minimum retained premium requirement set forth in the Insurance Code §2210.204, and it is necessary that the new 90-day minimum retained premium requirement be integrated into the plan of operation in §5.4905. Section 62(a) of HB 3 provides that the

amendments to the Insurance Code §2210.202 and §2210.204 are effective for new and renewal coverage issued by the Association on or after the 60th day after September 28, 2011. In accordance with Chapter 2210 of the Insurance Code, compliance with these requirements is essential to assure the availability of Association insurance coverage for all eligible persons and properties. To effect these necessary amendments the Department proposes the adoption of amendments to §5.4903(a) and §5.4905, along with a nonsubstantive change to the title of 28 TAC Chapter 5, Subchapter E, Division 10.

5.4903. Declination of Coverage

HB 3 amended the Insurance Code §2210.202 to require that the applicant for renewal of an Association policy must have evidence of one declination of coverage every three calendar years from an authorized insurer writing property insurance providing windstorm and hail insurance coverage in the first tier coastal counties to renew Association insurance coverage. Before the HB 3 amendment, the Insurance Code §2210.202 required an applicant to obtain evidence of one declination of coverage to obtain or renew Association insurance coverage.

The requirement under proposed §5.4903(a)(1) that an applicant or applicant's agent must have received at least one such declination in order to obtain new Association coverage on a structure continues the existing rule requirement. The requirement under proposed §5.4903(a)(2) that an applicant or applicant's agent must have received at least one such declination every three calendar years in order to obtain renewal Association insurance coverage implements the HB 3 amendment to the Insurance Code §2210.202, which requires evidence of one declination every three calendar years with an application for renewal of an Association policy.

As a conforming change, the Department proposes deletion of the phrase "new or renewal" in existing §5.4903(a). The declination requirement for new coverage is now addressed under proposed new §5.4903(a)(1), and the declination requirement for renewal coverage is now addressed under proposed new §5.4903(a)(2).

5.4905. Minimum Retained Premium

Proposed §5.4905 establishes the minimum retained premium for Association policyholders required by the Insurance Code §2210.204. The Insurance Code §2210.204(c) provides that the Association shall have a minimum retained premium set forth in the plan of operation. HB 3 amends the Insurance Code §2210.204(e) to provide that the minimum retained premium in the plan of operation must be for a period of not less than 90 days, except for certain events specified in the plan of operation. Before the HB 3 amendment, the Insurance Code §2210.204(e) required the minimum retained premium in the plan of operation to be for a period of not less than 180 days, except for certain events specified in the plan of operation, as established by House Bill 4409 (HB 4409), 81st Legislature, Regular Session. The Department proposes an amendment to §5.4905(a) to amend the time period in that subsection from 180 days to 90 days in order to implement HB 3. Proposed §5.4905(a) also continues the $100 minimum retained premium that was first adopted under §5.4501, effective June 15, 1999, and was incorporated into §5.4905 effective February 24, 2010.

The Department also proposes the deletion of existing §5.4905(c). The Department previously determined that the existing 180-day minimum premium requirement could potentially have a disproportionate adverse effect on persons relying on premium financing to obtain Association insurance coverage (premium finance customers). Requiring the Association to withhold a full minimum premium would require premium finance customers to make a deposit in excess of 50 percent of the policyholder's annual premium, which the Department determined was considerably more than current financing practices require and could effectively eliminate this option for those persons most in need of financing the premium.

However, because HB 3 changes the 180-day minimum premium requirement to a 90-day minimum premium requirement, the Department has determined that such a requirement does not have a disproportionate adverse effect on premium finance customers. Requiring the Association to withhold a full minimum premium would no longer require premium finance customers to make a deposit in excess of 50 percent of the policyholder's annual premium. Therefore, the Department proposes the deletion of existing §5.4905(c).

Because the exception in existing §5.4905(c) is proposed for deletion, §5.4905(d), (e), the second sentence of subsection (f), and (g), which administered §5.4905(c), are also no longer necessary and are also proposed for deletion. Existing subsection (f) is redesignated as subsection (c), as a conforming, non-substantive change.

FISCAL NOTE. Marilyn Hamilton, Associate Commissioner of the Property and Casualty Program, has determined that for each year of the first five years the proposed sections will be in effect, there will be no fiscal impact to state and local governments as a result of the enforcement or administration of the proposal. There will be no measurable effect on local employment or the local economy as a result of the proposal.

PUBLIC BENEFIT/COST NOTE. Ms. Hamilton also has determined that for each year of the first five years the proposed sections are in effect, there will be public benefits resulting from the proposal but there will be no costs to persons required to comply with the proposal that are in addition to costs that may result from the HB 3 amendments to the Insurance Code §2210.202(a) and §2210.204(e) and existing statutory or rule requirements.

Anticipated Public Benefits. The anticipated public benefits in general are the updating of existing rules to comply with legislation enacted by the 82nd Legislature. Specifically, the anticipated public benefits of the proposed rules and amendments related to compliance with legislation include the implementation of HB 3, which (i) amends the Insurance Code §2210.202(a) to require evidence of one declination every three calendar years with an application for renewal of an Association policy; and (ii) amends the Insurance Code §2210.204(e) to provide that the minimum retained premium in the plan of operation must be for a period of not less than 90 days, except for specified events.

Estimated Costs for Persons Required to Comply with the Proposal.

Requirements that do not result in any additional costs under this proposal. The Department has determined that the following proposed provisions do not result in any costs that are in addition to costs that may result from the HB 3 amendments to the Insurance Code §2210.202(a) and §2210.204(e) and existing statutory or rule requirements: (i) the requirement to receive at least one declination every three calendar years in order to obtain renewal Association coverage under proposed §5.4903(a)(2); and (ii) the 90-day minimum retained premium requirement under proposed §5.4905(a).

Under HB 3, the Insurance Code §2210.202 requires a declination on renewal every third year. The Department has determined that proposed §5.4903(a)(2) implements this statutory requirement and does not result in any costs to the applicant or applicant's agent that are in addition to those costs resulting from HB 3. Under proposed amendments to §5.4903(a), an applicant or applicant's agent must have received at least one such declination every three calendar years in order to obtain renewal Association coverage. Existing rules require the applicant and applicant's agent to obtain a declination with each renewal. The proposal does not change the manner in which the declination must be obtained, stored or presented to the Association if requested.

Under HB 3, the Insurance Code §2210.204(e) requires that the Association's plan of operation provide for a minimum retained premium of a period of not less than 90 days, except for events specified in the plan of operation that reflect a significant change in the exposure of the policyholder concerning the insured property. The statute includes four events that reflect a significant change in the exposure of the policyholder concerning the insured property. The statutory 90-day minimum retained premium requirement is included in proposed §5.4905(a). The proposal does not extend the minimum retained period beyond the 90-day minimum period required by statute. Proposed §5.4905(a) also continues the $100 minimum premium that existed for Association insurance coverage prior to the HB 4409 amendment. The $100 minimum retained premium under §5.4905(a) is not a newly proposed cost to Association applicants and policyholders. The Department has determined that there are no additional costs that would result to an applicant or policyholder that are in addition to those costs that result under §2210.204(e) of the Insurance Code and existing Department rule requirements.

Therefore, all costs to applicants, applicants' agents, or policyholders under this proposal result from the legislative enactment of the Insurance Code Chapter 2210 and the amendments to Chapter 2210 in HB 3 and are not a result of the adoption, enforcement, or administration of this proposal.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL AND MICRO BUSINESSES. The Government Code §2006.002(c) requires that if a proposed rule may have an economic impact on small businesses or micro businesses, state agencies must prepare as part of the rulemaking process an economic impact statement that assesses the potential impact of the proposed rule on these businesses and a regulatory flexibility analysis that considers alternative methods of achieving the purpose of the rule. The Government Code §2006.001(2) defines "small business" as a legal entity, including a corporation, partnership, or sole proprietorship, that is formed for the purpose of making a profit; is independently owned and operated, and has fewer than 100 employees or less than $6 million in annual gross receipts. The Government Code §2006.001(1) defines "micro-business" similarly to "small business" but specifies that such a business may not have more than 20 employees. The Government Code §2006.001(1) does not specify a maximum level of gross receipts for a "micro-business."

As detailed in the Public Benefit/Cost Note part of this proposal, there are no costs as a result of this proposal. Therefore, there is no adverse impact on small or micro businesses as a result of this proposal.

TAKINGS IMPACT ASSESSMENT. The Department has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking or require a takings impact assessment under the Government Code §2007.043.

REQUEST FOR PUBLIC COMMENT. To be considered, written comments on the proposal must be submitted no later than 5:00 p.m. on November 14, 2011, to Sara Waitt, Acting General Counsel, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. An additional copy of the comment must be simultaneously submitted to Marilyn Hamilton, Associate Commissioner, Property and Casualty Program, Mail Code 104-PC, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. Any request for a public hearing must be submitted separately to the Office of Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104, before the close of the public comment period. If a hearing is held, written and oral comments presented at the hearing will be considered.

STATUTORY AUTHORITY. Amendments to §5.4903 and §5.4905 are proposed under the Insurance Code §§2210.008, 2210.151, 2210.152, 2210.202, 2210.204, and 36.001. Section 2210.008(b) authorizes the Commissioner to adopt reasonable and necessary rules in the manner prescribed in Subchapter A, Chapter 36, Insurance Code. Section 2210.151 authorizes the Commissioner to adopt the Association's plan of operation to provide Texas windstorm and hail insurance coverage in the catastrophe area by rule. Section 2210.152 provides that the Association's plan of operation provide for the efficient, economical, fair, and nondiscriminatory administration of the Association and include both underwriting standards and other provisions considered necessary by the Department to implement the purposes of the Insurance Code Chapter 2210. Section 2210.202(a) requires that a declination be defined in the Association's plan of operation and that one declination every three calendar years is required with an application for renewal of an Association policy. Section 2210.202(b) requires the agent to possess proof of the declination described by §2201.202(a). Section 2210.204(d) provides that for cancellation of insurance coverage under §2210.204, the minimum retained premium in the plan of operation must be for a period of not less than 90 days, except for certain events specified in the plan of operation. Section 2210.204(d) and (e) require that the minimum retained premium be set forth in the plan of operation; and that the plan of operation specify events that reflect a significant change in the exposure, or the policyholder, concerning the insured property that would be exempt from the minimum retained premium requirement. Section 36.001 provides that the Commissioner of Insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of the state.

CROSS REFERENCE TO STATUTE. The following statutes are affected by this proposal: Insurance Code §2210.202 and §2210.204.

§5.4903. Declination of Coverage.

(a) To be eligible to obtain [~~new or renewal~~] windstorm and hail insurance coverage from the Association for a property, an applicant or applicant's agent must have received at least one declination of coverage for the property from an insurer authorized to engage in the business of, and writing, property insurance providing windstorm and hail insurance coverage in the first tier coastal counties: [~~.~~]

(1) in order to obtain new Association coverage on a structure; and

(2) every three calendar years, in order to obtain renewal Association coverage.

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

§5.4905. Minimum Retained Premium.

(a) Except as provided in this section, the minimum retained premium on an Association policy issued on an annual basis shall be the premium amount equal to the greater of 90 [~~180~~] days of the annual policy term or $100. The minimum retained premium shall be fully earned on the effective date of the policy. Unearned premium in excess of the minimum retained premium set forth in this subsection shall be refunded pro-rata.

(b) (No change.)

[~~(c) An Association policy that is canceled and premium for such policy is financed through a person authorized to finance premiums under the Insurance Code Chapter 651 is subject to the following:~~]

[~~(1) A $100 minimum retained premium applies, except as provided for in paragraph (3) of this subsection. The $100 minimum retained premium is fully earned on the effective date of the policy. The unearned premium in excess of the $100 minimum retained premium shall be refunded to the premium finance company on a pro-rata basis.~~]

[~~(2) Except as provided for under subsection (b) of this section, the named insured shall owe to the Association the unpaid balance of the minimum retained premium under subsection (a) of this section that is in excess of $100, and the named insured shall not be eligible for coverage until the balance is paid.~~]

[~~(3) Subsection (a) of this section applies to an Association policy that the premium is financed for a person that was insured under a prior Association policy that was issued or renewed on or after November 1, 2009, and the premium for such policy was financed and the policy was canceled within 180 days of the effective date of the policy.~~]

[~~(d) The Association shall maintain a list of all persons that are subject to subsection (c)(2) of this section. The Association may provide information concerning a person who is on the list to an agent who is preparing an application for that person. The list may be shared with persons authorized by the department to engage in the business of premium finance under the Insurance Code Chapter 651 and the department. A person may be removed from the list if on petition by the person to the Association, the Association determines that the cancellation resulted due to one or more of the events set forth in subsection (b) of this section.~~]

[~~(e) The Association shall not issue a new or renewal policy to an applicant who is indebted to the Association on a prior Association policy.~~]

(c) [~~(f)~~] The minimum retained premium shall not create or extend coverage beyond the policy's effective cancellation date. [~~A person making a payment on a balance due as provided under subsection (e) of this section shall not be entitled to any additional coverage beyond the policy's effective cancellation date.~~]

[~~(g) This section does not address or affect any requirement under statute or rule concerning the qualifications or licensure of persons engaging in the business of premium finance.~~]

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 October 3, 2011.

TRD-201104144
Sara Waitt
Acting General Counsel
Texas Department of Insurance
Earliest possible date of adoption: November 13, 2011
For further information, please call: (512) 463-6327

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 1. TEXAS DEPARTMENT OF PUBLIC SAFETY

CHAPTER 15. DRIVER LICENSE RULES
SUBCHAPTER B. APPLICATION REQUIREMENTS--ORIGINAL, RENEWAL, DUPLICATE, IDENTIFICATION CERTIFICATES

37 TAC §15.24

The Texas Department of Public Safety (the department) proposes amendments to §15.24, concerning Identification of Applicants. These amendments are necessary because certain provisions of Senate Bill 1 of the 82nd Legislature, 2011, First Called Session, supersede the provisions of this rule. Additionally, these rule changes are in response to the department's recently completed agreement with the U.S. Citizenship and Immigration Services for access to its database to confirm the immigration status of driver license and identification card applicants. This agreement will allow the department to independently verify the documents issued by federal immigration authorities and presented by applicants to obtain a Texas driver license or identification card. Currently, applicants who presented a document issued by U.S. Citizenship and Immigration Services for a foreign passport, U.S. visa, and form I-94 with a fixed duration needed to present a document or form I-94 that was issued for a period of at least one year and had at least six months of validity remaining at the time of application for a Texas driver license or identification card in order to be accepted by the department. The independent verification eliminates the need for the federal immigration documentation presented by an applicant to be issued for one year and have at least six months of validity remaining.

This rule also is amended to reflect that name changes have occurred and will continue to occur for the federal agencies responsible for immigration. Additionally, this rule is amended to reflect that certain groups of individuals may not be required to obtain or present a U.S. visa in order to enter the United States. For these individuals, this rule is amended to allow the department to waive the U.S. visa requirement found in paragraph (1)(F) and (1)(G).

Denise Hudson, Assistant Director, Finance, has determined that for each year of the first five-year period the rule is in effect there will be no fiscal implications for state or local government or local economies.

Ms. Hudson has also determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the rule as proposed. There is no anticipated economic cost to individuals who are required to comply

with the rule as proposed. There is no anticipated negative impact on local employment.

In addition, Ms. Hudson has determined that for each year of the first five-year period the rule is in effect the public benefit anticipated as a result of enforcing the rule will be current and updated rules.

The department has determined that this proposal is not a "major environmental rule" as defined by Texas Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule that 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.

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this proposal. Accordingly, the department is not required to complete a takings impact assessment regarding this rule.

Comments on this proposal may be submitted to Ron Coleman, Program Administrator, Texas Department of Public Safety, P.O. Box 4087 (MSC 0300), Austin, Texas 78773; by fax to (512) 424-5233; or by email to ron.coleman@dps.texas.gov. Comments must be received within thirty (30) days of publication of this proposal.

The amendment is proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; and Texas Transportation Code, §521.005, which authorizes the department to adopt rules necessary to administer Chapter 521.

Texas Government Code, §411.004(3) and Texas Government Code, Chapter 521 are affected by this proposal.

§15.24. Identification of Applicants.

All original applicants for a driver license or identification certificate must present proof of identity satisfactory to the department. All documents must be verifiable. There are three categories of documents that may be presented to establish proof of identity.

(1) Primary identification. These items are complete within themselves and require no supporting instruments: These documents must contain the applicant's complete name and full date of birth:

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

(D) unexpired [~~United States Bureau of Citizenship and Immigration Services~~] document issued by the United States Citizenship and Immigration Services or successor federal immigration agency. [~~for a period of at least one year and must be valid for no less than six (6) months from the date presented to the department with a completed application.~~] The document must contain verifiable data and identifiable photo; or[~~,~~]

(E) unexpired United States military ID card for active duty, reserve or retired personnel with identifiable photo.

(F) foreign passport with a visa issued by the United States Department of State (valid or expired) with unexpired I-94 marked valid for a fixed duration. If the applicant was not required by federal law to obtain a visa to enter the United States, the visa requirement under this subparagraph may be waived. [~~The Form I-94 must have been issued for a period of at least one year and must be valid for no less than six (6) months from the date presented to the department with a completed application.~~]

(G) foreign passport with a visa issued by the United States Department of State (valid or expired) with an I-94 marked valid for the duration of stay accompanied by appropriate documentation. If the applicant was not required by federal law to obtain a visa to enter the United States, the visa requirement under this subparagraph may be waived.

(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 30, 2011.

TRD-201104115
D. Phillip Adkins
General Counsel
Texas Department of Public Safety
Earliest possible date of adoption: November 13, 2011
For further information, please call: (512) 424-5848

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SUBCHAPTER K. SPECIAL PROVISIONS FOR NON-CITIZENS

37 TAC §15.171

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

The Texas Department of Public Safety (the department) proposes the repeal of §15.171, concerning Issuance of Driver Licenses and Identification Certificates to Non-citizens. The repeal of §15.171 is necessary because certain provisions of Senate Bill 1 of the 82nd Legislature, 2011, First Called Session, supersede this rule.

Denise Hudson, Assistant Director, Finance, has determined that for each year of the first five-year period the repeal is in effect there will be no significant fiscal implications for state or local government or local economies.

Ms. Hudson also has determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the repeal as proposed. There are no anticipated economic costs to individuals who are required to comply with repeal as proposed. There is no anticipated negative impact on local employment.

In addition, Ms. Hudson has determined that for each year of the first five-year period the repeal is in effect the public benefit anticipated as a result of enforcing the repeal will be updated and current rules.

The department has determined that this proposal is not a "major environmental rule" as defined by Texas Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule that 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.

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this repeal. Accordingly, the department is not required to complete a takings impact assessment regarding this proposal.

Comments on this proposal may be submitted to Ron Coleman, Program Administrator, Texas Department of Public Safety, P.O. Box 4087 (MSC 0300), Austin, Texas 78773; by fax to (512) 424-5233; or by email to ron.coleman@dps.texas.gov. Comments must be received within thirty (30) days of publication of this proposal.

This repeal is proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; and Texas Transportation Code, §521.005, which authorizes the department to adopt rules necessary to administer Chapter 521.

Texas Government Code, §411.004(3) and Texas Transportation Code, Chapter 521 are affected by this proposal.

§15.171. Issuance of Driver Licenses and Identification Certificates to Non-citizens.

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 30, 2011.

TRD-201104116
D. Phillip Adkins
General Counsel
Texas Department of Public Safety
Earliest possible date of adoption: November 13, 2011
For further information, please call: (512) 424-5848

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SUBCHAPTER L. ELECTION IDENTIFICATION CERTIFICATE

37 TAC §§15.181 - 15.185

The Texas Department of Public Safety (the department) proposes new §§15.181 - 15.185, concerning Election Identification Certificate. The 82nd Texas Legislature enacted Transportation Code, Chapter 521A, which requires the department to issue election identification certificates. These rules are necessary to inform the public of what will be required of applicants for issuance of an election identification certificate and allow the public to have a role in establishing the process.

Denise Hudson, Assistant Director of Finance, has determined that for each year of the first five-year period the rules are in effect there will be fiscal implications for state government, but no fiscal implication for local government or local economies. The fiscal impact for state government cannot be determined as there is no available data to support the number of individuals who may request a no-cost election identification certificate. The cost for production and issuance of the card is $1.67 each.

Ms. Hudson also has determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the rules as proposed. There is no anticipated economic cost to individuals who are required to comply with the rules as proposed. There is no anticipated negative impact on local employment.

In addition, Ms. Hudson has determined that for each year of the first five-year period the rules are in effect the public benefit anticipated as a result of the rules will be that individuals will be informed of the requirements and process related to the issuance of an election identification certificate.

The department has determined that this proposal is not a "major environmental rule" as defined by Texas Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risks 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 the 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.

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this proposal. Accordingly, the department is not required to complete a takings impact assessment regarding these rules.

Comments on the proposal may be submitted to Janie Smith, Driver License Division, Texas Department of Public Safety, P.O. Box 4087 (MSC 0300), Austin, Texas 78773; by fax to (512) 424-5233; or by email to DLDrulecomments@dps.texas.gov. Comments must be received no later than thirty (30) days from the date of publication of this proposal.

The new sections are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; and Texas Transportation Code, Chapter 521A, which authorizes the department to issue a no-cost election identification certificate to eligible applicants.

Texas Government Code, §411.004(3) and Texas Transportation Code, Chapter 521A are affected by this proposal.

§15.181. Eligibility for Election Identification Certificate.

(a) An applicant must be at least 17 years and 10 months of age in order to apply for an election identification certificate.

(b) An applicant must affirm that the person is obtaining the certificate for the purpose of satisfying Election Code, §63.001(b) and does not have another form of identification described by Election Code, §63.0101.

(c) An applicant must:

(1) Be a registered voter in this state and present a voter registration card issued to the individual; or

(2) Be eligible for voter registration under Election Code, §13.001 and submit an application for voter registration.

(d) An applicant who has been issued any of the following documents is not eligible to receive an election identification certificate:

(1) A driver license, election identification certificate, or personal identification certificate issued by the department that has not expired or that expired no earlier than 60 days before the date of application;

(2) A United States military identification card that contains the person's photograph that has not expired or that expired no earlier than 60 days before the date of application;

(3) A United States citizenship certificate issued to the person that contains the person's photograph;

(4) A United States passport issued to the person that has not expired or that expired no earlier than 60 days before the date of application; or

(5) A license to carry a concealed handgun issued to the person by the department that has not expired or that expired no earlier than 60 days before the date of application.

§15.182. Identification of Applicants.

An applicant for an election identification certificate must provide documents satisfactory to the department. All documents must be verifiable.

(1) An original applicant for an election identification certificate must present:

(A) One piece of primary identification;

(B) Two pieces of secondary identification; or

(C) One piece of secondary identification plus two pieces of supporting identification.

(2) Primary Identification. A Texas driver license or personal identification card issued to the person that has been expired for 60 days and is within two years of expiration date may be presented as primary identification.

(3) Secondary identification. These items are recorded governmental documents (United States, one of the 50 states, a United States territory, or District of Columbia):

(A) Original or certified copy of a birth certificate issued by the appropriate State Bureau of Vital Statistics or equivalent agency;

(B) Original or certified copy of United States Department of State Certification of Birth (issued to United States citizens born abroad); or

(C) Original or certified copy of court order with name and date of birth (DOB) indicating an official change of name and/or gender.

(4) Supporting identification. These items consist of other records or documents that aid examining personnel in establishing the identity of the applicant. The following items are not all inclusive:

(A) voter registration card;

(B) school records;

(C) insurance policy (at least two years old);

(D) vehicle title;

(E) military records;

(F) unexpired military dependant identification card;

(G) original or certified copy of marriage license or divorce decree;

(H) Social Security card;

(I) pilot's license;

(J) unexpired photo DL or photo ID issued by another (United States) state, U.S. territory, the District of Columbia;

(K) expired photo DL or photo ID issued by another (United States) state, U.S. territory, or the District of Columbia that is within two years of the expiration date;

(L) an offender identification card or similar form of identification issued by the Texas Department of Criminal Justice;

(M) any document that may be added to §15.24 of this title (relating to Identification of Applicants) other than those issued to persons who are not citizens of the U.S.

§15.183. Application Requirements.

(a) An application for an election identification certificate must include:

(1) the applicant's full name:

(A) A married woman may use her maiden name or she may adopt the surname of her husband or the surname of a previous husband. No name will be used that has not been documented. Middle names will not be substituted for first names. Three full names will be used, unless the applicant does not have three names, including the maiden name. This section applies to both sexes.

(i) When change of name occurs because of marriage, divorce, annulment, or death of spouse, the certificate holder may choose to keep her current married name, revert to her maiden name, or adopt a previous husband's surname. Name changes for reasons other than those set out above require a court order verifying such change.

(ii) Certificate holders who request a name change may apply for a duplicate and exercise the same privilege in name selection as an original applicant.

(B) Foreign language names will be spelled out as they appear on the identification documents presented. English versions of names will not be substituted for the actual name.

(C) Ecclesiastical names such as Brother Thomas, Sister Mary, or Father Kelly are not used.

(2) the applicant's place and date of birth;

(3) the fingerprints of the applicant; this does not apply to an applicant who is permitted and utilizes an alternative method for renewing or duplicating an election identification certificate;

(4) a photograph of the applicant;

(5) the signature of the applicant; the applicant's usual signature, in ink, is required on all applications for an election identification certificate:

(A) The primary purpose of the signature is to identify the applicant and verify the information given on the application.

(B) If an applicant cannot write his name, he may make his "mark." This is usually a cross in the place of his signature followed by the applicant's printed name. The Driver License field employee shall sign under the applicant's "mark" showing who printed the applicant's name.

(6) a brief description of the applicant;

(7) the sex of the applicant;

(8) the residence address of the applicant;

(9) whether the applicant is a citizen of the United States; and

(10) the county of residence of the applicant.

(b) Social Security number. Applicants for an election identification certificate will be asked to provide verification of Social Security number documentation. If the applicant fails or refuses to provide that social security information, the election identification certificate will be issued without such documentation unless state or federal statute requires otherwise. Acceptable documents to provide verification of Social Security number are listed in §15.42 of this title (relating to Social Security Number).

(c) Notarizations. The applicant must verify original election identification certificate applications before a person authorized to administer oaths. The following officials may administer such oaths or affirmations:

(1) within the State of Texas:

(A) a judge, clerk, or commissioner of any court of record;

(B) a notary public;

(C) a justice of the peace;

(D) authorized employees of the Department of Public Safety;

(2) general:

(A) in the absence of evidence to the contrary, it is presumed that all notarizations are legally made;

(B) the omission of the seal by officers normally required to use same for notarization invalidates the oath;

(C) notarized election identification certificate applications must be dated not more than six months prior to date of application.

§15.184. Expiration, Renewal, and Replacement of Election Identification Certificate.

(a) Expiration.

(1) An Election Identification Certificate expires on the first birthday of the cardholder occurring after the sixth anniversary of the date of the application.

(2) An Election Identification Certificate issued to a person 70 years of age or older does not expire.

(b) Renewal.

(1) An applicant for renewal of an election identification certificate must present evidence of eligibility, under §15.181 of this title (relating to Eligibility for Election Identification Certificate) plus one other piece of personal identification if the election identification certificate is not presented, if necessary to identify the applicant, prior to renewal.

(2) An election identification certificate may be renewed 12 months before expiration date. Earlier renewals will be accepted for good cause.

(3) The department may provide certificate holders with alternate methods of renewing or duplicating an election identification certificate.

(c) Applications for Replacements and Corrections. An application for replacement will be accepted in any of the following cases:

(1) when an election identification certificate has been lost, destroyed, marred, or mutilated;

(2) when there has been a change of name and/or gender.

§15.185. Cancellation and Surrender.

The department may cancel and require surrender of an election identification certificate upon confirmation that the certificate was issued to a person not entitled thereto.

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 30, 2011.

TRD-201104118
D. Phillip Adkins
General Counsel
Texas Department of Public Safety
Earliest possible date of adoption: November 13, 2011
For further information, please call: (512) 424-5848

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CHAPTER 27. CRIME RECORDS
SUBCHAPTER C. TATTOO MARKS FOR HOGS, DOGS, SHEEP, OR GOATS

37 TAC §27.31

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

The Texas Department of Public Safety (the department) proposes the repeal of §27.31, concerning Registration of Tattoo Marks. The proposed repeal is necessary because Subchapter E, Chapter 144, Agriculture Code, Registration of Animal Tattoo Marks was repealed by the 82nd Legislature and registration of animal tattoo marks by the department is no longer authorized by statute.

Denise Hudson, Assistant Director, Finance, has determined that for each year of the first five-year period the repeal is in effect there will be no significant fiscal implications for state or local government, or local economies.

Ms. Hudson also has determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the repeal as proposed. There are no anticipated economic costs to individuals who are required to comply with repeal as proposed. There is no anticipated negative impact on local employment.

In addition, Ms. Hudson has determined that for each year of the first five-year period the repeal is in effect the public benefit anticipated as a result of enforcing the repeal will be updated and current rules that are in compliance with recent changes made by the 82nd Legislature.

The department has determined that this proposal is not a "major environmental rule" as defined by Texas Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule that 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.

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this proposal. Accordingly, the department is not required to complete a takings impact assessment regarding this rule.

Comments on the proposed repeal may be submitted Louis Beaty, Manager, Crime Records Service, Texas Department of Public Safety, P.O. Box 4087, Austin, Texas 78773-0230, (512) 424-5836. Comments must be received no later than thirty (30) days from the date of publication of this proposal.

This repeal is proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work.

Texas Government Code, §411.004(3) and Texas Agriculture Code, Chapter 144, Subchapter E are affected by this proposal.

§27.31. Registration of Tattoo Marks.

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 30, 2011.

TRD-201104117
D. Phillip Adkins
General Counsel
Texas Department of Public Safety
Earliest possible date of adoption: November 13, 2011
For further information, please call: (512) 424-5848

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 1. DEPARTMENT OF AGING AND DISABILITY SERVICES

CHAPTER 19. NURSING FACILITY REQUIREMENTS FOR LICENSURE AND MEDICAID CERTIFICATION

SUBCHAPTER C. NURSING FACILITY LICENSURE APPLICATION PROCESS

40 TAC §19.214

The Health and Human Services Commission (HHSC) proposes, on behalf of the Department of Aging and Disability Services (DADS), an amendment to §19.214, concerning criteria for denying a license or renewal of a license, in Chapter 19, Nursing Facility Requirements for Licensure and Medicaid Certification.

BACKGROUND AND PURPOSE

The purpose of the amendment is to implement Senate Bill 78, 82nd Legislature, Regular Session, 2011, authorizing DADS to deny or refuse to renew a license if an applicant or certain persons associated with an applicant are listed in a health and human service agency's record of adverse licensing action maintained in accordance with Texas Government Code §531.952.

SECTION-BY-SECTION SUMMARY

The proposed amendment to §19.214 adds criteria for denying an initial license or refusing to renew a license for a nursing facility and updates a reference to the title of Chapter 99.

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 economic cost to persons required to comply with the amendment.

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 additional protection of the health and safety of the individuals receiving services from entities regulated by DADS.

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 Kim Lammons at (512) 438-2264 in DADS Policy, Rules, and Curriculum Development. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-11R14, Department of Aging and Disability Services W-615, P.O. Box 149030, Austin, Texas 78714-9030, or street address 701 West 51st St., Austin, Texas 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 11R14" 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 242, which authorizes DADS to license and regulate nursing facilities.

The amendment implements Texas Government Code, §531.0055; Texas Human Resources Code, §161.021; and Texas Health and Safety Code, §§242.001 - 242.906.

§19.214. Criteria for Denying a License or Renewal of a License.

(a) DADS may deny an initial license or refuse to renew a license if any person described in §19.201(e) of this subchapter (relating to Criteria for Licensing):

(1) is subject to denial or refusal as [~~has been convicted of an offense~~] described in Chapter 99 of this title (relating to Denial or Refusal of License [~~Criminal Convictions Barring Facility Licensure~~]) during the time frames described in that chapter;

(2) does not have a satisfactory history of compliance with state and federal nursing home regulations. In determining whether there is a history of satisfactory compliance with federal or state regulations, DADS at a minimum may consider:

(A) whether any violation resulted in significant harm or a serious and immediate threat to the health, safety, or welfare of any resident;

(B) whether the person promptly investigated the circumstances surrounding any violation and took steps to correct and prevent a recurrence of a violation;

(C) the history of surveys and complaint investigation findings and any resulting enforcement actions;

(D) a repeated failure to comply with regulation;

(E) an inability to attain compliance with cited deficiencies within an acceptable period of time as specified in the plan of correction or credible allegation of compliance, whichever is appropriate;

(F) the number of violations relative to the number of facilities the applicant or any other person named in §19.201(e) of this subchapter has been affiliated with during the last five years; and

(G) any exculpatory information deemed relevant by DADS;

(3) has committed any act described in §19.2112(a)(2) - (7) of this chapter (relating to Administrative Penalties);

(4) violated Chapter 242 of the Texas Health and Safety Code in either a repeated or substantial manner;

(5) aids, abets, or permits a substantial violation described in paragraph (4) of this subsection about which the person had or should have had knowledge;

(6) fails to provide the required information and facts and/or references;

(7) fails to pay the following fees, taxes, and assessments when due:

(A) licensing fees as described in §19.216 of this subchapter (relating to License Fees);

(B) reimbursement of emergency assistance funds within one year after the date on which the funds were received by the trustee in accordance with the provisions of §19.2116(e) and (f) of this chapter (relating to Involuntary Appointment of a Trustee); or

(C) franchise taxes;

(8) has a history of any of the following actions during the five-year period preceding the date of the application:

(A) operation of a facility that has been decertified or had its contract canceled under the Medicare or Medicaid program in any state or both;

(B) federal or state nursing facility sanctions or penalties, including, but not limited to, monetary penalties, downgrading the status of a facility license, proposals to decertify, directed plans of correction or the denial of payment for new Medicaid admissions;

(C) unsatisfied final judgments;

(D) eviction involving any property or space used as a facility in any state;

(E) suspension of a license to operate a health care facility, long-term care facility, assisted living facility, or a similar facility in any state;

(F) revocation of a license to operate a health care facility, long-term care facility, assisted living facility, or similar facility in any state;

(G) surrender of a license in lieu of revocation or while a revocation hearing is pending; or

(H) expiration of a license while a revocation action is pending and the license is surrendered without an appeal of the revocation or an appeal is withdrawn;

(9) fails to meet minimum standards of financial condition as described in §19.201(d)(1)(A) of this subchapter and §19.1925(a) of this chapter (relating to Financial Condition); or

(10) fails to notify DADS of a significant adverse change in financial condition as required under §19.1925 of this chapter.

(b) DADS does not issue a license to an applicant to operate a new facility if the applicant has a history of any of the following actions during the five-year period preceding the date of the application:

(1) revocation of a license to operate a health care facility, long-term care facility, assisted living facility, or similar facility in any state;

(2) surrender of a license in lieu of revocation or while a revocation hearing is pending;

(3) expiration of a license while a revocation action is pending and the license is surrendered without an appeal of the revocation or an appeal is withdrawn;

(4) debarment or exclusion from the Medicare or Medicaid programs by the federal government or a state; or

(5) a court injunction prohibiting the applicant or manager from operating a facility.

(c) Only final actions are considered for purposes of subsections (a)(8) and (b) of this section. An action is final when routine administrative and judicial remedies are exhausted. All actions, whether pending or final, must be disclosed.

(d) If an applicant for a new license owns multiple facilities, DADS examines the overall record of compliance in all of the appli-

cant's facilities. Denial of an application for a new license will not preclude the renewal of licenses for the applicant's other facilities with satisfactory records.

(e) If DADS denies a license or refuses to issue a renewal of a license, the applicant or license holder may request an administrative hearing. Administrative hearings are held under the Health and Human Services Commission's hearing procedures in 1 TAC Chapter 357, Subchapter I (relating to Hearings Under the Administrative Procedure Act).

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 October 3, 2011.

TRD-201104163
Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Proposed date of adoption: January 1, 2012
For further information, please call: (512) 438-3734

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CHAPTER 90. INTERMEDIATE CARE FACILITIES FOR PERSONS WITH MENTAL RETARDATION OR RELATED CONDITIONS SUBCHAPTER B. APPLICATION PROCEDURES

40 TAC §90.17

The Health and Human Services Commission (HHSC) proposes, on behalf of the Department of Aging and Disability Services (DADS), an amendment to §90.17, concerning criteria for denying a license or renewal of a license, in Chapter 90, Intermediate Care Facilities for Persons with Mental Retardation or Related Conditions.

BACKGROUND AND PURPOSE

The purpose of the amendment is to implement Senate Bill 78, 82nd Legislature, Regular Session, 2011, authorizing DADS to deny or refuse to renew a license if an applicant or certain persons associated with an applicant are listed in a health and human service agency's record of adverse licensing action maintained in accordance with Texas Government Code §531.952.

SECTION-BY-SECTION SUMMARY

The proposed amendment to §90.17 adds criteria for denying an initial license or refusing to renew a license for an intermediate care facility for persons with mental retardation or related conditions and updates a reference to the title of Chapter 99.

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 economic cost to persons required to comply with the amendment.

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 additional protection of the health and safety of the individuals receiving services from entities regulated by DADS.

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 Kim Lammons at (512) 438-2264 in DADS Policy, Rules, and Curriculum Development. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-11R14, Department of Aging and Disability Services W-615, P.O. Box 149030, Austin, Texas 78714-9030, or street address 701 West 51st St., Austin, Texas 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 11R14" 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 252, which authorizes DADS to license and regulate intermediate care facilities for persons with mental retardation or related conditions.

The amendment implements Texas Government Code, §531.0055; Texas Human Resources Code, §161.021; and Texas Health and Safety Code, §§252.001 - 252.208.

§90.17. Criteria for Denying a License or Renewal of a License.

(a) DADS may deny an initial license or refuse to renew a license if any person described in §90.11(d) of this subchapter (relating to Criteria for Licensing):

(1) is subject to denial or refusal as [~~has been convicted of an offense~~] described in Chapter 99 of this title (relating to Denial or Refusal of License [~~Criminal Convictions Barring Facility Licensure~~]) during the time frames described in that chapter;

(2) substantially fails to comply with the requirements described in §90.42 of this chapter (relating to Standards for Facilities Serving Persons with Mental Retardation or Related Conditions), including:

(A) noncompliance that poses a serious threat to health and safety, as described in Appendix Q of the State Operations Manual, "Guidelines for Determining Immediate and Serious Threat to Patient Health and Safety;" or

(B) a failure to maintain compliance on a continuous basis, including decertification, contract termination, denial of certification, or license revocation;

(3) aids, abets, or permits a substantial violation described in paragraph (2) of this subsection about which the person had or should have had knowledge;

(4) fails to provide the required information, facts, or references;

(5) provides the following false or fraudulent information:

(A) knowingly submits false or intentionally misleading statements to DADS;

(B) uses subterfuge or other evasive means of filing;

(C) engages in subterfuge or other evasive means of filing on behalf of another who is unqualified for licensure;

(D) knowingly conceals a material fact; or

(E) is responsible for fraud;

(6) fails to pay the following fees, taxes, and assessments when due:

(A) licensing fees as described in §90.19 of this subchapter (relating to License Fees);

(B) reimbursement of emergency assistance funds within one year after the date on which the funds were received by the trustee in accordance with the provisions of §90.238(e) of this chapter (relating to Involuntary Appointment of a Trustee);

(C) administrative penalties within 60 days after the order assessing the penalties in accordance with §90.236 of this chapter (relating to Administrative Penalties); or

(D) franchise taxes;

(7) has a history of any of the following actions during the five-year period preceding the date of the application:

(A) operation of a facility that has been decertified or had its contract cancelled under the Medicare or Medicaid program in any state;

(B) federal or state long term care facility sanctions or penalties, including vendor holds, monetary penalties, downgrading the status of a facility license, proposals to decertify, directed plans of correction, or the denial of payment for new Medicaid admissions;

(C) unsatisfied final judgments;

(D) eviction involving any property or space used as a facility in any state; or

(E) suspension of a license to operate a health care facility, long term care facility, assisted living facility, or a similar facility in any state.

(b) Concerning subsection (a)(7) of this section, DADS may consider exculpatory information provided by any person described in §90.11(d) of this subchapter and grant a license if DADS finds that person able to comply with the rules in this chapter.

(c) DADS does not issue a license to an applicant to operate a new facility if the applicant has a history of any of the following actions during the five-year period preceding the date of the application:

(1) revocation of a license to operate a health care facility, long term care facility, assisted living facility, or similar facility in any state;

(2) debarment or exclusion from the Medicare or Medicaid programs by the federal government or a state; or

(3) a court injunction prohibiting any person described in §90.11(d) of this subchapter from operating a facility.

(d) Only final actions are considered for purposes of subsections (a)(7) and (c) of this section. An action is final when routine administrative and judicial remedies are exhausted. All actions, whether pending or final, must be disclosed.

(e) If an applicant for a new license owns multiple facilities, DADS examines the overall record of compliance in all of the applicant's facilities. Denial of a new license will not preclude the renewal of licenses for the applicant's other facilities with a history of compliance with licensing regulations.

(f) DADS does not approve as meeting licensing standards new beds or the expansion of a facility serving persons with mental retardation or related conditions that participates in the medical assistance program under Title XIX of the Social Security Act, as provided by the Texas Health and Safety Code, §533.062, unless the new beds or the expansion was included in the plan approved by the Health and Human Services Commission (HHSC) in accordance with Texas Health and Safety Code, §533.061.

(g) If DADS denies an application for a new license, the applicant may request an administrative hearing. If DADS refuses to issue a renewal of a license, the licensee may request an informal reconsideration, as specified in §90.18 of this subchapter (relating to Informal Reconsideration) and an administrative hearing. An administrative hearing is held under HHSC's rules in 1 TAC Chapter 357, Subchapter I (relating to Hearings Under the Administrative Procedure Act).

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 October 3, 2011.

TRD-201104164
Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Proposed date of adoption: January 1, 2012
For further information, please call: (512) 438-3734

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CHAPTER 92. LICENSING STANDARDS FOR ASSISTED LIVING FACILITIES

SUBCHAPTER B. APPLICATION PROCEDURES

40 TAC §92.11

The Health and Human Services Commission (HHSC) proposes, on behalf of the Department of Aging and Disability Services (DADS), an amendment to §92.11, concerning criteria for licensing, in Chapter 92, Licensing Standards for Assisted Living Facilities.

BACKGROUND AND PURPOSE

The purpose of the amendment is to implement Senate Bill 78, 82nd Legislature, Regular Session, 2011, authorizing DADS to deny or refuse to renew a license if an applicant or certain persons associated with an applicant are listed in a health and human service agency's record of adverse licensing action maintained in accordance with Texas Government Code §531.952.

SECTION-BY-SECTION SUMMARY

The proposed amendment to §92.11 clarifies criteria for denying an initial license or refusing to renew a license for an assisted living facility and updates a reference to the title of Chapter 99.

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 economic cost to persons required to comply with the amendment.

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 additional protection of the health and safety of the individuals receiving services from entities regulated by DADS.

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 Kim Lammons at (512) 438-2264 in DADS Policy, Rules, and Curriculum Development. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-11R14, Department of Aging and Disability Services W-615, P.O. Box 149030, Austin, Texas 78714-9030, or street address 701 West 51st St., Austin, Texas 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 11R14" 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.

§92.11. Criteria for Licensing.

(a) A person must be licensed to establish or operate an assisted living facility in Texas.

(1) An assisted living facility is an establishment that:

(A) furnishes, in one or more facilities, food and shelter to four or more persons who are unrelated to the proprietor of the establishment;

(B) provides:

(i) personal care services;

(ii) administration of medication by a person licensed or otherwise authorized in this state to administer the medication; or

(iii) services described in clauses (i) and (ii) of this subparagraph; and

(C) may provide assistance with or supervision of the administration of medication.

(2) DADS considers one or more facilities to be part of the same establishment and, therefore, subject to licensure as an assisted living facility, based on the following factors:

(A) common ownership;

(B) physical proximity;

(C) shared services, personnel, or equipment in any part of the facilities' operations; and

(D) any public appearance of joint operations or of a relationship between the facilities.

(3) The presence or absence of any one factor in paragraph (2) of this subsection is not conclusive.

(b) To obtain a license, a person must follow the application requirements in this subchapter and meet the criteria for a license.

(c) An applicant must affirmatively show that the applicant, license holder, controlling person, and any person required to submit background and qualification information meet the criteria and eligibility for licensing, in accordance with this section, and:

(1) affirmatively show that:

(A) the building in which the facility is housed:

(i) meets local fire ordinances;

(ii) is approved by the local fire authority; and

(iii) meets DADS licensing standards in accordance with Subchapter D of this chapter (relating to Facility Construction) based on an on-site inspection by DADS; and

(B) operation of the facility meets DADS licensing standards based on an on-site health inspection by DADS, which must include observation of the care of a resident; or

(2) affirmatively show that the facility meets the standards for accreditation based on an on-site accreditation survey by the accreditation commission.

(d) An applicant that chooses the option allowed in subsection (c)(2) of this section must contact DADS to determine which accreditation commissions are available to meet the requirements of subsection (c)(2) of this section.

(e) DADS issues a license to a facility meeting all requirements of this chapter. The facility must not exceed the maximum allowable number of residents specified on the license.

(f) DADS denies an application for an initial license or for the renewal of a license if:

(1) the applicant, license holder, controlling person, or any person required to submit background and qualification information has been debarred or excluded from the Medicare or Medicaid programs by the federal government or a state;

(2) a court has issued an injunction prohibiting the applicant, license holder, controlling person, or any person required to submit background and qualification information from operating a facility; or

(3) during the five years preceding the date of the application, a license to operate a health care facility, long-term care facility, assisted living facility, or similar facility in any state held by the applicant, license holder, controlling person, or any person required to submit background and qualification information has been revoked.

(g) A license holder or controlling person who operates a nursing facility or an assisted living facility for which a trustee was appointed and for which emergency assistance funds, other than funds to pay the expenses of the trustee, were used is subject to exclusion from eligibility for:

(1) the issuance of an initial license for a facility for which the person has not previously held a license; and

(2) the renewal of the license of the facility for which the trustee was appointed.

(h) DADS may deny an application for an initial license or refuse to renew a license if an applicant, license holder, controlling person, or any person required to submit background and qualification information:

(1) violates Texas Health and Safety Code, Chapter 247; a section, standard or order adopted under Chapter 247; or a license issued under Chapter 247 in either a repeated or substantial manner;

(2) commits an act described in §92.551(a)(2) - (7) of this chapter (relating to Administrative Penalties);

(3) aids, abets, or permits a substantial violation described in paragraphs (1) - (2) of this subsection about which the person had or should have had knowledge;

(4) fails to provide the required information, facts, or references;

(5) provides the following false or fraudulent information:

(A) knowingly submits false or intentionally misleading statements to DADS;

(B) uses subterfuge or other evasive means of filing an application for licensure;

(C) engages in subterfuge or other evasive means of filing on behalf of another who is unqualified for licensure;

(D) knowingly conceals a material fact related to licensure; or

(E) is responsible for fraud;

(6) fails to pay the following fees, taxes, and assessments when due:

(A) license fees as described in §92.4 of this chapter (relating to License Fees); or

(B) franchise taxes, if applicable;

(7) during the five years preceding the date of the application, has a history in any state or other jurisdiction of any of the following:

(A) operation of a facility that has been decertified or has had its contract canceled under the Medicare or Medicaid program;

(B) federal or state long-term care facility, assisted living facility, or similar facility sanctions or penalties, including monetary penalties, involuntary downgrading of the status of a facility license, proposals to decertify, directed plans of correction, or the denial of payment for new Medicaid admissions;

(C) unsatisfied final judgments, excluding judgments wholly unrelated to the provision of care rendered in long-term care facilities;

(D) eviction involving any property or space used as a facility; or

(E) suspension of a license to operate a health care facility, long-term care facility, assisted living facility, or a similar facility;

(8) violates Texas Health and Safety Code, §247.021 by operating a facility without a license; or

(9) is subject to denial or refusal as [~~has been convicted of an offense~~] described in Chapter 99 of this title (relating to Denial or Refusal of License [~~Criminal Convictions Barring Facility Licensure~~]) during the time frames described in that chapter.

(i) For the grounds for denial of an application for an initial license or an application for renewal of a license set out in subsection (h)(8) of this section, DADS considers exculpatory information provided by an applicant, a license holder, a person with a disclosable interest, or a manager and may grant a license if DADS finds the applicant, license holder, person with a disclosable interest, affiliate, or manager able to comply with the rules in this chapter.

(j) For the grounds for denial of an application for an initial license or an application for renewal of a license set out in subsections

(f) and (h)(8) of this section, DADS considers only final actions. An action is final when routine administrative and judicial remedies are exhausted. An applicant must disclose all actions, whether pending or final.

(k) If an applicant owns multiple facilities, DADS examines the overall record of compliance in all of the applicant's facilities. An overall record poor enough to deny issuance of a new license does not preclude the renewal of a license of a facility with a satisfactory record.

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 October 3, 2011.

TRD-201104165
Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Proposed date of adoption: January 1, 2012
For further information, please call: (512) 438-3734

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CHAPTER 97. LICENSING STANDARDS FOR HOME AND COMMUNITY SUPPORT SERVICES AGENCIES

SUBCHAPTER B. CRITERIA AND ELIGIBILITY, APPLICATION PROCEDURES, AND ISSUANCE OF A LICENSE

40 TAC §97.11

The Health and Human Services Commission (HHSC) proposes, on behalf of the Department of Aging and Disability Services (DADS), an amendment to §97.11, concerning criteria and eligibility for licensing, in Chapter 97, Licensing Standards for Home and Community Support Services Agencies.

BACKGROUND AND PURPOSE

The purpose of the amendment is to implement Senate Bill 78, 82nd Legislature, Regular Session, 2011, authorizing DADS to deny or refuse to renew a license if an applicant or certain persons associated with an applicant are listed in a health and human service agency's record of adverse licensing action maintained in accordance with Texas Government Code §531.952.

SECTION-BY-SECTION SUMMARY

The proposed amendment to §97.11 clarifies criteria for denying an initial license or refusing to renew a license for a home and community support services agency and updates a reference to the title of Chapter 99.

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 economic cost to persons required to comply with the amendment.

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 additional protection of the health and safety of the individuals receiving services from entities regulated by DADS.

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 Kim Lammons at (512) 438-2264 in DADS Policy, Rules, and Curriculum Development. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-11R14, Department of Aging and Disability Services W-615, P.O. Box 149030, Austin, Texas 78714-9030, or street address 701 West 51st St., Austin, Texas 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 11R14" 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 142, which provides DADS with the authority to adopt rules for the licensing and regulation of home and community support services agencies.

The amendment implements Texas Government Code, §531.0055, Texas Human Resources Code, §161.021; and Texas Health and Safety Code, §§142.001 - 142.030.

§97.11. Criteria and Eligibility for Licensing.

(a) An applicant for a license must not admit a client or initiate services until the applicant completes the application process and receives an initial license.

(b) A first-time application for a license is an application for an initial license.

(c) An application for a license when there is a change of ownership is an application for an initial license.

(d) A separate license is required for each place of business as defined in §97.2 of this chapter (relating to Definitions).

(e) An agency's place of business must be located in and have an address in Texas. An agency located in another state must receive a license as a parent agency in Texas to operate as an agency in Texas.

(f) An applicant must be at least 18 years of age.

(g) Before issuing a license, DADS considers the background and qualifications of:

(1) the applicant;

(2) a controlling person of the applicant;

(3) a person with a disclosable interest;

(4) an affiliate of the applicant;

(5) the administrator;

(6) the alternate administrator; and

(7) the chief financial officer.

(h) DADS may deny an application for an initial license or for renewal of a license if any person described in subsection (g) of this section:

(1) on the date of the application:

(A) is subject to denial or refusal as [~~has been convicted of an offense~~] described in Chapter 99 of this title (relating to Denial or Refusal of License [~~Criminal Convictions Barring Facility Licensure~~]) during the time frames described in that chapter;

(B) has an unsatisfied final judgment in any state or other jurisdiction;

(C) is in default on a guaranteed student loan (Education Code, §57.491); or

(D) is delinquent on child support obligations (Family Code, Chapter 232);

(2) for two years preceding the date of the application, has a history in any state or other jurisdiction of any of the following:

(A) an unresolved federal or state tax lien;

(B) an eviction involving any property or space used as an inpatient hospice agency; or

(C) an unresolved final Medicare or Medicaid audit exception; or

(3) for twelve months preceding the date of the application, has a history in any state or other jurisdiction of any of the following:

(A) denial, suspension, or revocation of an agency license or a license for a health care facility;

(B) surrendering a license before expiration or allowing a license to expire instead of the licensing authority proceeding with enforcement action;

(C) a Medicaid or Medicare sanction or penalty relating to the operation of an agency or a health care facility;

(D) operating an agency that has been decertified in any state under Medicare or Medicaid; or

(E) debarment, exclusion, or involuntary contract cancellation in any state from Medicare or Medicaid.

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 October 3, 2011.

TRD-201104166
Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Proposed date of adoption: January 1, 2012
For further information, please call: (512) 438-3734

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CHAPTER 98. ADULT DAY CARE AND DAY ACTIVITY AND HEALTH SERVICES REQUIREMENTS

SUBCHAPTER B. APPLICATION PROCEDURES

40 TAC §98.19

The Health and Human Services Commission (HHSC) proposes, on behalf of the Department of Aging and Disability Services (DADS), an amendment to §98.19, concerning criteria for denying a license or renewal of a license, in Chapter 98, Adult Day Care and Day Activity and Health Services Requirements.

BACKGROUND AND PURPOSE

The purpose of the amendment is to implement Senate Bill 78, 82nd Legislature, Regular Session, 2011, authorizing DADS to deny or refuse to renew a license if an applicant or certain persons associated with an applicant are listed in a health and human service agency's record of adverse licensing action maintained in accordance with Texas Government Code §531.952.

SECTION-BY-SECTION SUMMARY

The proposed amendment to §98.19 adds criteria for denying an initial license or refusing to renew a license for an adult day care facility and updates a reference to the title of Chapter 99.

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 economic cost to persons required to comply with the amendment.

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 additional protection of the

health and safety of the individuals receiving services from entities regulated by DADS.

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 Kim Lammons at (512) 438-2264 in DADS Policy, Rules, and Curriculum Development. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-11R14, Department of Aging and Disability Services W-615, P.O. Box 149030, Austin, Texas 78714-9030, or street address 701 West 51st St., Austin, Texas 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 11R14" 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 Human Resources Code, Chapter 103, which provides DADS with the authority to license and regulate adult day care facilities.

The amendment implements Texas Government Code, §531.0055; Texas Human Resources Code, §161.021; and Texas Human Resources Code, §§103.001 - 103.011.

§98.19. Criteria for Denying a License or Renewal of a License.

(a) DADS may deny an initial license or refuse to renew a license if any person described in §98.11(e) of this subchapter (relating to Criteria for Licensing):

(1) is subject to denial or refusal as [~~has been convicted of an offense~~] described in Chapter 99 of this title (relating to Denial or Refusal of License [~~Criminal Convictions Barring Facility Licensure~~]) during the time frames described in that chapter;

(2) substantially fails to comply with the requirements described in §§98.42, 98.43, 98.61, and 98.62 of this chapter (relating to Safety; Sanitation; General Requirements; and Program Requirements), including:

(A) noncompliance that poses a serious threat to health and safety; or

(B) a failure to maintain compliance on a continuous basis;

(3) aids, abets, or permits a substantial violation described in paragraph (2) of this subsection about which the person had or should have had knowledge;

(4) fails to provide the required information, facts, or references;

(5) knowingly provides the following false or fraudulent information:

(A) submits false or intentionally misleading statements to DADS;

(B) uses subterfuge or other evasive means of filing;

(C) engages in subterfuge or other evasive means of filing on behalf of another who is unqualified for licensure;

(D) knowingly conceals a material fact; or

(E) is responsible for fraud;

(6) fails to pay the following fees, taxes, and assessments when due:

(A) licensing fees as described in §98.21 of this subchapter [~~chapter~~] (relating to License Fees); and

(B) franchise taxes, if applicable;

(7) has a history of any of the following actions during the five-year period preceding the date of the application:

(A) operation of a facility that has been decertified or had its contract canceled under the Medicare or Medicaid program in any state;

(B) federal or state Medicare or Medicaid sanctions or penalties;

(C) unsatisfied final judgments;

(D) eviction involving any property or space used as a facility in any state;

(E) suspension of a license to operate a health facility, long-term care facility, assisted living facility, or a similar facility in any state.

(b) Concerning subsection (a)(7) of this section, DADS may consider exculpatory information provided by any person described in §98.11(e) of this subchapter and grant a license if DADS finds that person able to comply with the rules in this chapter.

(c) DADS does not issue a license to an applicant to operate a new facility if the applicant has a history of any of the following actions during the five-year period preceding the date of the application:

(1) revocation of a license to operate a health care facility, long-term care facility, assisted living facility, or similar facility in any state;

(2) debarment or exclusion from the Medicare or Medicaid programs by the federal government or a state; or

(3) a court injunction prohibiting any person described in §98.11(e) of this subchapter from operating a facility.

(d) Only final actions are considered for purposes of subsections (a)(7) and (c) of this section. An action is final when routine administrative and judicial remedies are exhausted. All actions, whether pending or final, must be disclosed.

(e) If an applicant owns multiple facilities, the overall record of compliance in all of the facilities will be examined. An overall record poor enough to deny issuance of a new license will not preclude the renewal of licenses of individual facilities with satisfactory records.

(f) If DADS denies a license or refuses to issue a renewal of a license, the applicant or license holder may request a hearing by following the Health and Human Services Commission's rules in 1 TAC Chapter 357, Subchapter I (relating to Hearings Under the Administrative Procedure Act). An administrative hearing is conducted in accordance with Texas Government Code, Chapter 2001, and 1 TAC Chapter 357, Subchapter I.

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 October 3, 2011.

TRD-201104167
Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Proposed date of adoption: January 1, 2012
For further information, please call: (512) 438-3734

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CHAPTER 99. DENIAL OR REFUSAL OF LICENSE

40 TAC §99.3

The Health and Human Services Commission (HHSC) proposes, on behalf of the Department of Aging and Disability Services (DADS), new §99.3, concerning convictions barring licensure, in Chapter 99, Criminal Convictions Barring Facility Licensure.

BACKGROUND AND PURPOSE

The purpose of the new section is to implement Senate Bill 78, 82nd Legislature, Regular Session, 2011, authorizing DADS to deny or refuse to renew a license if an applicant or certain persons associated with an applicant are listed in a health and human service agency's record of adverse licensing action maintained in accordance with Texas Government Code §531.952. In addition, the title of Chapter 99 is changed to Denial or Refusal of License.

SECTION-BY-SECTION SUMMARY

The proposed new §99.3, Adverse Licensing Record, adds that DADS may deny a license application or refuse to renew a license if an applicant or certain associated persons are listed in the record maintained in accordance with Texas Government Code §531.952.

FISCAL NOTE

Gordon Taylor, DADS Chief Financial Officer, has determined that, for the first five years the proposed new section is in effect, enforcing or administering the new section 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 new section will not have an adverse economic effect on small businesses or micro-businesses, because there is no economic cost to persons required to comply with the new section.

PUBLIC BENEFIT AND COSTS

Veronda Durden, DADS Assistant Commissioner for Regulatory Services, has determined that, for each year of the first five years the new section is in effect, the public benefit expected as a result of enforcing the new section is additional protection of the health and safety of the individuals receiving services from entities regulated by DADS.

Ms. Durden anticipates that there will not be an economic cost to persons who are required to comply with the new section. The 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 Kim Lammons at (512) 438-2264 in DADS Policy, Rules, and Curriculum Development. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-11R14, Department of Aging and Disability Services W-615, P.O. Box 149030, Austin, Texas 78714-9030, or street address 701 West 51st St., Austin, Texas 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 11R14" in the subject line.

STATUTORY AUTHORITY

The new section 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 Chapters 142, 242, 247, 252, and Texas Human Resources Code Chapter 103, which authorize DADS to license and regulate nursing facilities, intermediate care facilities for persons with mental retardation or related conditions, assisted living facilities, home and community support service agencies, and adult day care facilities respectively.

The new section implements Texas Government Code, §531.0055, Texas Human Resources Code, §161.021; Texas Health and Safety Code Chapters 142, 242, 247, 252; and Texas Human Resources Code Chapter 103.

§99.3. Adverse Licensing Record.

DADS may deny an application for a license or refuse to renew a license if:

(1) any of the following persons are listed in a record maintained by a health and human services agency under Texas Government Code §531.952:

(A) the applicant or license holder;

(B) a person listed on an initial or renewal application; or

(C) a controlling person of the applicant or license holder; and

(2) the agency's action that resulted in the person being listed in a record maintained under Texas Government Code §531.952 is based on:

(A) an act or omission that resulted in physical or mental harm to an individual in the care of the person;

(B) a threat to the health, safety, or well-being of an individual in the care of the person;

(C) the physical, mental, or financial exploitation of an individual in the care of the person; or

(D) a determination by the agency that the person has committed an act or omission that renders the person unqualified or unfit to fulfill the obligations of the license, listing, or registration.

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 October 3, 2011.

TRD-201104168
Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Proposed date of adoption: January 1, 2012
For further information, please call: (512) 438-3734

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PART 12. TEXAS BOARD OF OCCUPATIONAL THERAPY EXAMINERS

CHAPTER 364. REQUIREMENT FOR LICENSURE

40 TAC §364.2, §364.3

The Texas Board of Occupational Therapy Examiners proposes amendments to §364.2 and §364.3, concerning initial and temporary license. The amendments will require a copy of the applicant's receipt from National Board for Certification in Occupational Therapy (NBCOT) showing that a score report has been ordered for the board.

John P. Maline, Executive Director of the Executive Council of Physical Therapy and Occupational Therapy Examiners, has determined that for the first five-year period the sections are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the sections.

Mr. Maline has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing the sections will be enhancement of the professional practice of occupational therapy practitioners, by ensuring that applicants report their national examination test scores, not by paying for a new costly form, but by faxing us a copy of their examination registration. There will not be an effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the proposed sections.

Comments on the proposed amendments may be submitted to Augusta Gelfand, OT Coordinator, Texas Board of Occupational Therapy Examiners, 333 Guadalupe Street, Suite 2-510, Austin, Texas 78701, or through email: augusta@ptot.texas.gov.

The amendments are proposed under the Occupational Therapy Practice Act, Title 3, Subchapter H, Chapter 454, Occupations Code, which provides the Texas Board of Occupational Therapy Examiners with the authority to adopt rules consistent with this Act to carry out its duties in administering this Act.

Title 3, Subchapter H, Chapter 454 of the Occupations Code is affected by the amended sections.

§364.2. Initial License by Examination.

(a) An applicant [~~Applicant~~] applying for license by examination must:

(1) meet all provisions for §364.1 of this title (relating to Requirements for a License) and send the board a copy of the examination registration showing that a NBCOT score report has been ordered for TBOTE; and

(2) pass the NBCOT certification examination for occupational therapists or occupational therapy assistants with a score set by NBCOT. Score reports must be sent to the Board by NBCOT or their score reporting service.

(3) application for license must be received no later than two years following date of exam.

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

§364.3. Temporary License.

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

(c) To be issued a temporary license, the applicant must:

(1) meet all provision of §364.1 of this title (relating to Requirements for a License);

(2) meet all provision of §364.2 of this title (relating to License by Examination);

(3) submit the Confirmation of Examination Registration and Eligibility to Examine form from NBCOT, which must be sent directly to the board by NBCOT and which reflects the 90 day window in which the applicant will take the examination;

(4) submit a signed Verification of Supervision Form as provided by the board;

(5) send the board the application fee as set by the Executive Council; and[~~.~~]

(6) submit the copy of the NBCOT examination registration, which reflects that a score report has been ordered for TBOTE.

(d) - (f) (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 30, 2011.

TRD-201104128
John P. Maline
Executive Director
Texas Board of Occupational Therapy Examiners
Earliest possible date of adoption: November 13, 2011
For further information, please call: (512) 305-6900

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CHAPTER 369. DISPLAY OF LICENSES

40 TAC §369.3

The Texas Board of Occupational Therapy Examiners proposes an amendment to §369.3, concerning use of titles. The amendment will exempt those who work in academia or publishing from listing their license title first after their name.

John P. Maline, Executive Director of the Executive Council of Physical Therapy and Occupational Therapy Examiners, has determined that for the first five-year period the section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. Maline has determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be a satisfaction to those who publish and work in academic settings in following academic and publishing protocols. There will not be an effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the proposed section.

Comments on the proposed amendment may be submitted to Augusta Gelfand, OT Coordinator, Texas Board of Occupational Therapy Examiners, 333 Guadalupe Street, Suite 2-510, Austin, Texas 78701, or through email: augusta@ptot.texas.gov.

The amendment is proposed under the Occupational Therapy Practice Act, Title 3, Subchapter H, Chapter 454, Occupations Code, which provides the Texas Board of Occupational Therapy Examiners with the authority to adopt rules consistent with this Act to carry out its duties in administering this Act.

Title 3, Subchapter H, Chapter 454 of the Occupations Code is affected by this amended section.

§369.3. Use of Titles.

(a) A licensed occupational therapist shall use the title occupational therapist or the initials OT. OTR is an alternate term for OT if an individual who is licensed by this board takes the responsibility for ensuring that he or she is qualified to use it.

(b) A licensed occupational therapy assistant shall use the title occupational therapy assistant or the initials OTA. COTA is an alternate term for OTA if an individual who is licensed by this board takes the responsibility for ensuring that he or she is qualified to use it.

(c) No other titles or initials are conferred for a license from this board.

(d) Except when practicing as an occupational therapy practitioner in a higher education setting or when signing as an author for a publication, and that publication requires a recognized publication format, any letters designating other titles, academic degrees, or certifications must follow the initials OT or OTA (example John Doe, OT, CHT or Jane Doe, OTR, PhD).

(e) Limitations. A person who does not hold a license to practice occupational therapy in Texas may not use any of the following terms in conjunction with their business, work, or services:

(1) "occupational therapist," "licensed occupational therapist," "occupational therapist, registered;"

(2) "occupational therapy assistant," "licensed occupational therapy assistant," "certified occupational therapy assistant;"

(3) "OT," "OTR," "LOT," "OTR/L;"

(4) "OTA," "LOTA," "COTA," "COTA/L;" or

(5) any other words, letters, abbreviations, or insignia indicating or implying that he or she is an occupational therapist or an occupational therapy assistant.

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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John P. Maline
Executive Director
Texas Board of Occupational Therapy Examiners
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CHAPTER 370. LICENSE RENEWAL

40 TAC §370.3

The Texas Board of Occupational Therapy Examiners proposes an amendment to §370.3, concerning restoration of a Texas license. The amendment will provide clarification.

John P. Maline, Executive Director of the Executive Council of Physical Therapy and Occupational Therapy Examiners, has determined that for the first five-year period the section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. Maline has determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be a clarification of the restoration process as opposed to late renewal, including further specificity. There will not be an effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the proposed section.

Comments on the proposed amendment may be submitted to Augusta Gelfand, OT Coordinator, Texas Board of Occupational Therapy Examiners, 333 Guadalupe Street, Suite 2-510, Austin, Texas 78701, or through email: augusta@ptot.texas.gov.

The amendment is proposed under the Occupational Therapy Practice Act, Title 3, Subchapter H, Chapter 454, Occupations Code, which provides the Texas Board of Occupational Therapy Examiners with the authority to adopt rules consistent with this Act to carry out its duties in administering this Act.

Title 3, Subchapter H, Chapter 454 of the Occupations Code is affected by the amended section.

§370.3. Restoration of a Texas License.

(a) The board may restore a license expired more than one year to a person who was licensed in Texas, moved to another state or US territory, is currently licensed in another US state or territory, and that license has not been suspended, revoked, cancelled, surrendered or otherwise restricted for any reason if the person shall meet the following requirements:

(1) make application for licensure to the board on a form prescribed by the board which includes a recent passport type photo;

(2) submits to the board verification of all the state licenses held since leaving Texas. At least one must be current and in good standing, and any disciplinary actions must be reported to the board;

(3) pass the jurisprudence exam;

(4) pay the restoration fee; and

(5) completes all requirements for licensure within one year from the date of application.

(b) If the person's Texas license has been expired more than one year and less than two years, and has no current license in another state or US territory, the person shall:

(1) make application for licensure to the board on a form prescribed by the board, which includes a recent passport type photo;

(2) pass the board jurisprudence examination;

(3) submit copies of the completed continuing education showing 45 hours of continuing education as per Chapter 367 of this title (relating to Continuing Education) with a minimum of 30 hours in Type 2;

(4) pay the restoration fee; and the renewal fee; and

(5) complete all requirements for licensure within one year from the date of the application.

(c) A former licensee whose Texas license is expired more than two years and holds no current state or US territory license may return to Texas licensure by:

(1) complete a re-entry course through an accredited college or university, and submit the certificate of completion or transcript to the board; or

(2) obtain an advanced occupational therapy degree, with an official transcript sent to the board; or

(3) retake the NBCOT examination "for licensure purposes only" and the scores reported to Texas from NBCOT; and submit copies of the completed continuing education showing 45 hours of continuing education as per Chapter 367 of this title (relating to Continuing Education), with a minimum of 30 hours in Type 2;

(A) submit a board approved application which includes a recent passport type photo;

(B) pass the jurisprudence exam;

(C) pay the restoration fee;

(D) complete the requirements for licensure within one year from the date of 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 30, 2011.

TRD-201104130
John P. Maline
Executive Director
Texas Board of Occupational Therapy Examiners
Earliest possible date of adoption: November 13, 2011
For further information, please call: (512) 305-6900

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CHAPTER 372. PROVISION OF SERVICES

40 TAC §372.1

The Texas Board of Occupational Therapy Examiners proposes an amendment to §372.1, concerning provision of services. The amendment changes the word "treatment" to "intervention", as all services are not medical; adds a subsection on documentation; allows evaluations; and clarifies discharge.

John P. Maline, Executive Director of the Executive Council of Physical Therapy and Occupational Therapy Examiners, has determined that for the first five-year period the section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. Maline has determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be a clarification and strengthening of the rules of documentation, plan of care and discharge, removing ambiguousness. There will not be an effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the proposed section.

Comments on the proposed section may be submitted to Augusta Gelfand, OT Coordinator, Texas Board of Occupational Therapy Examiners, 333 Guadalupe Street, Suite 2-510, Austin, Texas 78701, or through email: augusta@ptot.texas.gov.

The amendment is proposed under the Occupational Therapy Practice Act, Title 3, Subchapter H, Chapter 454, Occupations Code, which provides the Texas Board of Occupational Therapy Examiners with the authority to adopt rules consistent with this Act to carry out its duties in administering this Act.

Title 3, Subchapter H, Chapter 454 of the Occupations Code is affected by this amended section.

§372.1. Provision of Services.

(a) Medical Conditions.

(1) Occupational therapists may evaluate the patient/client to determine the need for occupational therapy services without a referral.

(2) [~~(1)~~] Intervention [~~Treatment~~] for a medical condition by an occupational therapy practitioner requires a referral from a licensed referral source.

(3) [~~(2)~~] The referral may be an oral or signed written order. The occupational therapy practitioner must ensure that all oral orders are followed with a signed written order. [~~If oral, it must be followed by a signed written order.~~]

(4) [~~(3)~~] If a written referral signed by the referral source is not received by the third treatment or within two weeks from the receipt of the oral referral, whichever is later, the therapist must have documented evidence of attempt(s) to contact the referral source for the written referral (e.g., registered letter, fax, certified letter, email, return receipt, etc.). The therapist must exercise professional judgment

to determine cessation or continuation of treatment with a receipt of the written referral.

(b) Non-Medical Conditions.

(1) Consultation, monitored services, and evaluation for need of services may be provided without a referral.

(2) Non-medical conditions do not require a referral. However, a referral must be requested at any time during the evaluation or treatment process when necessary to insure the safety and welfare of the consumer.

(c) Screening. A screening may be performed by an occupational therapy practitioner.

(d) Evaluation.

(1) Only an occupational therapist may perform the evaluation.

(2) An occupational therapy plan of care must be based on an occupational therapy evaluation.

(3) The occupational therapist must have face-to-face, real time interaction with the patient or client during the evaluation process.

(4) The occupational therapist may delegate to an occupational therapy assistant or temporary licensee the collection of data for the assessment. The occupational therapist is responsible for the accuracy of the data collected by the assistant.

(e) Plan of Care.

(1) Only an occupational therapist may initiate, develop, modify or complete an occupational therapy plan of care. It is a violation of the OT Practice Act for an occupational therapy assistant to dictate, or attempt to dictate, when occupational therapy services should or should not be provided, the nature and frequency of services that are provided, when the patient should be discharged, or any other aspect of the provision of occupational therapy as set out in the OT Act and Rules.

(2) The occupational therapist and an occupational therapy assistant may work jointly to revise the short-term goals, but the final determination resides with the occupational therapist. Revisions to the plan of care and goals must be documented by the occupational therapist and/or occupational therapy assistant to reflect revisions at the time of the change.

(3) An occupational therapy plan of care may be integrated into an interdisciplinary plan of care, but the occupational therapy goals or objectives must be easily identifiable in the plan of care.

(4) Only occupational therapy practitioners [~~licensed by the Texas Board of Occupational Therapy Examiners (TBOTE)~~] may implement the written plan of care once it is completed by the occupational therapist [~~established~~].

(5) Only the occupational therapy practitioner may train non-licensed personnel or family members to carry out specific tasks that support the occupational therapy plan of care.

(6) The occupational therapist is responsible for determining whether intervention is needed and if a referral is required for occupational therapy intervention.

(7) The occupational therapy practitioners must have face-to-face, real time interaction with the patient or client during the intervention process.

(8) Except where otherwise restricted by rule, the supervising occupational therapist may only delegate to an occupational therapy assistant or temporary licensee tasks that they both agree are within the competency level of that occupational therapy assistant or temporary licensee.

[~~(9) The occupational therapy assistant must include the name of his or her supervising occupational therapist in each treatment note. If there is not a current supervising occupational therapist, the occupational therapy assistant cannot treat.~~]

(f) Documentation

(1) The patient's/client's records include the medical referral, if required; and the plan of care. The plan of care includes the initial examination and evaluation; the goals and any updates or change of the goals; the documentation of each intervention session by the OT or OTA providing the service; progress notes, any re-evaluations, if required; any written communication and the discharge documentation.

(2) The licensee providing occupational therapy services must document for each intervention session. The documentation must accurately reflect the intervention, decline of intervention, and/or modalities provided.

(3) The occupational therapy assistant must include the name of his or her available supervising occupational therapist in each intervention note. If there is not a current supervising occupational therapist, the occupational therapy assistant cannot intervene.

(g) [~~(f)~~] Discharge.

(1) Only an occupational therapist has the authority to discharge patients from occupational therapy services. The discharge is based on whether the patient or client has achieved predetermined goals, has achieved maximum benefit from occupational therapy services; or when other circumstances warrant discontinuation of occupational therapy services.

(2) The occupational therapist must review any information from the occupational therapy assistant(s), determine if goals were met or not, complete and sign the discharge documentation and/or make recommendations for any further needs of the patient in another continuum of care. [~~The occupational therapist is responsible for the content and validity of the discharge summary and must sign the discharge summary.~~]

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 30, 2011.

TRD-201104131
John P. Maline
Executive Director
Texas Board of Occupational Therapy Examiners
Earliest possible date of adoption: November 13, 2011
For further information, please call: (512) 305-6900

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CHAPTER 373. SUPERVISION

40 TAC §373.3

The Texas Board of Occupational Therapy Examiners proposes an amendment to §373.3, concerning supervision of a licensed occupational therapy assistant. The amendment will allow the board to audit the occupational therapy assistants' Supervision Log.

John P. Maline, Executive Director of the Executive Council of Physical Therapy and Occupational Therapy Examiners, has determined that for the first five-year period the section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. Maline has determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be the acknowledgement of the occupational therapy assistants' Supervision Log requirement and the enforcement of such by audit.There will not be an effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the proposed section.

Comments on the proposed rule may be submitted to Augusta Gelfand, OT Coordinator, Texas Board of Occupational Therapy Examiners, 333 Guadalupe Street, Suite 2-510, Austin, Texas 78701, or through email: augusta@ptot.texas.gov.

The amendment is proposed under the Occupational Therapy Practice Act, Title 3, Subtitle H, Chapter 454, Occupations Code, which provides the Texas Board of Occupational Therapy Examiners with the authority to adopt rules consistent with this Act to carry out its duties in administering this Act.

Title 3, Subtitle H, Chapter 454 of the Occupations Code is affected by this amended section.

§373.3. Supervision of a Licensed Occupational Therapy Assistant.

(a) An occupational therapy assistant shall provide occupational therapy services only under the supervision of an occupational therapist(s).

(b) Supervision of a full time employed occupational therapy assistant by the occupational therapist(s) in all settings includes:

(1) A minimum of six hours a month of frequent communication between the supervising occupational therapist(s) and the occupational therapy assistant(s) by telephone, written report, email, conference etc., including review of progress of patient's/client's assigned, plus

(2) A minimum of two hours of supervision a month of face-to-face, real time interaction with the occupational therapist(s) observing the occupational therapy assistant providing services with patients/clients.

(3) These hours shall be documented on a Supervision Log for each employer. The occupational therapist(s) or employer may request a copy of the Supervision Log. The Supervision Log is kept by the occupational therapy assistant and signed by occupational therapist(s) when supervision is given.

(4) All the occupational therapist(s), whether working full time, PRN or part-time, who delegate to the occupational therapy assistant, must be participating in the supervision time, whether on a rotational or shared basis.

(c) Occupational therapy assistants working part-time or less than a full month within a given month may pro-rate these hours, but shall document no less than four hours of supervision per month, one hour of which includes face-to-face, real time interaction by the occupational therapist(s) observing the occupational therapy assistant providing services with patients/clients.

(d) Those months where the occupational therapy assistant licensee does not work as a occupational therapy assistant, he or she shall write N/A in the Supervision Log for that month.

(e) Occupational therapy assistants with more than one employer must have a supervisor at each job whose name is on file with the board and must receive supervision by an occupational therapist(s), as outlined for part-time employment in this section. Occupational therapy assistants who work for more than one employer must submit the name and license number at least one OT at each employer, though any of the occupational therapist(s) at the employer may supervise.

(f) The occupational therapy assistant must include the name of the supervising OT in each patient's intervention [~~treatment~~] note. This may not necessarily be the occupational therapist who wrote the Plan of Care, but an occupational therapist who is readily available to answer questions about the patient's/client's intervention [~~treatment or patient~~].

(g) Occupational therapy assistants' Supervision Logs are subject to audit 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 30, 2011.

TRD-201104132
John P. Maline
Executive Director
Texas Board of Occupational Therapy Examiners
Earliest possible date of adoption: November 13, 2011
For further information, please call: (512) 305-6900

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PART 20. TEXAS WORKFORCE COMMISSION

CHAPTER 807. CAREER SCHOOLS AND COLLEGES

The Texas Workforce Commission (Commission) proposes amendments to the following sections of Chapter 807, relating to Career Schools and Colleges:

Subchapter A. General Provisions, §807.2

Subchapter D. Representatives, §807.51

Subchapter F. Instructors, §807.82

Subchapter H. Courses of Instruction, §807.134

Subchapter N. Cancellation and Refund Policy, §§807.261 - 807.264

Subchapter P. Complaints, §807.302

The Commission proposes the following new sections of Chapter 807, relating to Career Schools and Colleges:

Subchapter A. General Provisions, §807.8

Subchapter B. Certificates of Approval, §807.17

Subchapter D. Representatives, §807.54

Subchapter O. Records, §807.284

The Commission proposes the repeal of the following sections of Chapter 807, relating to Career Schools and Colleges:

Subchapter B. Certificates of Approval, §807.17

Subchapter O. Records, §807.284

The Commission proposes the repeal of the following subchapters of Chapter 807, relating to Career Schools and Colleges, in their entirety:

Subchapter S. Cease and Desist Orders, §§807.361 - 807.366

Subchapter T. Career Schools Hearings, §§807.381 - 807.395

The Commission proposes the following new subchapters of Chapter 807, relating to Career Schools and Colleges:

Subchapter S. Sanctions, §§807.351 - 807.353

Subchapter T. Cease and Desist Orders, §§807.361 - 807.366

Subchapter U. Career Schools Hearings, §807.381 and §§807.383 - 807.395

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS

PART III. IMPACT STATEMENTS

PART IV. COORDINATION ACTIVITIES

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

Texas law charges the Commission with exercising jurisdiction and control of the oversight of career schools and colleges operating in Texas. The Commission's Career Schools and Colleges department (department) licenses and regulates most private postsecondary career schools and colleges that offer vocational training or continuing education to Texas residents. In Texas, the number of licensed career schools and colleges has grown from 418 schools on August 31, 2007, to 530 schools on May 31, 2011. In the three years between Fiscal Year 2007 (FY'07) and FY'10, the number of students enrolled in vocational programs has increased 33 percent. Consequently, the Commission currently regulates more than 500 career schools and colleges that provide vocational training to more than 180,000 students annually.

Recent legislation has provided changes to regulatory requirements in several key areas. House Bill (HB) 736 requires improved and coordinated dissemination of online information regarding the operation and performance of career schools or colleges. House Bill 2784 strengthens refund provisions. In addition, HB 2538 specifies that student-level data is confidential and not subject to disclosure under Texas Government Code, Chapter 552. These proposed rules implement these bills passed by the 82nd Texas Legislature, Regular Session (2011).

Texas law requires the Commission to administer the provisions of Texas Education Code, Chapter 132, enforce minimum standards for approval and regulation of career schools and colleges, and adopt policies and rules necessary for carrying out the responsibilities of Chapter 132. To fulfill this role, the Commission investigates complaints about schools, monitors schools to ensure regulatory compliance, arranges for the disposition of students affected by a school closure, and administers the Tuition Trust Account to pay tuition refunds to students when a school closes. In carrying out its regulatory duties, the department seeks to:

--hold all businesses meeting the definition as a career school or college to meet consistent standards of quality, performance, and regulatory oversight;

--provide consumer protection for Texas students; and

--ensure students receive quality training to meet the needs of Texas employers.

To support the Commission's ability to effectively and efficiently protect students, regulate career schools and colleges, and meet employer needs, and to implement recent legislation, the Commission proposes amendments in several key areas. The amendments enumerate the Commission's expectations and use of its regulatory authority in areas where recent violations and possible abuses have been identified. In addition, the amendments are intended to increase the transparency of the regulatory requirements and the overall performance of career schools and colleges.

Further, to support the Commission's ability to effectively and efficiently respond to the needs of schools, students, and consumers and to provide direction to career schools and colleges regulated by the Commission, the Chapter 807 amendments:

--require training of registered representatives on key compliance topics, such as legal and ethical advertising, solicitation and enrollment of students as outlined in Texas Education Code, Chapter 132, Career Schools and Colleges (the Act), administrative rules, and Commission policies and procedures;

--explain the consequences for violations of statute and rules by representatives, including assessment of sanctions up to and including revocation of approval to serve as a representative in Texas and establish a corrective action matrix for violations by representatives;

--specify a student has the right to cancel enrollment and receive a full refund in certain circumstances;

--require schools to provide a tour on or before the first scheduled class day;

--modernize career school and college reporting by requiring electronic submission of all data and reports; clarify what data must be reported; specify what constitutes verifiable documentation; and add specific reference to the department's authority with regard to data monitoring and auditing;

--specify the corrective actions to be taken if a career school program does not meet performance expectations;

--allow for public dissemination of appropriate data reported by career schools and colleges, including student outcomes and regulatory and compliance information associated with a school regulated by the Commission;

--clarify the complaint-handling process, including establishing a two-year time frame for filing a complaint;

--specify that complaints must be filed within two years with an allowance for exceptions, and that there must be adequate information to support investigation;

--develop a comprehensive strategy, in coordination with the Texas Higher Education Coordinating Board, to improve and coordinate dissemination of online information regarding the operation and performance of career schools or colleges (HB 736);

--establish a penalty matrix for violations of career schools and colleges statutes and rules, with penalty amounts, not to exceed the $1,000 statutory cap, based on the seriousness of the violation;

--provide information regarding refunds, when they may be required, and how to find provisions in statute (HB 2784); and

--specify that student-level data is confidential and not subject to disclosure under Texas Government Code, Chapter 552 (HB 2538).

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS

(Note: Minor editorial changes are made that do not change the meaning of the rules and, therefore, are not discussed in the Explanation of Individual Provisions.)

SUBCHAPTER A. GENERAL PROVISIONS

The Commission proposes the following amendments to Subchapter A:

§807.2. Definitions

New §807.2(8), formerly §807.382(1), defines "Agency" as the unit of state government established under Texas Labor Code, Chapter 301, that is presided over by the Commission and administered by the executive director to operate the integrated workforce development system and administer the unemployment compensation insurance program in this state as established under the Texas Unemployment Compensation Act, Texas Labor Code Annotated, Title 4, Subtitle A, as amended. The definition of Agency shall apply to all uses of the term in rules contained in this chapter.

New §807.2(9), formerly §807.382(2), defines "appellant" as the party or the party's authorized hearing representative who files an appeal from an appealable determination or decision.

New §807.2(12), formerly §807.382(3), defines "Commission" as the body of governance of the Texas Workforce Commission composed of three members appointed by the governor as established under Texas Labor Code §301.002 that includes one representative of labor, one representative of employers, and one representative of the public. The definition of Commission shall apply to all uses of the term in rules contained in this chapter.

New §807.2(16), formerly §807.382(4), defines "date of notice" as the date the notice is received, unless good cause exists for the hearing officer to determine otherwise.

New §807.2(17), formerly §807.382(5), defines "date of request of hearing" as the date on which the appellant or the hearing representative filed a written notice of appeal with the Agency by hand delivery, facsimile, or mail. If an appeal is mailed to the Agency, then the appeal is perfected as of the postmark date on the envelope containing the appeal request, unless good cause exists for the hearing officer to determine otherwise. If an appeal is delivered by hand or facsimile after 5:00 p.m., the date of request shall be the next day.

New §807.2(21), formerly §807.2(16), defines "good reputation" and clarifies what is considered when determining whether school personnel meet the requirement to be of good reputation.

New §807.2(22), formerly §807.382(6), defines "hearing" as an informal, orderly, and readily available proceeding held before an impartial hearing officer. A party or hearing representative may present evidence to show that the Agency's determination should be reversed, affirmed, or modified.

New §807.2(23), formerly §807.382(7), defines "hearing officer" as an Agency employee designated to conduct impartial hearings and issue final administrative decisions.

New §807.2(24), formerly §807.382(8), defines "hearing representative" as any individual authorized by a party to assist the party in presenting the party's appeal. A hearing representative may be legal counsel or another individual. Each party may have a hearing representative to assist in presenting the party's appeal.

New §807.2(27), formerly §807.382(9), defines "party" as the person or entity with the right to participate in a hearing authorized in applicable statute or rule.

New §807.2(29) defines "refund" as the completed payment of a refund such that the refund instrument has been negotiated or credited into the proper account(s).

New §807.2(32) defines "sanctions" as administrative or civil actions, including, but not limited to, penalties, revocation of approvals, or cease and desist orders taken by the Agency against an entity in response to violations of the Act or this chapter.

New §807.2(43) amends the definition of "tour" to specify that a tour is a "required" and "in-person" inspection of the facilities and equipment pertaining to a course of instruction.

Certain paragraphs in this section have been renumbered to reflect additions or deletions.

§807.8. Confidentiality of Information

New §807.8 stipulates that student-specific information obtained from or about any school by the Agency is confidential information and not releasable, and is not public information under Texas Government Code, Chapter 552; however, it may be compiled and reported to the public at a summary level that does not include personally identifiable information about a student or identify a student through combination with other publicly available information. The passage of HB 2538 clearly enumerated that student-level data held by the Agency is confidential and not subject to disclosure under Texas Government Code, Chapter 552.

SUBCHAPTER B. CERTIFICATES OF APPROVAL

The Commission proposes the following amendments to Subchapter B:

§807.17. Penalties and Sanctions Regarding Schools

Section 807.17, relating to Penalties and Sanctions Regarding Schools, is repealed and the contents are relocated to new §807.352, relating to Sanctions.

§807.17. Unlicensed Schools

New §807.17 states that if a career school or college, as defined in the Act, operates, solicits, or enrolls students for, or conducts any course of instruction before receiving a certificate of approval or an exemption from the Agency, the Agency may:

(1) assess a penalty;

(2) require full refunds to all students; or

(3) issue a cease and desist order.

SUBCHAPTER D. REPRESENTATIVES

The Commission proposes the following amendments to Subchapter D:

§807.51. Representative Requirements

Section 807.51(c) is amended to clarify that the release from obligations to which students are entitled if solicited or enrolled by an unregistered representative applies only to obligations to the school.

New §807.51(d) states that the Agency shall require representatives registered with the Agency to take training that covers the Act and Commission rules relative to representatives, admissions, advertising, and any other topics as required by the Agency to support the legal and ethical solicitation and enrollment of students.

§807.54. Representative Compliance

New §807.54 provides, consistent with §132.059 and §132.151 of the Texas Education Code, that representatives may be held liable for violations of statute and Commission rules, policies, and procedures notwithstanding §807.51(b). Further, the section explains that such violations may result in sanctions up to and including revocation of the individual's status as an approved career school and college representative in Texas in accordance with the matrix of corrective actions and violations, as identified in statute and rule, set forth in this section.

SUBCHAPTER F. INSTRUCTORS

The Commission proposes the following amendments to Subchapter F:

§807.82. Temporary Instructors

Section 807.82(c) removes the term "penalties" and replaces it with the term "sanctions" to align with new §807.2(32), which includes penalties in the definition of sanctions.

Section 807.82(f) removes the term "penalties" and replaces it with the term "sanctions" to align with new §807.2(32), which includes penalties in the definition of sanctions, and to clarify that sanctions and refunds can both be applied.

SUBCHAPTER H. COURSES OF INSTRUCTION

The Commission proposes the following amendments to Subchapter H:

§807.134. Sanctions Relating to Courses of Instruction

Section 807.134 replaces the title "Penalties Relating to Courses of Instruction" with "Sanctions Relating to Courses of Instruction," to align with new §807.2(32), which includes penalties in the definition of sanctions.

Section 807.134(e)(3) clarifies that false, misleading, or deceptive advertising on a school's behalf includes using words that are "commonly associated with" a degree other than degrees approved by the Texas Higher Education Coordinating Board.

SUBCHAPTER N. CANCELLATION AND REFUND POLICY

The Commission proposes the following amendments to Subchapter N:

§807.261. Requirement for Tour

Section 807.261 replaces the title "Right to Cancel after Tour" with "Requirement for Tour" to more closely align with the contents of this section.

New §807.261(a) adds that, notwithstanding subsection (b) of this section, schools are required to provide a tour on or before the first scheduled class day.

Section 807.261(c) clarifies that students must sign and date an acknowledgement form certifying the completion of the tour.

The section removes the requirement for a school to provide a potential student who was not given an opportunity to tour the school before signing an enrollment contract an additional three days, excluding Saturdays, Sundays, and legal holidays, following a tour to cancel enrollment and request a full refund and release from all obligations. New §807.261(a) clarifies that schools are required to provide a tour on or before the first scheduled class day.

Certain subsections in this section have been relettered to reflect additions or deletions.

§807.262. Completion of Refund

Section 807.262 replaces the title "Consummation of Refund" with "Completion of Refund" to provide more precise terminology.

Section 807.262(a) - (c) also replaces the terms "consummation" and "consummate" with "completion" and "complete," respectively, to provide more precise terminology.

§807.263. Refund Requirements

Section 807.263(a) sets forth the critical types of violations--mentioned elsewhere in this chapter but not previously detailed in this section, that entitle a student to a refund. Remittance of refunds does not limit a school's liability for other sanctions available to the Agency under the Act and Commission rules.

Section 807.263(a)(1)(A) - (C) is reorganized, and states that students are entitled to a full refund for classes attended if the school does not provide a class with:

(A) an approved instructor;

(B) an instructor for whom an application has been properly submitted to the Agency; or

(C) a temporary instructor for whom the school submitted notice to the Agency.

New §807.263(a)(2) - (6) adds that students are entitled to a full refund for classes attended if the school:

(2) fails to maintain the instructors, facilities, equipment, or courses of instruction on the basis of which Agency approval was issued or student enrollment was obtained;

(3) violates any provision of this chapter in the process of soliciting and enrolling the student;

(4) fails to adhere to applicable academic, attendance, and refund policies that meet state requirements and apply to the course enrolled in, as published at the time of the student's enrollment in the course;

(5) fails to furnish the student, upon satisfactory completion of the program, with a certificate of completion. A school may withhold the transcript or certificate until the student has paid outstanding financial obligations to the school; or

(6) does not have course approval or the required certificate of approval from the Agency.

Section 807.263(b) removes the phrase "a class has no instructor for" and replaces it with the phrase "any of the violations in subsection (a)(1) - (6) of this section" to specify that if the violations apply to more than one class period, students are entitled to a full refund for each such class attended.

Section 807.263(e) specifies that for schools other than seminars, a student may cancel enrollment, request a full refund, and request a release from any obligations to the school within the first three scheduled class days.

New §807.263(f) provides guidance on where additional information may be obtained regarding refunds due to a student who withdraws or is discontinued from a program prior to completion. The new subsection states that the refund is calculated in accordance with the school's policy, which must be at least equivalent to the refund policy outlined in §132.061 of the Act. The passage of HB 2784 revised the refund policy required for residence programs and synchronous distance education programs detailed in §132.061(4) of the Act. This policy is simpler to calculate and more advantageous to students than the previous policy, basing refunds on a straight proportion of the remaining portion of the clock hours for which the student has been charged, up to the point at which 75 percent of the period has been completed.

§807.264. Penalties Relating to Refunds

Section 807.264 removes the term "consummated" and replaces it with "completed" to provide more precise terminology.

SUBCHAPTER O. RECORDS

The Commission proposes the following amendments to Subchapter O:

§807.284. Employment Records

Section 807.284 is repealed. It contains out-of-date references and lacks information on a number of issues important to the reporting of data by schools to the Agency and the Agency's use and reporting of the data.

§807.284. Reporting

New §807.284 sets forth the data reporting requirements and report formats necessary for the Agency to administer the Act and this chapter. The language provides direction and allows for better information to the public and the Agency. It also provides flexibility to accommodate future changes in technology. Some of the provisions contained in new §807.284 are in response to the passage of HB 736.

New §807.284(a) requires schools to report to the Agency, as directed, the facts and information about their programs and operations deemed necessary for the proper administration of the Act and any rules adopted under the Act.

New §807.284(a)(1)(A) - (C) specifies that the data to be reported by a school shall include student enrollment information for all programs; completion, employment, and job placement information for all programs approved for an occupational objective; and any other information that is required.

New §807.284(a)(2) requires schools to submit the required data to the Agency on or before the specified date.

New §807.284(a)(3) mandates that schools shall provide the data in an electronic format prescribed by the Agency unless a different format is approved in writing by the Agency.

New §807.284(a)(4) allows that, when good cause is shown, the Agency may extend the deadline for submission of the data required under this section; however, the extension shall be effective only if authorized in writing.

New §807.284(a)(5) states that the Agency may require schools to store on file the verifiable documentation supporting the data reported and make it available to the Agency upon request.

New §807.284(b) states that the Agency shall develop data monitoring and audit protocols for the data reported under subsection (a) of this section for use in assessing the accuracy of the information.

New §807.284(c) states that the Agency may impose penalties or sanction, or both, for failure to submit data under subsection (a) of this section by the due dates required, or for submission of data that is shown to contain inaccuracies.

New §807.284(d) establishes the corrective actions that will be taken for career school programs that do not meet the minimum employment rate as referenced in §807.131(b).

New §807.284(d)(1) states that a program that does not meet the minimum employment rate for the first year will be required to develop and submit a performance improvement plan that is determined acceptable by the Agency.

New §807.284(d)(2) states that a program that does not meet the minimum employment rate for the second consecutive year, but has shown at least a 50% improvement from the previous year and toward the minimum employment rate, will be required to submit modifications to the performance improvement plan that are determined acceptable by the Agency. For example, in order to fall in this category, a program reporting a 20% employment rate in year one must report at least a 40% employment rate in the subsequent year if the employment minimum is 60%.

New §807.284(d)(3)(A) - (B) states that a program that does not meet the minimum employment rate for the second consecutive year and that has not shown at least a 50% improvement toward the minimum employment rate will result in conditions placed on the school's certificate that require submission of a modified performance improvement plan and the suspension of new enrollment of students in the program who are funded by Local Workforce Development Board-allocated funds. Thus, if the program described in subsection (d)(2) did not meet at least a 40% employment rate, the program would fall in this corrective action category.

New §807.284(d)(4) states that the Agency will revoke its approval of a program that does not meet the minimum employment rate for three consecutive years.

New §807.284(e)(1) - (2) provides that the Agency shall publish on its website information compiled from:

(1) data reported under subsection (a) of this section; and

(2) any other information about schools and programs that is deemed appropriate and useful to the public and that:

(A) assists a person in deciding whether to enroll in a school or in identifying or choosing which postsecondary institution, school, or college to attend; and

(B) addresses regulatory compliance and performance of schools.

New §807.284(e)(3) provides that the Agency, to the extent practical, shall present the published information in a manner that is consistent among institutions, schools, and colleges; easy to understand; and accessible to the public.

Certain subparagraphs in this section have been relettered to reflect additions or deletions.

SUBCHAPTER P. COMPLAINTS

The Commission proposes the following amendments to Subchapter P:

§807.302. Complaints and Investigations

New §807.302(a) ensures that the Agency shall investigate or refer to other authorities with jurisdiction to investigate all complaints received about licensed and unlicensed schools.

Section 807.302(b) removes the phrase "may investigate a complaint about a school." New §807.302(a) clarifies the Commission's intent to respond to complaints about licensed and unlicensed schools.

Section 807.302(b)(5) adds "the feasibility of investigations" as a factor the Agency may consider in determining the extent of investigation needed.

Section 807.302(c) adds language addressing the adequacy of information about a violation that may be required in order to initiate a complaint investigation. It also stipulates that, notwithstanding subsection (a) of this section, anonymous complaints will not be investigated, but rather reviewed for potential action.

New §807.302(d) stipulates that a complaint is timely if it has been filed with the Agency while a student who files the complaint is enrolled or within two years of the date the student withdraws, terminates, or graduates from the program that is the subject of the complaint unless good cause exists. Good cause includes, but is not limited to, fraud.

Certain subsections and paragraphs in this section have been relettered and renumbered to reflect additions or deletions.

SUBCHAPTER S. SANCTIONS

The Commission proposes new Subchapter S:

New Subchapter S centralizes the rules regarding sanctions. Specifically, the new subchapter addresses the requirements for notice and administration of sanctions, sanctions for violations, and the assessment of administrative penalties in accordance with a matrix contained in the rule.

§807.351. Notice and Administration of Sanctions

New §807.351(a) clarifies the Agency's authority under §132.152 of the Act to impose administrative penalties or other sanctions on an entity for violations of §132.151 of the Act or this chapter.

New §807.351(b) provides that the Agency shall serve notice of a sanction, with determination of the violation on which it is based, by both U.S. mail and certified mail, return receipt requested, mailed to the owner's address of record as listed on the application for certificate of approval. Notice is presumed received five days from the date it is mailed by the Agency unless there is other evidence of receipt.

New §807.351(c)(1) - (3) stipulates that in imposing administrative penalties or other sanctions, the Agency shall consider all the factors that it deems relevant, including, but not limited to, the following:

(1) The amount of administrative penalty or level of sanction necessary to ensure immediate and continued compliance with statutes and regulations;

(2) The conduct of the entity in taking all reasonable steps or procedures necessary and appropriate to comply with statutes and regulations and to correct the violation; and

(3) The entity's prior violations of statutes, regulations, or orders administered, adopted, or issued by the Commission.

New §807.351(d) provides that notwithstanding subsections (a) - (c) of this section, the Commission shall order refunds pursuant to applicable statute and rules.

§807.352. Sanctions

New §807.352(a)(1) - (17) retains the provisions of repealed §807.17, and sets forth sanctions for violations, which may include:

(1) administrative penalties outlined in §807.353;

(2) collecting a late renewal fee from the school;

(3) denying the school's application for a certificate of approval;

(4) revoking the school's certificate of approval;

(5) placing conditions on the school's certificate of approval;

(6) suspending the admission of students to the school or a program;

(7) denying a program approval;

(8) revoking a program approval;

(9) denying or revoking approval of an owner, school director, instructor, or other staff member whose approval may be required;

(10) denying, suspending, or revoking the registration of the school's representatives;

(11) assessing a late refund penalty;

(12) charging the school an investigation fee to resolve a complaint against the school;

(13) charging the school interest and penalties on late payments of fee installments;

(14) applying for an injunction against the school;

(15) asking the Attorney General to collect a civil penalty from any person who violates the Act or this chapter;

(16) ordering a peer review of the school; and

(17) issuing a cease and desist order to an unlicensed school.

New §807.352(b) stipulates that notwithstanding subsection (a)(1) - (17) of this section, the Agency shall order refunds pursuant to applicable statutes and rules.

§807.353. Administrative Penalties

Section 132.152 of the Texas Education Code authorizes the Commission to assess an administrative penalty in an amount not to exceed $1,000 and requires the Commission to consider the seriousness of the violation in determining the amount of the penalty. Consistent with this authority and direction, requirements for assessing administrative penalties for violations are established, including the use of a penalty matrix, which establishes penalty amounts for violations of career schools and colleges statutes and rules, based on the seriousness of the violation and potential harm to consumers, up to the $1,000 statutory cap. Consideration is given to the number of instances of violations and whether a violation is a repeat violation.

New §807.353(a) - (e) details requirements for assessing administrative penalties for violations:

(a) Unless otherwise provided by statute, an administrative penalty shall not exceed $1,000 for each instance of a violation.

(b) The administrative penalty for repeat violations shall be up to the maximum penalty amount of $1,000 per violation.

(c) The total amount of an administrative penalty shall be calculated as the product of the penalty dollar amount and the number of instances of violation.

(d) The assessment of an administrative penalty shall not preclude the Agency from administering other sanctions, up to and including revocation of a school's certificate of approval.

(e) The Agency shall, for purposes of determining and assessing an administrative penalty, use the penalty matrix set out in this section, which assigns a penalty for violations identified in statute and rule, based on the seriousness of the violation or the potential to cause harm to consumers. The absence of a listing for a specific violation in the matrix does not preclude the Agency from assessing an administrative penalty.

SUBCHAPTER S. CEASE AND DESIST ORDERS

The Commission proposes the repeal of Subchapter S in its entirety. The contents of this subchapter are proposed as new Subchapter T.

§807.361. Statement of Charges and Notice of Hearing on Cease and Desist Orders.

§807.362. Contents of Statement of Charges and Notice of Hearing.

§807.363. Service of Statement and Charges and Hearing. Notice for the Issuance of Cease and Desist Orders.

§807.364. Ex Parte Consultations.

§807.365. Hearing Decision and Final Review by the Commission.

§807.366. Cease and Desist Order.

SUBCHAPTER T. CAREER SCHOOLS HEARINGS

The Commission proposes the repeal of Subchapter T in its entirety. Section 807.382, Definitions, is proposed as new in §807.2; the remaining sections are proposed as new Subchapter U.

§807.381. Purpose.

§807.382. Definitions.

§807.383. Information on Right of Appeal.

§807.384. Request for Hearing.

§807.385. Setting of Hearing.

§807.386. Hearing Officer Independence and Impartiality.

§807.387. Hearing Procedures.

§807.388. Postponements, Continuances, and Withdrawals.

§807.389. Evidence.

§807.390. Ex Parte Communications.

§807.391. Change in Determination.

§807.392. Hearing Decision.

§807.393. Motion for Reopening.

§807.394. Motion for Rehearing.

§807.395. Finality of Decision.

To consolidate the definitions in this chapter in one section, §807.382, Definitions, is proposed as new in §807.2, as follows:

Section 807.382(1), the definition of "Agency," is new §807.2(8).

Section 807.382(2), the definition of "appellant," is new §807.2(9).

Section 807.382(3), the definition of "Commission," is new §807.2(12).

Section 807.382(4), the definition of "date of notice," is new §807.2(16).

Section 807.382(5), the definition of "date of request of hearing," is new §807.2(17).

Section 807.382(6), the definition of "hearing," is new §807.2(22).

Section 807.382(7), the definition of "hearing officer," is new §807.2(23).

Section 807.382(8), the definition of "hearing representative," is new §807.2(24).

Section 807.382(9), the definition of "party," is new §807.2(28).

SUBCHAPTER T. CEASE AND DESIST ORDERS

The Commission proposes new Subchapter T as follows:

New Subchapter T, regarding Cease and Desist Orders, retains the provisions of repealed Subchapter S, Cease and Desist Orders, in its entirety:

§807.361. Statement of Charges and Notice of Hearing on Cease and Desist Orders.

§807.362. Contents of Statement of Charges and Notice of Hearing.

§807.363. Service of Statement and Charges and Hearing Notice for the Issuance of Cease and Desist Orders.

§807.364. Ex Parte Consultations.

§807.365. Hearing Decision and Final Review by the Commission.

§807.366. Cease and Desist Order.

The subchapter is relettered to accommodate the insertion of new Subchapter S, Sanctions.

SUBCHAPTER U. CAREER SCHOOLS HEARINGS

The Commission proposes new Subchapter U as follows:

New Subchapter U, regarding Career Schools Hearings, retains the following sections of repealed Subchapter T, Career Schools Hearings, in their entirety:

§807.381. Purpose.

§807.383. Information on Right of Appeal.

§807.384. Request for Hearing.

§807.385. Setting of Hearing.

§807.386. Hearing Officer Independence and Impartiality.

§807.387. Hearing Procedures.

§807.388. Postponements, Continuances, and Withdrawals.

§807.389. Evidence.

§807.390. Ex Parte Communications.

§807.391. Change in Determination.

§807.392. Hearing Decision.

§807.393. Motion for Reopening.

§807.394. Motion for Rehearing.

§807.395. Finality of Decision.

The subchapter is relettered to accommodate the insertion of new Subchapter S, Sanctions.

PART III. IMPACT STATEMENTS

Randy Townsend, Chief Financial Officer, has determined that for each year of the first five years the rules will be in effect, the following statements will apply:

There are no additional estimated costs to the state and to local governments expected as a result of enforcing or administering the rules.

There are no estimated reductions in costs to the state and to local governments as a result of enforcing or administering the rules.

There are no estimated losses or increases in revenue to the state or to local governments as a result of enforcing or administering the rules.

There are no foreseeable implications relating to the costs or revenues of the state or local governments as a result of enforcing or administering the rules.

There are no significant, probable economic costs to persons required to comply with the rules.

There is no estimated adverse economic effect on small businesses.

There is no significant, estimated adverse economic effect on small businesses as a result of adopting the rules.

Richard C. Froeschle, Director of Labor Market and Career Information, has determined that there is no significant negative impact upon employment conditions in the state as a result of the rules.

Laurence M. Jones, Director, Workforce Development Division, has determined that for each year of the first five years the rules are in effect, the public benefit anticipated as a result of enforcing the proposed rules will be to clarify regulatory requirements for career schools and colleges, to clarify regulatory requirements for career schools and colleges, assist the Agency to exercise its regulatory authority as efficiently as possible, and provide career school and college students with enhanced information about institutions' performance and recourse for complaints.

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

PART IV. COORDINATION ACTIVITIES

In the development of these rules for publication and public comment, the Commission sought the involvement of Texas's 28 Local Workforce Development Boards. The Commission provided a concept paper regarding these rule amendments to the Boards for consideration and review on June 28, 2011.

During the rulemaking process, the Commission considered all information gathered in order to develop rules that provide clear and concise direction to all parties involved.

Comments on the proposed rules may be submitted to TWC Policy Comments, Workforce Policy and Service Delivery, attn: Workforce Editing, 101 East 15th Street, Room 440T, Austin, Texas 78778; faxed to (512) 475-3577; or e-mailed to TWCPolicyComments@twc.state.tx.us.

SUBCHAPTER A. GENERAL PROVISIONS

40 TAC §807.2, §807.8

The rules are proposed under Texas Labor Code §301.0015 and §302.002(d), which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities.

The proposed rules affect Title 4, Texas Labor Code, particularly Chapters 301 and 302, as well as Texas Education Code, Chapter 132.

§807.2. Definitions.

In addition to the definitions contained in §800.2 of this title, the following words and terms, when used in this chapter, shall have the following meanings unless the context clearly indicates otherwise.

(1) Academic quarter--A period of instruction that includes at least ten weeks of instruction, unless otherwise approved by the Agency [~~Commission~~].

(2) Academic semester--A period of instruction that includes at least 15 weeks of instruction, unless otherwise approved by the Agency [~~Commission~~].

(3) Academic term--An academic quarter, academic semester, or other progress evaluation period.

(4) Academically related activity--An exam, tutorial, computer-assisted instruction, academic counseling, academic advisement, turning in a class assignment, or attending a study group that is assigned by the institution, or other activity as determined by the Agency [~~Commission~~].

(5) Accountant--An independent certified public accountant properly registered with the appropriate state board of accountancy.

(6) Act--Texas Education Code, Chapter 132, Career Schools and Colleges.

(7) Advertising--Any affirmative act designed to call attention to a school or program for the purpose of encouraging enrollment.

(8) Agency--The unit of state government established under Texas Labor Code, Chapter 301, that is presided over by the Commission and administered by the executive director to operate the integrated workforce development system and administer the unemployment compensation insurance program in this state as established under the Texas Unemployment Compensation Act, Texas Labor Code Annotated, Title 4, Subtitle A, as amended. The definition of Agency shall apply to all uses of the term in rules contained in this chapter.

(9) Appellant--The party or the party's authorized hearing representative who files an appeal from an appealable determination or decision.

(10) [~~(8)~~] Asynchronous distance education--Distance education training that the Agency [~~Commission~~] determines is not synchronous.

(11) [~~(9)~~] Class or course--An identifiable unit of instruction that is part of a program of instruction.

(12) Commission--The body of governance of the Texas Workforce Commission composed of three members appointed by the governor as established under Texas Labor Code §301.002 that includes one representative of labor, one representative of employers, and

one representative of the public. The definition of Commission shall apply to all uses of the term in rules contained in this subchapter.

(13) [~~(10)~~] Coordinating Board--The Texas Higher Education Coordinating Board.

(14) [~~(11)~~] Course of instruction--A program or seminar.

(15) [~~(12)~~] Course time--A course or class period that is:

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

(B) a 50-minute to 60-minute internship in a 60-minute period; or

(C) 60 minutes of preparation in asynchronous distance education.

(16) Date of notice--The date the notice is received, unless good cause exists for the hearing officer to determine otherwise.

(17) Date of request of hearing--The date on which the appellant or the hearing representative filed a written notice of appeal with the Agency by hand delivery, facsimile, or mail. If an appeal is mailed to the Agency, then the appeal is perfected as of the postmark date on the envelope containing the appeal request unless good cause exists for the hearing officer to determine otherwise. If an appeal is delivered by hand or facsimile after 5:00 p.m., the date of request shall be the next day.

(18) [~~(13)~~] Distance education course--Either a seminar or a program that is offered to non-residence school students via correspondence or other media from a remote site on a self-paced schedule, excluding programs using interactive instruction.

(19) [~~(14)~~] Distance education school--A school that offers only distance education courses.

(20) [~~(15)~~] Employment--A graduating or graduate student's employment in the same or substantially similar occupation for which the student was trained.

(21) [~~(16)~~] Good reputation--The possession of honesty and truthfulness, trustworthiness and reliability, and a professional commitment to the educational process and the training or preparing of a person for a field of endeavor in a business, trade, technical, or industrial occupation, as well as the condition of being regarded as possessing such qualities. In determining whether a person is of good reputation, the Agency is not limited to the following acts or omissions. The Agency may consider similar acts or omissions and rehabilitation efforts in response to prior convictions in making its determination. A person is considered to be of good reputation if the person:

(A) has never been convicted of a felony or any other crime [~~related to the operation of a school, and the person has been rehabilitated, including completion of parole or probation, from any other convictions~~] that would constitute risk of harm to the school or students as determined by the Agency [~~Commission~~];

(B) has not [~~never~~] been successfully sued for fraud or deceptive trade practices, or breach of contract, within the last 10 years;

(C) does not own or administer a school currently in violation of legal requirements, has never owned or administered a school with repeated violations, and has never owned or administered a school that closed with violations including, but not limited to, unpaid refunds; or [~~and~~]

(D) has not knowingly falsified or withheld information from the Agency [~~Commission~~].

(22) Hearing--An informal, orderly, and readily available proceeding held before an impartial hearing officer. A party or hearing representative may present evidence to show that the Agency's determination should be reversed, affirmed, or modified.

(23) Hearing officer--An Agency employee designated to conduct impartial hearings and issue final administrative decisions.

(24) Hearing representative--Any individual authorized by a party to assist the party in presenting the party's appeal. A hearing representative may be legal counsel or another individual. Each party may have a hearing representative to assist in presenting the party's appeal.

(25) [~~(17)~~] Job placement--An affirmative effort by the school to assist the student in obtaining employment in the same or substantially similar stated occupation for which the student was trained.

(26) [~~(18)~~] Master student registration list--A comprehensive list with an entry made for any person who signs an enrollment agreement, makes a payment to attend the school, or attends a class. The entry shall be made on the date the first of these events occurs.

(27) Party--The person or entity with the right to participate in a hearing authorized in applicable statute or rule.

(28) [~~(19)~~] Program or program of instruction--A postsecondary program of organized instruction or study that may lead to an academic, professional, or vocational degree, certificate, or other recognized educational credential.

(29) Refund--The completed payment of a refund such that the refund instrument has been negotiated or credited into the proper account(s).

(30) [~~(20)~~] Reimbursement contract basis--A school operating, or proposing to operate, under a contract with a state or federal entity in which the school receives payment upon completion of the training.

(31) [~~(21)~~] Residence school--A school that offers at least one program that includes classroom instruction or synchronous distance education.

(32) Sanctions--Administrative or civil actions, including, but not limited to, penalties, revocation of approvals, or cease and desist orders taken by the Agency against an entity in response to violations of the Act or this chapter.

(33) [~~(22)~~] School--A "career school or career college," as defined in the Act, that includes each location where courses of instruction shall be offered.

(34) [~~(23)~~] Secondary education--Successful completion of public, private, or home schooling at the high school level or obtainment of a recognized high school equivalency credential.

(35) [~~(24)~~] Seminar--A course of instruction that enhances a student's career, as opposed to a program that teaches skills and fundamental knowledge required for a stated occupation. A seminar may include a workshop, an introduction to an occupation or cluster of occupations, a short course that teaches part of the skills and knowledge for a particular occupation, language training, continuing professional education, and review for postsecondary examination.

(36) [~~(25)~~] Seminar school--A school that offers only seminars.

(37) [~~(26)~~] Small school--A "small career school or college" as defined in the Act.

(38) [~~(27)~~] Stated occupation--An occupation for which a program is offered that:

(A) is recognized by a state or federal law or by a state or federal agency as existing or emerging;

(B) is in demand; and

(C) requires training to achieve entry-level proficiencies.

(39) [~~(28)~~] Student--Any individual solicited, enrolled, or trained in Texas by a school.

(40) [~~(29)~~] Suspension of enrollments--A [~~Commission~~] sanction that requires the school to suspend enrollments, re-enrollments, advertising, and solicitation, and to cease, in any way, advising prospective students, either directly or indirectly, of the available courses of instruction.

(41) [~~(30)~~] Synchronous distance education--The Agency [~~Commission~~] may determine distance education to be synchronous under the following conditions:

(A) The training is conducted simultaneously in real time, or the training is conducted so that the manner of delivery ensures that even if the instructor and student are separated by time, the course time of instruction that the student experiences can be determined; and

(B) There is consistent interaction between the student(s) and the instructor on a schedule that includes a definite time for completion of the program and periodic verifiable student completion/performance measures that allow the application of the progress standards of Subchapter L and attendance standards of Subchapter M of this chapter.

(42) [~~(31)~~] Title IV school--A career school or college that participates in student financial aid programs under Title IV, Higher Education Act of 1965 (20 U.S.C. Section 1070 et seq.).

(43) [~~(32)~~] Tour--A required, in-person [~~An~~] inspection of the facilities and equipment pertaining to a course of instruction.

(44) [~~(33)~~] Week--Seven consecutive calendar days.

§807.8. Confidentiality of Information.

All student-specific information obtained from or about any school by the Agency, including, but not limited to, data submitted under §807.284(a), is confidential information and not releasable, and is not public information under Texas Government Code, Chapter 552, but may be compiled and reported to the public at a summary level of information that does not include the personally identifiable information of any student or allow for the identification of any student through combination with other publically available information.

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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Reagan Miller
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SUBCHAPTER B. CERTIFICATES OF APPROVAL

40 TAC §807.17

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

The rule is repealed under Texas Labor Code §301.0015 and §302.002(d), which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities.

The proposed repeal affects Title 4, Texas Labor Code, particularly Chapters 301 and 302, as well as Texas Education Code, Chapter 132.

§807.17. Penalties and Sanctions Regarding Schools.

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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40 TAC §807.17

The rule is proposed under Texas Labor Code §301.0015 and §302.002(d), which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities.

The proposed rule affects Title 4, Texas Labor Code, particularly Chapters 301 and 302, as well as Texas Education Code, Chapter 132.

§807.17. Unlicensed Schools.

If a career school or college, as defined in the Act, operates, solicits, or enrolls students, or conducts any course of instruction before receiving a certificate of approval or an exemption from the Agency, the Agency may:

(1) assess a penalty;

(2) require full refunds to all students; or

(3) issue a cease and desist order.

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 D. REPRESENTATIVES

40 TAC §807.51, §807.54

The rules are proposed under Texas Labor Code §301.0015 and §302.002(d), which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities.

The proposed rules affect Title 4, Texas Labor Code, particularly Chapters 301 and 302, as well as Texas Education Code, Chapter 132.

§807.51. Representative Requirements.

(a) The school shall apply annually to register representatives on forms provided by the Agency [~~Commission~~] and with the appropriate fee.

(b) A representative shall be of good reputation and under the control of the school and is deemed to be the agent of the school. The school is responsible for any representations or misrepresentations, expressed or implied, made by a representative.

(c) Any student solicited or enrolled by an unregistered representative is entitled to a refund of all monies paid and a release from all obligations to the school. Any contract signed by a prospective student as a result of solicitation or enrollment by an unregistered representative is null and void and unenforceable.

(d) Representatives shall participate in training approved by the Agency that covers the Act and Commission rules relative to representatives, admissions, advertising, and any other topics as required by the Agency to support the legal and ethical solicitation and enrollment of students.

§807.54. Representative Compliance.

The Agency may hold representatives liable for violations of statute, Commission rules, policies, and procedures notwithstanding §807.51(b) of this subchapter. Violations may result in sanctions up to and including revocation of approval to serve as a representative in Texas, in accordance with the matrix below:
Figure: 40 TAC §807.54

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 F. INSTRUCTORS

40 TAC §807.82

The rule is proposed under Texas Labor Code §301.0015 and §302.002(d), which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities.

The proposed rule affects Title 4, Texas Labor Code, particularly Chapters 301 and 302, as well as Texas Education Code, Chapter 132.

§807.82. Temporary Instructors.

(a) The Agency [~~Commission~~] may allow a school to use a previously unapproved instructor to teach temporarily for a reasonable amount of time in the case of an emergency, as determined by the Agency [~~Commission~~].

(b) In such circumstances, the school shall provide written notice to the Agency [~~Commission~~] delivered no later than the first day the temporary instructor begins teaching. The notice shall include:

(1) the class to be taught;

(2) the name of the approved instructor;

(3) the name of the temporary instructor; and

(4) the reason for the temporary instructor.

(c) Failure to properly notify the Agency [~~Commission~~] shall result in sanctions [~~penalties~~] for the use of an unapproved instructor.

(d) The temporary instructor shall have practical experience or education in the course area to be taught, and shall not have been previously disapproved to teach the class.

(e) There shall be no more than one temporary instructor per grading period in an individual class, unless specifically approved in advance by the Agency [~~Commission~~].

(f) Failure to comply with this section shall result in sanctions, [~~penalties, up to and including,~~] a full refund to all students attending such classes, or both.

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. COURSES OF INSTRUCTION

40 TAC §807.134

The rule is proposed under Texas Labor Code §301.0015 and §302.002(d), which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it

deems necessary for the effective administration of Agency services and activities.

The proposed rule affects Title 4, Texas Labor Code, particularly Chapters 301 and 302, as well as Texas Education Code, Chapter 132.

§807.134. Sanctions [~~Penalties~~] Relating to Courses of Instruction.

(a) If an approved course of instruction is discontinued for any reason, the Agency [~~Commission~~] shall be notified within 72 hours of discontinuance and furnished with the names and addresses of any students who were prevented from completion of the course of instruction due to discontinuance. Should the school fail to make arrangements satisfactory to the students and the Agency [~~Commission~~] for the completion of the course of instruction, the full amount of all tuition and fees paid by the students are then due and refundable. Any course of instruction discontinued will be removed from the list of approved courses of instruction.

(b) The Agency [~~Commission~~] may suspend enrollments in a particular course of instruction at any time the Commission finds cause. For purposes of this subsection, cause includes, but is not limited to:

(1) inadequate instruction;

(2) unapproved or inadequate curriculum;

(3) inadequate equipment; or

(4) inadequate facilities.

(c) If a school begins teaching a course of instruction or revised course of instruction that has not been approved by the Agency [~~Commission~~], the Agency [~~Commission~~] may require the school to refund to the enrolled students all or a portion of the tuition fees.

(d) If upon review and consideration of an original, renewal, or revised application for course of instruction approval, the Agency [~~Commission~~] determines that the applicant fails to meet the requirements in the Act or this chapter, the Agency [~~Commission~~] shall notify the school, setting forth in writing the reasons for the denial. This may include summaries of peer evaluations from both educators and employers offering similar courses of instruction.

(e) The Agency [~~Commission~~] may revoke approval of a school's course of instruction at any time the Agency [~~Commission~~] finds cause. For purposes of this subsection, cause includes, but is not limited to:

(1) any statement contained in the application for the course of instruction approval which is untrue;

(2) the school's failure to maintain the instructors, facilities, equipment, or courses of instruction, or course of instruction outcomes on the basis of which approval was issued;

(3) advertising made on behalf of the school which is false, misleading, or deceptive, including those that use the words commonly associated with [~~word "associate" to describe~~] a degree other than those approved by the Coordinating Board;

(4) courses of instruction without clearly stated limited transferability if there are no articulation agreements with other postsecondary institutions in the same geographic area;

(5) courses of instruction for which financial aid is advertised but is not available;

(6) repeated violations by the school that negatively impact the quality of a particular course of instruction; or

(7) violations by the school of any applicable provision of the Act or this chapter.

(f) A school whose course of instruction approval is denied or revoked shall have the right to appeal. The Agency [~~Commission~~] will conduct hearings in accordance with Agency [~~Commission~~] policies and procedures applicable to the appeal.

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 N. CANCELLATION AND REFUND POLICY

40 TAC §§807.261 - 807.264

The rules are proposed under Texas Labor Code §301.0015 and §302.002(d), which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities.

The proposed rules affect Title 4, Texas Labor Code, particularly Chapters 301 and 302, as well as Texas Education Code, Chapter 132.

§807.261. Requirement for Tour [~~Right to Cancel after Tour~~].

(a) Notwithstanding subsection (b) of this section, schools are required to provide a tour on or before the first scheduled class day.

(b) [~~(a)~~] Distance education, combination distance education-residence, and seminars are not required to provide the student a tour.

(c) [~~(b)~~] [~~Any potential student who has not been provided the opportunity to tour the school facilities and inspect the equipment before signing an enrollment contract has an additional three days, excluding Saturdays, Sundays, and legal holidays, following a tour and inspection to cancel enrollment and request a full refund of any money paid to the school and release from all obligations.~~] The student shall sign and date an acknowledgement form certifying the completion of the tour.

§807.262. Completion [~~Consummation~~] of Refund.

(a) A school shall document refunds by written record indicating the date of the refund transaction, the name of the student receiving the refund, the total amount refunded, and the specific reason for the refund. Proof of completion [~~consummation~~] shall be on file within 120 days of the effective date of termination and shall include:

(1) copies of both sides of the cancelled check;

(2) printed proof of completed transaction of electronic funds transfer or other similar electronic means; or

(3) documentation of an awarded credit to a credit card or other similar account.

(b) To ensure a school's good faith effort to timely complete [~~consummate~~] a refund owed directly to a student, the student's file

shall contain evidence of the following proof of a certified mailing of the refund to the:

(1) student's last known address;

(2) student's permanent address, if different from the student's last known address; or

(3) address of the student's parent or legal guardian, if different from the student's last known and permanent addresses.

(c) If after making a good faith effort to timely complete [~~consummate~~] a refund, the school is unable to complete [~~consummate~~] the refund, the school shall forward to the Agency [~~Commission~~] the appropriate refund amount and any pertinent student information to assist the Agency [~~Commission~~] in locating the student.

§807.263. Refund Requirements.

(a) Students are entitled to a full refund for classes attended if the school [~~does not provide a class with~~]:

(1) does not provide a class with:

(A) [~~(1)~~] an approved instructor;

(B) [~~(2)~~] an instructor for whom an application has been properly submitted to the Agency [~~Commission~~]; or

(C) [~~(3)~~] a temporary instructor for whom the school submitted notice to the Agency; [~~Commission.~~]

(2) fails to maintain the instructors, facilities, equipment, or courses of instruction on the basis of which Agency approval was issued or student enrollment was obtained;

(3) violates any provision of this chapter in the process of soliciting and enrolling the student;

(4) fails to adhere to applicable academic, attendance, and refund policies that meet state requirements and apply to the course enrolled in, as published at the time of the student's enrollment in the course;

(5) fails to furnish the student, upon satisfactory completion of the program, with a certificate of completion. A school may withhold the transcript or certificate until the student has paid outstanding financial obligations to the school; or

(6) does not have course approval or the required certificate of approval from the Agency.

(b) If any of the violations in subsection (a)(1) - (6) of this section apply to [~~a class has no instructor for~~] more than one class period, students are entitled to a full refund for each such class attended.

(c) The length of a program, for purposes of calculating refunds owed, is the shortest scheduled time period in which the program may be completed by continuous attendance of a full-time student.

(d) A non-Title IV school, or a Title IV school voluntarily taking attendance, shall calculate refunds for students based upon scheduled hours of classes through the last date of attendance. A Title IV school shall calculate refunds for students based upon scheduled hours of classes through the last documented day of an academically related activity. Neither type of school shall count leaves of absence, suspensions, school holidays, days when classes are not offered, and summer vacations for purposes of calculating a student's refund.

(e) For all schools other than [~~distance education and~~] seminars, a student may cancel enrollment, request a full refund, and request a release from any obligations to the school within the first three scheduled class days. [~~, excluding Saturdays, Sundays, and legal holidays following:~~]

[~~(1) the first day of the student's scheduled classes if the student is not provided an opportunity to tour the school facilities, which includes inspection of equipment, before signing an enrollment contract; or~~]

[~~(2) the day the tour of the school facilities, including inspection of the equipment, is completed, when provided before the first day of the student's scheduled classes.~~]

(f) Students are entitled to a refund paid in accordance with the school's policy, which must provide for refunds at least equivalent to the provisions in §132.061 of the Act, if students withdraw or are discontinued from a program prior to completion.

§807.264. Penalties Relating to Refunds.

(a) A penalty shall be paid on any refund not completed [~~consummated~~] in a timely manner as required by the Act. The penalty assessment shall begin on the first day following the expiration of the statutorily defined refund period and end on the day preceding the date the refund is completed [~~consummated~~].

(b) Penalties assessed on late refunds for grants shall be paid to the tuition trust account if the amount is $15 or less. Any other penalty assessed on a school's late payment of student refunds shall be disbursed in the following order of priority:

(1) to the student's account at a lending institution for the balance of principal and interest on the student loan;

(2) to the student for tuition and fees paid directly by the student; and

(3) to the tuition trust account for any remaining balance of assessed penalty.

(c) If the Agency [~~Commission~~] determines that the method used by the school to calculate refunds is in error or the school does not routinely pay refunds within the time required by the Act, the school shall submit an audited report conducted by an accountant of the refunds due former students that includes any penalty due as specified in the Act. An audit opinion letter shall accompany a schedule of student refunds due, which discloses the following information for the four years prior to the date of the Agency's [~~Commission's~~] request:

(1) student information, including name, address, and Social Security [~~social security~~] number;

(2) pertinent dates, including last date of attendance and date of termination; and

(3) refund information, including amount of refund with principal, penalty, and any balance due separately stated, payee, and date and check number of payment if payment has been made.

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 O. RECORDS

40 TAC §807.284

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

The rule is repealed under Texas Labor Code §301.0015 and §302.002(d), which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities.

The proposed repeal affects Title 4, Texas Labor Code, particularly Chapters 301 and 302, as well as Texas Education Code, Chapter 132.

§807.284. Employment Records.

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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40 TAC §807.284

The rule is proposed under Texas Labor Code §301.0015 and §302.002(d), which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities.

The proposed rule affects Title 4, Texas Labor Code, particularly Chapters 301 and 302, as well as Texas Education Code, Chapter 132.

§807.284. Reporting.

(a) Schools shall report to the Agency, as directed, the facts and information about their programs and operations deemed necessary for the proper administration of the Act and any rules adopted under the Act.

(1) The data to be reported by a school shall include:

(A) student enrollment information for all programs;

(B) completion, employment, and job placement information for all programs approved for an occupational objective; and

(C) any other required information.

(2) The school shall submit the required data to the Agency on or before the specified date.

(3) The school shall provide the data in an electronic format prescribed by the Agency unless a different format is approved in writing by the Agency.

(4) When good cause is shown, the Agency may extend the deadline for submission of the data required under this section; however, the extension shall be effective only if authorized in writing.

(5) The Agency may require schools to maintain on file the verifiable documentation supporting the data reported and make it available to the Agency upon request.

(b) The Agency shall develop and apply data monitoring and audit protocols for the data reported under subsection (a) of this section, in a manner sufficient to reasonably determine the accuracy of the reported information.

(c) The Agency may impose penalties or sanctions, or both, for failure to submit data under subsection (a) of this section by the due dates required, or for submission of data that is shown to contain inaccuracies.

(d) For any programs not meeting a minimum employment rate for program graduates in jobs related to the stated occupation, as referenced in §807.131(b), the following graduated corrective actions will be taken:

(1) For a program not meeting the minimum employment rate for the first year, the school will be required to develop and submit a performance improvement plan acceptable to the Agency;

(2) For a program not meeting the minimum employment rate for the second consecutive year, but showing at least a 50% improvement toward the minimum employment rate of the previous year, the school will be required to reexamine and submit modifications to the performance improvement plan acceptable to the Agency;

(3) For a program not meeting the minimum employment rate for the second consecutive year and not showing at least a 50% improvement toward the minimum employment rate of the previous year, conditions will be placed on the school's certificate, which include:

(A) modification of the performance improvement plan; and

(B) suspension of new enrollment of students funded with Local Workforce Development Board-allocated funds in the program; and

(4) For a program not meeting the minimum employment rate for the third consecutive year, the Agency will revoke approval of the program.

(e) The Agency shall publish on its website information compiled from:

(1) data reported under subsection (a) of this section; and

(2) any other information collected about schools and programs deemed appropriate and useful to the public, which:

(A) assists a person in deciding whether to enroll in a school or in identifying or choosing which postsecondary institution, school, or college to attend; and

(B) addresses regulatory compliance and performance of schools.

(3) The Agency, to the extent practical, shall present the published information in a manner that is consistent among institutions, schools, and colleges; easy to understand; and accessible to the public.

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 29, 2011.

TRD-201104077
Reagan Miller
Deputy Division Director, Workforce Policy and Service Delivery
Texas Workforce Commission
Earliest possible date of adoption: November 13, 2011
For further information, please call: (512) 475-0829

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SUBCHAPTER P. COMPLAINTS

40 TAC §807.302

The rule is proposed under Texas Labor Code §301.0015 and §302.002(d), which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities.

The proposed rule affects Title 4, Texas Labor Code, particularly Chapters 301 and 302, as well as Texas Education Code, Chapter 132.

§807.302. Complaints and Investigations.

(a) The Agency shall investigate or refer to other authorities with jurisdiction to investigate, as appropriate, all complaints received about a school, whether licensed or unlicensed.

(b) [~~(a)~~] The Agency [~~Commission may investigate a complaint about a school and~~] may determine the extent of investigation needed by considering various factors, such as:

(1) the seriousness of the alleged violation;

(2) the source of the complaint;

(3) the school's history of compliance and complaints;

(4) the timeliness of the complaint; [~~and~~]

(5) the feasibility of investigations; and

(6) [~~(5)~~] any other reasonable matter deemed appropriate.

(c) [~~(b)~~] The Agency [~~Commission~~] may require adequate documentation or other evidence of the violation before initiating a complaint investigation. Notwithstanding subsection (a) of this section, anonymous complaints will not be investigated but will be reviewed to identify any action needed.

(d) Unless good cause is shown, a complaint is timely only if it is filed with the Agency while the student who files the complaint is enrolled or within two years of the date the student withdraws, terminates, or graduates from the program that is the subject of the complaint. Good cause includes, but is not limited to, fraud.

(e) [~~(c)~~] The investigation fee authorized by the Act is based on a per site visit. The school director shall be notified that an on-site visit was conducted when the investigation results in assessment of a 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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Reagan Miller
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Texas Workforce Commission
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SUBCHAPTER S. CEASE AND DESIST ORDERS

40 TAC §§807.361 - 807.366

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

The rules are repealed under Texas Labor Code §301.0015 and §302.002(d), which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities.

The proposed repeals affect Title 4, Texas Labor Code, particularly Chapters 301 and 302, as well as Texas Education Code, Chapter 132.

§807.361. Statement of Charges and Notice of Hearing on Cease and Desist Orders.

§807.362. Contents of Statement of Charges and Notice of Hearing.

§807.363. Service of Statement and Charges and Hearing Notice for the Issuance of Cease and Desist Orders.

§807.364. Ex Parte Consultations.

§807.365. Hearing Decision and Final Review by the Commission.

§807.366. Cease and Desist Order.

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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Reagan Miller
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SUBCHAPTER T. CAREER SCHOOLS HEARINGS

40 TAC §§807.381 - 807.395

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

The rules are repealed under Texas Labor Code §301.0015 and §302.002(d), which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it

deems necessary for the effective administration of Agency services and activities.

The proposed repeals affect Title 4, Texas Labor Code, particularly Chapters 301 and 302, as well as Texas Education Code, Chapter 132.

§807.381. Purpose.

§807.382. Definitions.

§807.383. Information on Right of Appeal.

§807.384. Request for Hearing.

§807.385. Setting of Hearing.

§807.386. Hearing Officer Independence and Impartiality.

§807.387. Hearing Procedures.

§807.388. Postponements, Continuances, and Withdrawals.

§807.389. Evidence.

§807.390. Ex Parte Communications.

§807.391. Change in Determination.

§807.392. Hearing Decision.

§807.393. Motion for Reopening.

§807.394. Motion for Rehearing.

§807.395. Finality of Decision.

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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Reagan Miller
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Texas Workforce Commission
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For further information, please call: (512) 475-0829

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SUBCHAPTER S. SANCTIONS

40 TAC §§807.351 - 807.353

The rules are proposed under Texas Labor Code §301.0015 and §302.002(d), which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities.

The proposed rules affect Title 4, Texas Labor Code, particularly Chapters 301 and 302, as well as Texas Education Code, Chapter 132.

§807.351. Notice and Administration of Sanctions.

(a) Pursuant to its authority under §132.152 of the Act, the Agency may impose administrative penalties or other sanctions on an entity for violations of §132.151 of the Act or this chapter.

(b) The Agency shall serve notice of a sanction, with determination of the violation on which it is based, by both U.S. mail and certified mail, return receipt requested, mailed to the owner's address of record as listed on the application for certificate of approval. Unless there is other evidence of receipt, notice is presumed received five days from the date it is mailed by the Agency.

(c) In imposing administrative penalties or other sanctions, the Agency shall consider all the factors that it deems relevant, including, but not limited to, the following:

(1) The amount of administrative penalty or level of sanction necessary to ensure immediate and continued compliance with statutes and regulations;

(2) The conduct of the entity in taking all reasonable steps or procedures necessary and appropriate to comply with statutes and regulations and to correct the violation; and

(3) The entity's prior violations of statutes, regulations, or orders administered, adopted, or issued by the Commission.

(d) Notwithstanding subsections (a) - (c) of this section, the Agency shall order refunds pursuant to applicable statute and rules.

§807.352. Sanctions.

(a) Sanctions may include:

(1) administrative penalties outlined in §807.353;

(2) collecting a late renewal fee from the school;

(3) denying the school's application for a certificate of approval;

(4) revoking the school's certificate of approval;

(5) placing conditions on the school's certificate of approval;

(6) suspending the admission of students to the school or a program;

(7) denying a program approval;

(8) revoking a program approval;

(9) denying or revoking approval of an owner, school director, instructor, or other staff member whose approval may be required;

(10) denying, suspending, or revoking the registration of the school's representatives;

(11) assessing a late refund penalty;

(12) charging the school an investigation fee to resolve a complaint against the school;

(13) charging the school interest and penalties on late payments of fee installments;

(14) applying for an injunction against the school;

(15) asking the attorney general to collect a civil penalty from any person who violates the Act or this chapter;

(16) ordering a peer review of the school; and

(17) issuing a cease and desist order to an unlicensed school.

(b) Notwithstanding subsection (a)(1) - (17) of this section, the Agency shall order refunds pursuant to violations of applicable statutes and rules.

§807.353. Administrative Penalties.

(a) Unless otherwise provided by statute, an administrative penalty shall not exceed $1,000 for each instance of a violation.

(b) Regardless of the penalty amount for a particular violation contained in the penalty matrix, the administrative penalty for repeat violations shall be up to the maximum penalty amount of $1,000 per violation.

(c) The total amount of an administrative penalty shall be calculated as the product of the penalty dollar amount and the number of instances of violation.

(d) The assessment of an administrative penalty shall not preclude the Agency from administering other sanctions, up to and including revocation of a school's certificate of approval.

(e) For the purposes of determining and assessing an administrative penalty, the Agency shall use the penalty matrix in this subsection. The absence of a particular violation from the matrix shall not preclude the Agency from assessing an administrative penalty.
Figure: 40 TAC §807.353(e)

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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Reagan Miller
Deputy Division Director, Workforce Policy and Service Delivery
Texas Workforce Commission
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For further information, please call: (512) 475-0829

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SUBCHAPTER T. CEASE AND DESIST ORDERS

40 TAC §§807.361 - 807.366

The rules are proposed under Texas Labor Code §301.0015 and §302.002(d), which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities.

The proposed rules affect Title 4, Texas Labor Code, particularly Chapters 301 and 302, as well as Texas Education Code, Chapter 132.

§807.361. Statement of Charges and Notice of Hearing on Cease and Desist Orders.
If the Agency believes a person is operating a career school or college without a certificate of approval in violation of §132.151 of the Act, the Agency may issue a statement of charges and notice of hearing to consider the issuance of a cease and desist order.

§807.362. Contents of Statement of Charges and Notice of Hearing.
The statement of charges and notice of hearing issued by the Agency shall contain the following information:

(1) The name and last known address of the person against whom the order may be entered;

(2) A short and plain statement of the reasons the Agency believes the person is operating a career school or college without a certificate of approval;

(3) A copy of the Commission's Career Schools and Colleges rules, Title 40, Chapter 807 of the Texas Administrative Code; and

(4) The date, time, and location of the hearing.

§807.363. Service of Statement and Charges and Hearing Notice for the Issuance of Cease and Desist Orders.
The statement of charges and notice of hearing to consider a cease and desist order shall be served by certified mail, return receipt requested, on the person against whom the order is entered. Notice is presumed received five days from the date it is mailed by the Agency.

§807.364. Ex Parte Consultations.

(a) A Commissioner or employee of the Agency assigned to render a decision or to make findings of fact and conclusions of law in a cease and desist proceeding shall not directly or indirectly communicate in connection with an issue of fact or law with the Commission, a person, a party, or a representative of those entities, except on notice and opportunity for each party to participate.

(b) A Commissioner or employee of the Agency assigned to render a decision or to make findings of fact and conclusions of law in a cease and desist hearing may communicate ex parte with an Agency employee who has not participated in a hearing in the case for the purpose of using the special skills or knowledge of the Agency and its staff in evaluating the evidence.

(c) This section shall be construed liberally to promote the effectiveness and efficiency of issuance of cease and desist orders.

§807.365. Hearing Decision and Final Review by the Commission.

(a) Within 10 days after the hearing is held, the hearing officer shall issue a written decision granting or denying the request for the issuance of a cease and desist order that includes findings of fact and conclusions of law. The hearing decision shall be mailed by certified mail, return receipt requested, and is presumed received five days from the date it is mailed. The hearing officer's decision becomes final the 15th day after receipt of the hearing decision unless an appeal is filed under subsection (b) of this section.

(b) A party that is not satisfied with the decision of the hearing officer may file a written appeal of the decision to the Commission for a final review no later than the 15th day after receipt of the hearing decision. The written appeal shall contain the party's arguments as to why the decision of the hearing officer should be reversed. A party may request oral argument on the written appeal before the Commission. If oral argument is approved, each party or its hearing representative may present argument in support of its position.

(c) Upon receipt of the written appeal of the hearing officer's decision, the Commission shall consider the appeal and issue a decision promptly. If in the written appeal, oral argument is requested by a party and approved, the Commission shall schedule and hold oral argument not later than 90 days of receipt of the written appeal. The Commission shall consider the appeal on the basis of the record made before the hearing officer. The decision of the Commission shall be mailed by certified mail, return receipt requested, and is presumed received five days from the date it is mailed.

§807.366. Cease and Desist Order.

(a) If the request for the issuance of a cease and desist order becomes final under the provisions of §807.365(a) or, if after an appeal the decision under §807.365(c) upholds the issuance of a cease and desist order by the Commission, the hearing officer shall issue a cease and desist order against the person who is found operating a career school or college without a certificate of approval in violation of §132.151 of the Act.

(b) The cease and desist order shall be delivered by certified mail, return receipt requested, and is presumed received five days from the date it is mailed.

(c) From the date of receipt of the issuance of the cease and desist order, the person must completely cease and desist operating the career school or college.

(d) The cease and desist order shall remain in effect until the person comes into complete compliance with the Act as determined by the Commission, or unless otherwise provided by the order of the Commission.

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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Reagan Miller
Deputy Division Director, Workforce Policy and Service Delivery
Texas Workforce Commission
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For further information, please call: (512) 475-0829

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SUBCHAPTER U. CAREER SCHOOLS HEARINGS

40 TAC §§807.381, 807.383 - 807.395

The rules are proposed under Texas Labor Code §301.0015 and §302.002(d), which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities.

The proposed rules affect Title 4, Texas Labor Code, particularly Chapters 301 and 302, as well as Texas Education Code, Chapter 132.

§807.381. Purpose.

This subchapter provides a hearing process to the extent authorized by the Act and the rules administered by the Agency.

§807.383. Information on Right of Appeal.

An issuer of a determination shall inform the career school applicant or any party directly aggrieved by the determination of the right to a hearing. The notice shall explain the procedure for an appeal, the party's right of appeal, and the right to be represented by others, including legal counsel.

§807.384. Request for Hearing.

(a) The party seeking review of a determination under this subchapter relating to career schools hearings shall request a hearing in writing within 15 days after receipt of the notice of determination.

(b) The request shall be addressed as provided in the determination and state the nature of the determination, the name and identifying information of the requesting party, and a request that the determination be reviewed.

(c) The request may include an explanation of why the determination should be changed; however, this is not a jurisdictional requirement.

§807.385. Setting of Hearing.

(a) Upon receipt of request for a hearing, the Agency shall promptly mail a notice of hearing that sets the hearing for a reasonable time and place within 30 days from receipt of the request for a hearing.

(b) The notice of hearing shall be in writing and include a:

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

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

(3) short and plain statement of the issues to be considered during the hearing.

(c) The notice of hearing shall be issued at least 10 days before the date of the hearing unless a shorter period is permitted by statute.

(d) The hearing notice shall state whether the hearing shall be conducted by telephone or in-person. The hearing notice shall also include the location of an in-person hearing.

(e) Parties needing special accommodations, including a bilingual or sign language interpreter, may request such before the setting of the hearing, if possible, or as soon as practical.

§807.386. Hearing Officer Independence and Impartiality.

(a) A hearing officer presiding over a hearing shall have all powers necessary and appropriate to conduct a full, fair, and impartial hearing. Hearing officers shall remain independent and impartial in all matters regarding the handling of any issues during the pendency of a case and in issuing their written decisions.

(b) A hearing officer shall be disqualified if the hearing officer has a personal interest in the outcome of the appeal or if the hearing officer directly or indirectly participated in the determination on appeal. Any party may present facts to the Agency in support of a request to disqualify a hearing officer.

(c) The hearing officer may withdraw from a hearing to avoid the appearance of impropriety or partiality.

(d) Following any disqualification or withdrawal of a hearing officer, the Agency shall assign an alternate hearing officer to the case. The alternate hearing officer shall not be bound by any findings or conclusions made by the disqualified or withdrawn hearing officer.

§807.387. Hearing Procedures.

(a) The hearing shall be conducted in person in Austin, Texas, unless the parties agree to a telephonic hearing or request a different location.

(b) The hearing shall be conducted informally and in such a manner as to ascertain the substantive rights of the parties. All issues relevant to the appeal shall be considered and addressed, and may include:

(1) Presentation of Evidence. The parties to an appeal may present evidence that is material and relevant, as determined by the hearing officer. In conducting a hearing, the hearing officer shall actively develop the record on the relevant circumstances and facts to resolve all issues. To be considered as evidence in a decision, any document or physical evidence must be entered as an exhibit at the hearing. A party has the right to object to evidence offered at the hearing by the hearing officer or other parties.

(2) Examination of Parties and Witnesses. After placing the witnesses under oath, the hearing officer shall examine parties and any witnesses and shall allow cross-examination to the extent the hearing officer deems necessary to afford the parties due process.

(3) Additional Evidence. The hearing officer, with or without notice to any of the parties, may take additional evidence as deemed necessary, provided that a party shall be given an opportunity to rebut the evidence if it is to be used against the party's interest.

(4) Appropriate Hearing Behavior. All parties shall conduct themselves in an appropriate manner. The hearing officer may expel any individual or party who fails to correct behavior the hearing officer identifies as disruptive. After expulsion, the hearing officer may proceed with the hearing and render a decision.

(c) Records.

(1) The hearing record shall include the audio recording of the proceeding and any other relevant evidence relied on by the hearing officer, including documents and other physical evidence entered as exhibits.

(2) The hearing record shall be maintained in accordance with federal and state law.

(3) Confidentiality of information contained in the hearing record shall be maintained in accordance with federal and state law.

(4) Upon request, a party has the right to obtain a copy of the hearing record at no charge. However, a party requesting a transcript of the hearing record shall pay the costs of the transcription.

§807.388. Postponements, Continuances, and Withdrawals.

(a) The hearing officer may grant a postponement of a hearing for good cause at a party's request.

(b) A continuance of a hearing may be ordered at the discretion of the hearing officer in order to consider additional, necessary evidence or for any other reason the hearing officer deems appropriate.

(c) A party may withdraw an appeal at any time prior to the issuance of the final decision.

§807.389. Evidence.

(a) Evidence Generally. Evidence, including hearsay evidence, shall be admitted if it is relevant and if in the judgment of the hearing officer it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs. However, the hearing officer may exclude evidence if its probative value is outweighed by the danger of unfair prejudice, by confusion of the issues, or by reasonable concern for undue delay, waste of time, or needless presentation of cumulative evidence.

(b) Exchange of Exhibits. Any documentary evidence to be presented during a telephonic hearing shall be exchanged with all parties and a copy shall be provided to the hearing officer in advance of the hearing. Any documentary evidence to be presented at an in-person hearing shall be exchanged at the hearing.

(c) Stipulations. The parties, with the consent of the hearing officer, may agree in writing to relevant facts. The hearing officer may decide the appeal based on such stipulations or, at the hearing officer's discretion, may set the appeal for hearing and take such further evidence as the hearing officer deems necessary.

(d) Experts and Evaluations. If relevant and useful, testimony from an independent expert or a professional evaluation from a source satisfactory to the parties and the Agency may be ordered by hearing officers, on their own motion or at a party's request. The cost of any such expert or evaluation ordered by the hearing officer shall be borne equally by the parties.

(e) Subpoenas.

(1) The hearing officer may issue subpoenas to compel the attendance of witnesses and the production of records. A subpoena may be issued either at the request of a party or on the hearing officer's own motion.

(2) A party requesting a subpoena shall state the nature of the information desired, including names of any witnesses and the records that the requestor feels are necessary for the proper presentation of the case.

(3) The request shall be granted only to the extent the records or the testimony of the requested witnesses appears to be relevant to the issues on appeal.

(4) A denial of a subpoena request shall be made in writing or on the record, stating the reasons for such denial.

§807.390. Ex Parte Communications.

(a) The hearing officer shall not participate in ex parte communications, directly or indirectly, in any matter in connection with any substantive issue, with any interested person or party. Likewise, no person shall attempt to engage in ex parte communications with the hearing officer on behalf of any interested person or party.

(b) If the hearing officer receives any such ex parte communication, the other parties shall be given an opportunity to review any such ex parte communication.

(c) Nothing shall prevent the hearing officer from communicating with parties or their representatives about routine matters such as requests for continuances or opportunities to inspect the file.

(d) The hearing officer may initiate communications with an impartial Agency employee who has not participated in a hearing or any determination in the case for the limited purpose of using the special skills or knowledge of the Agency and its staff in evaluating the evidence.

§807.391. Change in Determination.

The issuer of the determination may change the determination any time before the hearing officer issues the decision. Despite the issuer changing the determination, the parties may proceed with the hearing.

§807.392. Hearing Decision.

(a) Following the conclusion of the hearing, the hearing officer shall promptly prepare a written decision on behalf of the Agency.

(b) The decision shall be based exclusively on the evidence of record in the hearing and on matters officially noticed in the hearing. The decision shall include:

(1) a list of the individuals who appeared at the hearing;

(2) the findings of fact and conclusions of law reached on the issues; and

(3) the affirmation, reversal, or modification of the determination.

(c) Unless a party files a timely motion for rehearing, the Agency may assume continuing jurisdiction to modify or correct a hearing decision until the expiration of 30 calendar days from the mailing date of the hearing decision.

§807.393. Motion for Reopening.

(a) If a party does not appear for a hearing, the party may request the reopening of the hearing within 30 calendar days from the date the decision is mailed.

(b) The motion for reopening shall be in writing and detail the reason for failing to appear at the hearing.

(c) The Agency may schedule a hearing on whether to grant the reopening.

(d) The motion may be granted if the hearing officer determines that the party has shown good cause for failing to appear at the hearing.

§807.394. Motion for Rehearing.

(a) A party has 30 calendar days from the date the decision is mailed to file a motion for rehearing. A rehearing shall be granted only for the presentation of new evidence.

(b) A motion for rehearing shall be in writing and allege the new evidence to be considered. The party shall show a compelling reason why this evidence was not presented at the hearing.

(c) If the hearing officer determines that the alleged, new evidence warrants a rehearing, a hearing shall be scheduled at a reasonable time and place.

(d) The hearing officer shall issue a written decision in response to a timely filed motion for rehearing.

(e) The Agency may assume continuing jurisdiction to modify, correct, or reform a decision until the expiration of 30 calendar days from the date of mailing of the hearing decision.

§807.395. Finality of Decision.

(a) The decision of the hearing officer is the final decision of the Agency after the expiration of 30 calendar days from the mailing date of the decision unless within that time:

(1) a request for reopening is filed with the Agency;

(2) a request for rehearing is filed with the Agency; or

(3) the Agency assumes continuing jurisdiction to modify or correct the decision.

(b) Any decision issued in response to a request for reopening or rehearing or a modification or correction issued by the Agency shall be final on the expiration of 30 calendar days from the mailing date of the decision, modification, or correction.

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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Reagan Miller
Deputy Division Director, Workforce Policy and Service Delivery
Texas Workforce Commission
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For further information, please call: (512) 475-0829

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TITLE 43. TRANSPORTATION

PART 1. TEXAS DEPARTMENT OF TRANSPORTATION

CHAPTER 2. ENVIRONMENTAL POLICY
SUBCHAPTER D. PUBLIC PARTICIPATION PROGRAMS

43 TAC §§2.61 - 2.71

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

The Texas Department of Transportation (department) proposes the repeal of §2.61, Purpose and Scope; §2.62, Definitions; §2.63, Adopt-a-Highway Program; §2.64, Adopt-a-Highway for Landscaping Program; §2.65, Landscape Cost Sharing Program; §2.66, Adopt-a-Freeway Program; §2.67, Landscape Partnership Program; §2.68, General Sign Restrictions; §2.69, Approval and Appeal; §2.70, Termination or Revision of a Program; and §2.71, Adopt-an-Airport Program, all concerning the department's public participation programs.

EXPLANATION OF PROPOSED REPEALS

The current rules relating to the department's public participation programs, such as the Adopt-a-Highway Program, are contained in 43 TAC Chapter 2, Subchapter D, of the department's rules. Chapter 2 relates to environmental policies and the public participation programs subchapter bears little in common with the other topics contained in the chapter. These changes repeal the sections in Chapter 2, Subchapter D, and move the content without substantive change to new Chapter 12 which is simultaneously proposed with these repeals.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each year of the first five years the repeals as proposed are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the repeals.

Bob Jackson, General Counsel, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the repeals.

PUBLIC BENEFIT AND COST

Mr. Jackson has also determined that for each year of the first five years the repeals as proposed are in effect, the public benefit anticipated as a result of enforcing or administering the repeals will be better organization of environmental and public participation rules and greater flexibility in the structuring of revised environmental rules. There are no anticipated economic costs for persons required to comply with the repeals as proposed. There will be no adverse economic effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed repeal of §§2.61 - 2.71 may be submitted to Bob Jackson, General Counsel, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on November 14, 2011.

STATUTORY AUTHORITY

The repeals are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission (commission) with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §21.054, which provides the department with the authority to contract as necessary or advisable to encourage and assist the development of aeronautics, including the design, construction, repair, maintenance, or improvement of airports and airstrips, and Transportation Code, §203.002, which authorizes

and empowers the commission to lay out, construct, maintain, and operate a modern state highway system.

CROSS REFERENCE TO STATUTE

Transportation Code, §21.054 and §203.002.

§2.61. Purpose and Scope.

§2.62. Definitions.

§2.63. Adopt-a-Highway Program.

§2.64. Adopt-a-Highway for Landscaping Program.

§2.65. Landscape Cost Sharing Program.

§2.66. Adopt-a-Freeway Program.

§2.67. Landscape Partnership Program.

§2.68. General Sign Restrictions.

§2.69. Approval and Appeal.

§2.70. Termination or Revision of a Program.

§2.71. Adopt-an-Airport Program.

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 30, 2011.

TRD-201104101
Bob Jackson
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: November 13, 2011
For further information, please call: (512) 463-8683

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CHAPTER 9. CONTRACT AND GRANT MANAGEMENT

The Texas Department of Transportation (department) proposes amendments to §9.33, Notice of Intent and Letter of Interest; and §9.83, Notice and Letter of Interest, both concerning newspaper advertising.

EXPLANATION OF PROPOSED AMENDMENTS

The department procures scientific services under Transportation Code, Chapter 223, Subchapter D, and professional services under Government Code, Chapter 2254, Subchapter A and 23 C.F.R. §172.5.

The Sunset Advisory Commission's Report to the 81st Legislature recommended that the department amend its rules requiring professional services contract solicitations to be advertised in local or statewide newspapers. Currently, the department posts the contract solicitations (notices) on the department's webpage and the Electronic State Business Daily. Newspaper advertisements do not contain the full solicitation, but merely refer the reader to the full notice, which is posted on the department's website.

To comply with the recommendation made by the Sunset Advisory Commission, it is necessary to amend §9.33(a) and §9.83(a)(1). Implementing this recommendation will save newspaper advertising costs and staff time while still allowing for effective notification of contracting opportunities. While newspaper advertising would no longer be mandatory, the department would retain the authority to publish notices in the newspaper when doing so is necessary and cost effective.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each year of the first five years the amendments as proposed are in effect, there will be a fiscal impact to state government as a result of enforcing or administering the amendments. There will be a net savings to state government of approximately $32,404 for each of the first five years because the Electronic State Business Daily publishes notices free of charge and the department will no longer purchase newspaper advertisements unless necessary and cost effective. There will be no fiscal implications for local governments as a result of enforcing or administering the amendments.

Bob Jackson, General Counsel, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the amendments.

PUBLIC BENEFIT AND COST

Mr. Jackson has also determined that for each year of the first five years in which the sections are in effect, the public benefit anticipated as a result of enforcing or administering the amendments will be reduced costs to advertise contracting opportunities. There are no anticipated economic costs for persons required to comply with the sections as proposed. There will be no adverse economic effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments to §9.33 and §9.83 may be submitted to Bob Jackson, General Counsel, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on November 14, 2011.

SUBCHAPTER C. CONTRACTING FOR ARCHITECTURAL, ENGINEERING, AND SURVEYING SERVICES

43 TAC §9.33

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE

None.

§9.33. Notice of Intent and Letter of Interest.

(a) Notice of intent [~~Intent~~] (NOI). Not fewer than 21 days before the letter of interest due date, the department will post on an electronic bulletin board a notice identifying:

[~~(1) Electronic notice. Not less than 21 days before the letter of interest due date, the department will post on an electronic bulletin board a notice identifying:~~]

(1) [~~(A)~~] the solicitation number;

(2) [~~(B)~~] work category codes;

(3) [~~(C)~~] the type of selection in accordance with §9.39 of this subchapter (relating to Selection Types, Contract Types, and Projected Contracts);

(4) [~~(D)~~] the general description of the project and work to be done;

(5) [~~(E)~~] the due date and time;

(6) [~~(F)~~] qualification information if the work type is not an approved category according to §9.43 of this subchapter (relating to Precertification Requirements);

(7) [~~(G)~~] whether the department has waived the precertification requirement of §9.41 of this subchapter (relating to Precertification) when the total contract fee for professional services is anticipated to be less than $250,000 on an individual contract;

(8) [~~(H)~~] selection criteria to be used to determine the short list; and

(9) [~~(I)~~] the assigned HUB or DBE participation goal for the contract(s) (The department may assign individual contract DBE or HUB goals pursuant to 49 CFR Part 26 or 34 TAC §20.13, respectively.).

~~[(2) Newspaper notice. Not less than 21 days before the letter of interest due date, the department will publish a notice in a local newspaper within the geographical area of the district, division, or office in which the work will be performed. If the newspaper fails to print the notice, the department will consider the notice posted. The notice will contain:]~~

~~[(A) the solicitation number;]~~

~~[(B) the general description of the project and work to be done;]~~

~~[(C) the due date and time;]~~

~~[(D) the contact person; and]~~

~~[(E) the location of the electronic bulletin board that contains more information.]~~

(b) Letter of interest (LOI).

(1) The provider shall send a letter of interest to the department notifying the department of the provider's interest in the contract prior to the deadline published in the notice.

(2) The following requirements apply unless otherwise specified in the NOI. The letter of interest will consist of a minimum of three and a maximum of five pages plus attachments. The maximum page length will be stated in the notice. Attachments will be restricted to precertification information required in paragraph (3) of this subsection. The department will not accept a letter of interest by electronic facsimile or electronic mail.

(3) To be considered:

(A) a prime provider or a subprovider that will be performing work in any individual work category must be precertified by the deadline for receiving the letter of interest in accordance with §9.41 of this subchapter [~~(relating to Precertification)~~] unless the work category is not approved according to §9.43 of this subchapter [~~(relating to Precertification Requirements)~~];

(B) a prime provider or subprovider must demonstrate in an attachment to the LOI how it meets the minimum qualifications for work that does not fall within any work category approved according to §9.43 of this subchapter (The attachment is in addition to the maximum pages allowed for the LOI.);

(C) in the LOI, a subprovider that is not precertified must identify both the service to be provided for which there is no dedicated pre-certified work category and the precertified or non-listed work category that the service supports;

(D) if the total contract fee for professional services is anticipated to be less than $250,000 on an individual contract and the department has waived the precertification requirement of §9.41 of this subchapter [~~(relating to Precertification)~~], then a provider or subprovider that:

(i) is not precertified must submit an attachment with the LOI that describes how the prime provider or subprovider meets the minimum requirements specified for the work category approved according to §9.43(b) of this subchapter or how it possesses the knowledge and skill to perform the work in those categories (The attachment is in addition to the maximum pages allowed for the LOI.); or

(ii) is precertified must submit a LOI, but is not required to submit an attachment describing its qualifications in precertified categories (If the firm proposes to do work in categories in which it has not been precertified, then it must submit an attachment describing how the firm meets the minimum requirements or how it possesses the knowledge and skill to perform the work in those categories.);

(E) the proposed team must demonstrate that they have a professional engineer, architect, or surveyor registered or licensed in Texas who will sign and/or seal the work to be performed on the contract;

(F) the provider must demonstrate that it is registered with the appropriate State of Texas licensing board, such as the:

(i) Texas Board of Professional Engineers;

(ii) Texas Board of Architectural Examiners; or

(iii) Texas Board of Professional Land Surveying; and

(G) the letter of interest is received by the department by the deadline specified in the notice.

(4) The letter of interest shall include:

(A) the solicitation number;

(B) an organizational chart containing:

(i) the prime provider's project manager (who may be replaced during the selection process and before contract execution only by another person proposed in the LOI for the prime provider and approved by the director of the Design Division); and

(ii) names of the prime provider's and any subprovider's key personnel (who may be replaced during the selection process and before contract execution only by another person from the team proposed in the LOI and approved by the CST);

(C) information addressing the criteria stated in the notice;

(D) evidence of compliance with the assigned DBE/HUB goal;

(E) name and contact information for references from the department or other entities; and

(F) other pertinent information addressed in the notice.

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 30, 2011.

TRD-201104102
Bob Jackson
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: November 13, 2011
For further information, please call: (512) 463-8683

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SUBCHAPTER F. CONTRACTS FOR SCIENTIFIC, REAL ESTATE APPRAISAL, RIGHT OF WAY ACQUISITION, AND LANDSCAPE ARCHITECTURAL SERVICES

43 TAC §9.83

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE

None.

§9.83. Notice and Letter of Interest.

(a) Notice. When the department elects to use competitive sealed proposals to procure appraisal, right of way acquisition, landscape architectural, and scientific services, notice will be given as follows.

(1) Electronic [~~and newspaper~~] notice. Not less than 21 days before the proposal due date, the department will post a notice on an electronic bulletin board [~~and publish a notice in a selected newspaper~~]. The notice will contain the:

(A) proposed contract or RFP number;

(B) type of selection in accordance with §9.87 of this subchapter [~~title~~] (relating to Selection [~~Types~~]);

(C) general description of the project and work to be done;

(D) due date for providers to send letters of interest to the department;

(E) contact person;

(F) date and location of the proposal meeting, if applicable; and

[~~(G) location of the electronic bulletin board that contains more information; and~~]

(G) [~~(H)~~] if the notice is for an appraiser, a statement that the appraiser must be precertified in accordance with §9.89 of this subchapter [~~section~~] (relating to Qualification Requirements for Appraisers [~~Appraiser~~]).

(2) Organizations. The department will publish a quarterly statewide list of projected contracts to be issued under this subchapter and will provide upon request, or make available on the department's Web site, a copy of the list to community, business, and professional organizations for dissemination to their membership.

(b) Letter of interest.

(1) The provider may obtain an RFP packet by:

(A) sending a letter of interest to the department notifying the department of the provider's interest in the contract;

(B) downloading it from the department's Web site; or

(C) obtaining it at the proposal meeting, if applicable.

(2) The department will accept a letter of interest by electronic facsimile.

(c) Requests for proposals. The RFP packet will include:

(1) the requirements for a responsive proposal including:

(A) date, time, and location for submittal of the proposal;

(B) an outline of the required proposal format and content; and

(C) mandatory/minimum provider qualifications;

(2) scope of services to be provided by the department;

(3) scope of services to be provided by the provider;

(4) proposed contract duration;

(5) proposed method of payment;

(6) any constraints directly relating to the performance of the contract, if applicable;

(7) description of the evaluation criteria including numerical weighting values;

(8) a copy of the evaluation matrices;

(9) type of contract selection;

(10) a copy of the proposed contract, with all attachments;

(11) criteria for breaking ties, if criteria are different from that outlined in §9.85(e) of this subchapter [~~title~~] (relating to Evaluation);

(12) any special contract requirements.

(d) Proposal meeting. The meeting may be either mandatory or optional at the discretion of the department. If the meeting is mandatory, the department will only accept proposals from providers represented at the meeting. The proposal meeting provides an opportunity for the provider to seek clarification or ask questions concerning the 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.

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Bob Jackson
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: November 13, 2011
For further information, please call: (512) 463-8683

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SUBCHAPTER H. GRANT SANCTIONS

43 TAC §9.133

The Texas Department of Transportation (department) proposes amendments to §9.133, Procedure for Imposing Sanctions.

EXPLANATION OF PROPOSED AMENDMENTS

Effective January 6, 2011, 43 TAC §1.8, Internal Ethics and Compliance Program, was repealed and the substance of that rule was moved to new 43 TAC §10.51. The transferred section establishes the minimum requirements of an internal ethics and compliance program required for entities doing business with the department, other than business under highway improvement contracts. At the time of the transfer of that rule, several references in the department's rules were changed from §1.8 to §10.51. However, the reference in §9.133 to §1.8 was overlooked and remained unchanged. The purpose of the amendment is to correct that error.

The amendment to §9.133(b) merely changes the reference from §1.8 to §10.51 to correctly cite the section that currently contains the internal ethics and compliance program requirements.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each year of the first five years in which the amendments as proposed are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the amendments.

Bob Jackson, General Counsel, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the amendments.

PUBLIC BENEFIT AND COST

Mr. Jackson has also determined that for each year of the first five years in which the sections are in effect, the public benefit anticipated as a result of enforcing or administering the amendments will be correct internal section references within the rules of the department. There are no anticipated economic costs for persons required to comply with the sections as proposed. There will be no adverse economic effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments to §9.133 may be submitted to Bob Jackson, General Counsel, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on November 14, 2011.

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE

None.

§9.133. Procedure for Imposing Sanctions.

(a) The assistant executive director may impose sanctions on a subgrantee under §9.135 of this subchapter (relating to Withholding Funds or Disallowing Costs), §9.136 of this subchapter (relating to Suspension or Termination for Cause), or §9.137 of this subchapter (relating to Determination of Ineligibility).

(b) In making the decision whether to impose a sanction, the assistant executive director may consider, as a mitigating factor, whether the subgrantee has adopted and enforces an internal ethics and compliance program that satisfies the requirements of §10.51 [~~§1.8~~] of this title (relating to Internal Ethics and Compliance Program).

(c) If the assistant executive director decides to impose a sanction on a subgrantee, the department will notify the subgrantee of the sanction by certified mail within five working days after the date of the assistant executive director's decision. The notice will summarize the facts and circumstances underlying the sanction, identify the period of the sanction and the deadline for correction of deficient conditions, if applicable, and state that the subgrantee may appeal the sanction in accordance with §9.138 of this subchapter (relating to Appeal of Sanction).

(d) Except as provided by §9.138(d) of this subchapter, a sanction is effective on the date specified in the notice given under subsection (c) of this section.

(e) The imposition of a sanction does not affect a subgrantee's obligations under a grant or subgrant agreement with the department or limit the department's remedies under such an agreement. The department may take any remedy that is legally available.

(f) For purposes of this subchapter, an act or omission by an individual or other person on behalf of a subgrantee is considered to be an act or omission of the subgrantee.

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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Bob Jackson
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: November 13, 2011
For further information, please call: (512) 463-8683

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CHAPTER 12. PUBLIC PARTICIPATION IN LANDSCAPING AND LITTER REMOVAL
SUBCHAPTER A. PUBLIC PARTICIPATION PROGRAMS

43 TAC §§12.1 - 12.11

The Texas Department of Transportation (department) proposes new Chapter 12, Public Participation in Landscaping and Litter Removal, Subchapter A, Public Participation Programs, §12.1, Purpose and Scope; §12.2, Definitions; §12.3, Adopt-a-Highway Program; §12.4, Adopt-a-Highway for Landscaping Program; §12.5, Landscape Cost Sharing Program; §12.6, Adopt-a-Freeway Program; §12.7, Landscape Partnership Program; §12.8, General Sign Restrictions; §12.9, Approval and Appeal; §12.10, Termination or Revision of a Program; and §12.11, Adopt-an-Airport Program.

EXPLANATION OF PROPOSED NEW SECTIONS

The current rules relating to the department's public participation programs, such as the Adopt-a-Highway Program, are contained in 43 TAC Chapter 2, Subchapter D, of the department's rules. Chapter 2 relates to environmental polices and the public participation programs subchapter bears little in common with the other topics contained in the chapter. The changes move the public participation programs to new Chapter 12 to provide flexibility for the structure of revised Chapter 2. To accomplish the move, the new sections merely renumber the sections and change, within the new chapter, the references to sections and other rule divisions accordingly. All changes that are made are non-substantive.

New §12.1, Purpose and Scope, is the same as current §2.61.

New §12.2, Definitions, is the same as current §2.62.

New §12.3, Adopt-a-Highway Program, is the same as current §2.63.

New §12.4, Adopt-a-Highway for Landscaping Program, is the same as current §2.64.

New §12.5, Landscape Cost Sharing Program, is the same as current §2.65.

New §12.6, Adopt-a-Freeway Program, is the same as current §2.66.

New §12.7, Landscape Partnership Program, is the same as current §2.67.

New §12.8, General Sign Restrictions, is the same as current §2.68.

New §12.9, Approval and Appeal, is the same as current §2.69.

New §12.10, Termination or Revision of a Program, is the same as current §2.70.

New §12.11, Adopt-an-Airport Program, is the same as current §2.71.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each year of the first five years the new sections as proposed are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the new sections.

Bob Jackson, General Counsel, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the new sections.

PUBLIC BENEFIT AND COST

Mr. Jackson has also determined that for each year of the first five years in which the sections are in effect, the public benefit anticipated as a result of enforcing or administering the new sections will be better organization of environmental and public participation rules and greater flexibility in the structuring of revised environmental rules. There are no anticipated economic costs for persons required to comply with the sections as proposed. There will be no adverse economic effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed new §§12.1 - 12.11 may be submitted to Bob Jackson, General Counsel, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on November 14, 2011.

STATUTORY AUTHORITY

The new sections are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission (commission) with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §21.054, which provides the department with the authority to contract as necessary or advisable to encourage and assist the development of aeronautics, including the design, construction, repair, maintenance, or improvement of airports and airstrips, and Transportation Code, §203.002, which authorizes and empowers the commission to lay out, construct, maintain, and operate a modern state highway system.

CROSS REFERENCE TO STATUTE

Transportation Code, §21.054 and §203.002.

§12.1. Purpose and Scope.

In order to increase public awareness of the maintenance needs of the state highway and airport systems, improve the aesthetics of state highways and airports, and maximize the use of taxpayer revenue, it is the policy of the Texas Transportation Commission to encourage public participation in the maintenance, landscaping, and beautification of the state highway and airport systems through the creation of programs whereby local governments and private entities may adopt sections of the state highway system or airports for litter pickup, routine maintenance, landscaping, and beautification. The sections under this subchapter govern the operation of these programs.

§12.2. Definitions.

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

(1) Adopt-a-Highway coordinator--A district employee responsible for coordinating the Adopt-a-Highway program within the district's counties.

(2) Adopted section--A section of state highway right of way or an airport approved for adoption by a group.

(3) Airport--A publicly-owned airport that is included in the Texas Airport System Plan (TASP).

(4) Aviation Division--A division of the department.

(5) Authorized representative--An individual with the authority to sign agreements for the group or donor.

(6) Commission--The Texas Transportation Commission.

(7) Department--The Texas Department of Transportation.

(8) Design fee--Those engineering or project administration costs or expenses identified prior to the construction of a project.

(9) District--One of the 25 geographical areas, managed by a district engineer, in which the department conducts its primary work activities.

(10) District engineer--The chief executive officer in charge of a district, or his or her designee.

(11) Donation--A contribution of anything of value given to the department.

(12) Donor--The private business or civic organization that donates funds or services for the purpose of participating in the Landscape Cost Sharing or Adopt-a-Freeway Programs.

(13) Family member--Any spouse, sibling, parent, stepparent, grandparent, child, stepchild, aunt, uncle or cousin.

(14) Group--An entity that adopts a section of state highway right of way or an airport.

(15) Highway landscaping--A project design intent which attempts to provide primarily for the installation of native, naturalized, or adapted plant material within the project limits.

(16) Local government--A city or county.

(17) Non-cash contributions--The agreed value of labor, equipment, material, or design services furnished by a local government or donor in support of the project.

(18) Pedestrian landscaping--A project design intent which requires the installation of elements oriented primarily to pedestrian usage, including, but not limited to, parking, curbs, sidewalks, pavers, ramps for the disabled, cycling or jogging trails, benches, trash receptacles, or illumination.

(19) Project concept plan--The preliminary sketches, drawings, details, estimates, and specifications required by the department to illustrate the type of project development and establishment proposed, and as required for the department to determine if the proposed project is a highway landscaping project or a pedestrian landscaping project.

(20) Project design plan--The final drawings, details, specifications, and estimates as may be required by the department to fully control the work to be performed on the project.

(21) Project development--The initial construction and installation of the landscape items in accordance with the project design plan.

(22) Project establishment--The landscape maintenance activities required to ensure the viability, upkeep, and continued effectiveness of the project.

(23) Project maintenance--The activities performed as determined by the program agreement to ensure the establishment, upkeep, and continued effectiveness of the project.

(24) Sponsor--A local government or other public entity that owns or operates an airport.

(25) Vandalism--Significant and deliberate damage or defacement that renders a sign unreadable or unsightly.

§12.3. Adopt-a-Highway Program.

(a) Purpose. The Adopt-a-Highway Program (Program) allows private citizens an opportunity to support the department's litter prevention programs by adopting a section of highway for the purpose of reducing litter on an adopted section through public participation. This section sets forth policies and procedures to be used in administering the Program.

(b) Participation.

(1) Adoption. An eligible group may, upon approval by the department, adopt a section of a highway on the state highway system for purposes of picking up and removing litter from the rights-of-way of that section under such terms and conditions as may be prescribed by the department and the commission. The adoption of a section of highway is a privilege that may be granted by the department to individuals or groups who would assist the Program in achieving its purpose and goals. The department may deny a request to adopt a section of highway if, in its opinion, granting the request would jeopardize the Program, be counterproductive to its purpose, or create a hazard to the safety of the traveling public. Highway safety is a principal concern in all decisions related to the Program. Program participants must agree to hold the department harmless and agree not to hold the department responsible for any injuries that they may suffer or damages they may cause or suffer as a result of participation in the Program.

(2) Eligibility.

(A) The following groups are eligible to participate in the Program:

(i) members or employees of civic and nonprofit organizations;

(ii) employees of private businesses and governmental entities;

(iii) families; and

(iv) individuals.

(B) To be eligible a group must be located or reside in the county or a county adjacent to the county in which the adopted section is located.

(C) Only individuals or groups who are responsible and wish to assist the department will be allowed to adopt a highway.

(c) Application.

(1) The authorized representative of a group who desires to participate, or to continue to participate, in the Program shall submit an application to the district Adopt-a-Highway coordinator of the district in which the section of highway to be adopted is located.

(2) The application shall be in the form prescribed by the department and shall at a minimum include:

(A) the date of application;

(B) the name and complete mailing address, including street address, of the group;

(C) the name, telephone number, complete mailing address, and e-mail address if applicable, of the group's authorized representative, and the same information for a secondary representative, or in the case of school or university groups, the name and contact information for a faculty sponsor; and

(D) the highway section the group is interested in adopting.

(d) Agreement.

(1) If the application submitted by the group under subsection (c) of this section is approved by the district engineer, the authorized representative of that group shall execute a written agreement with the department providing for the group's participation in the Program.

(2) The agreement shall be in the form prescribed by the department and shall include:

(A) an acknowledgment by the group of the hazardous nature of the work involved in participating in the Program;

(B) an acknowledgment that the members of the group agree jointly and severally to be bound by and comply with the terms of the agreement; and

(C) the respective responsibilities of the group and the department as contained in subsection (e) of this section.

(e) Responsibilities of group and department.

(1) Groups must:

(A) appoint or select an authorized representative and alternate to serve as spokesperson for the group;

(B) obey and abide by all laws and regulations relating to safety and such other terms and conditions as may be required by the district engineer for special conditions on a particular adopted section;

(C) furnish adequate supervision by one or more adults for minor participants of a group who are 15 years of age and older, with at least one adult for every three children who are 7 to 14 years of age;

(D) conduct or attend at least two safety meetings per year and ensure participants of the group attend a safety meeting before participating in the cleanup of the adopted section;

(E) adopt a section that is a minimum of two miles in length unless the district engineer determines a shorter length is in the best interests of the department;

(F) adopt a section for a minimum period of two years;

(G) pick up litter a minimum of four times a year at approximately quarterly intervals and at such additional times as required by the district engineer, unless the district engineer determines that two times a year is adequate to maintain an acceptable right of way (it is desired that one of these pickups occur during the department's annual Don't Mess with Texas trash-off events);

(H) obtain required supplies and materials from the department during regular business hours;

(I) assure that traffic control signs are open during a cleanup and returned to the closed position (or removed in the case of detachable signs) after the cleanup;

(J) wear department furnished safety vests during the pickup;

(K) place litter in trash bags furnished by the department, place filled trash bags at the sign base, and contact the district maintenance office the first working day after the cleanup for removal of the bags;

(L) return all unused materials and supplies to the department within one week following cleanup;

(M) neither possess nor consume alcoholic beverages or illegal drugs while on the adopted section; and

(N) maintain a first-aid kit and adequate drinking water while picking up litter on the adopted section.

(2) The department will:

(A) work with the group to determine the specific section of state highway right of way to be adopted;

(B) erect a sign at each end of the adopted section with the group's name or acronym displayed;

(C) provide traffic control signs, safety vests, trashbags, and safety information;

(D) after notification from the group, remove the filled trashbags the first workday after the pickup; and

(E) remove litter from the adopted section only under unusual circumstances, i.e., to remove large, heavy, or hazardous items or if the group has not fulfilled its responsibilities.

(f) General limiting conditions. The Program is subject to the following conditions.

(1) The department may consider such factors as width of right of way, geometrics, congestion, and sight distance of roadways in determining what sections of highways shall be eligible for adoption. In no circumstance shall a section of an interstate highway be eligible for adoption.

(2) If any actions are determined to be contrary to any legislative restrictions or any restrictions on the use of appropriated funds for political activities, the department, at its sole discretion will take any and all necessary remedial actions, including, but not limited to, the removal of signs displaying the group's name or acronym.

(3) Adopt-a-Highway signs shall be four feet by four feet, shall be the least expensive and most effective for each situation, and will not state the full name or official title of an elected official.

(4) A group may not subcontract or assign its responsibilities to any other group, organization, or enterprise without the express written authorization of the department.

(5) The department, in no event, shall have the right to control the group in performing the details of picking up litter from the section of highway adopted by the group, and, in picking up litter, the group shall act as an independent contractor without direct, on-site supervision from the department.

(6) Children under the age of seven may not participate in the Program.

(g) Modification/renewal/termination of the agreement.

(1) An agreement may be modified in any manner at the sole discretion of the department.

(2) If the department undertakes a construction project on an adopted section, the group may suspend its agreement or choose a new section to adopt for the duration of the construction project.

(3) The group will have the option of renewing an agreement subject to the approval of the district engineer and the continuation of the Program.

(4) The department may terminate an agreement and remove the signs upon 30-day notice, if in its sole judgment it finds and determines that the group is not meeting the terms and conditions of the agreement.

(h) Memorial adoptions. An eligible group may adopt a section of highway as a memorial to an individual who has died as a result of a motor vehicle accident on the state highway system. Except as provided in this subsection, all applicable provisions of this subchapter governing the Adopt-a-Highway program apply to memorial adoptions under this subsection.

(1) The adopting group must include family members of the individual in whose memory the section of highway is adopted.

(2) A sign erected for a memorial adoption may include the phrase "in memory of" and the name of the individual in whose memory the section is adopted, along with the name of the adopting group.

(3) In approving memorial adoptions, the district engineer will consider:

(A) the availability of sections of highway on the state highway system that are appropriate for litter control by volunteers; and

(B) the potential of the proposed adoption to increase public awareness of traffic safety.

(4) The requirements of subsection (b)(2)(B) of this section do not apply if the adopting group adopts the segment of highway on which the accident occurred.

§12.4. Adopt-a-Highway for Landscaping Program.

(a) Purpose. The Adopt-a-Highway for Landscaping Program (Program) augments the Adopt-a-Highway Program, established in §12.3 of this subchapter (relating to Adopt-a-Highway Program) by allowing groups to adopt a section of rural state highway right-of-way for landscape development and maintenance to enhance the beauty of rural Texas highways while preserving the integrity of native Texas flora and providing litter pickup. This section sets forth policies and procedures to be used in administering the Program.

(b) Participation.

(1) Adoption. An eligible group may, upon approval by the department, adopt a rural section of the state highway system for landscape development and maintenance and litter pickup.

(2) Eligibility.

(A) The following groups are eligible to participate in the Program:

(i) members or employees of civic and nonprofit organizations;

(ii) employees of private businesses and governmental entities; and

(iii) families.

(B) To be eligible a group must be located or reside in the county or a county adjacent to the county in which the adopted section is located.

(3) Current participating groups. Groups currently participating in the Program for litter control will be given the opportunity to expand their scope of support by adopting their respective sections of highway right-of-way as a landscape project if their section satisfies requirements relating to right-of-way width, highway geometrics, sight distance, and safety considerations.

(c) Application.

(1) The authorized representative of a group who desires to participate, or continue to participate, in the Program shall submit an application to the district engineer of the district in which the proposed adopted section is located.

(2) The application shall be in the form prescribed by the department and shall at a minimum include:

(A) the date of application;

(B) the name and complete mailing address, including the street address, of the group;

(C) the name, telephone number, and complete mailing address, including street address, of the authorized representative of the group;

(D) the highway section the group is interested in adopting;

(E) whether the group proposes to adopt the section for project development, establishment, and maintenance only, or also for litter control in accordance with §12.3 of this subchapter; and

(F) the project design plan, including sketches, drawings, and specifications as may be required by the department to illustrate the level of landscape development.

(3) Groups currently participating in the Adopt-a-Highway Program will be required to indicate on the application their current participation in such Program.

(d) Agreement.

(1) If the application submitted by the group under subsection (c) of this section is approved by the district engineer, the authorized representative of that group shall enter into a written agreement with the department providing for the group's participation in the Program.

(2) The agreement shall be in the form prescribed by the department and shall at a minimum include the following terms.

(A) The project design plan furnished by the group shall consist of plans, sketches, drawings, notes, and specifications required to fully illustrate the level of project development proposed.

(B) The group shall acknowledge the hazardous nature of the work involved in participating in the Program.

(C) The group shall agree that its members are jointly and severally to be bound by and comply with the terms of the agreement.

(D) The project design plan shall be subject to the approval of the department.

(E) All costs, materials, labor, and equipment necessary for project development shall be furnished by the group.

(F) All costs, materials, labor, and equipment necessary to provide for project establishment and maintenance for a period specified by the department, such period being not less than two consecutive years following the completion of project development, shall be furnished by the group.

(G) The respective responsibilities of the group and the department as cited in subsection (e) of this section.

(H) Conditions by which the agreement may be terminated.

(I) A provision to satisfy legal relations and responsibilities to the public, including insurance and traffic control.

(3) The department's decision will be final with respect to any disputes that may arise concerning the group's responsibilities under the agreement.

(e) Responsibilities of group and department.

(1) Groups must:

(A) appoint an authorized representative who shall have the authority to execute the agreement as defined in subsection (d) of this section;

(B) obey and abide by all laws and regulations relating to safety, and legal relations to the public, and such other terms and conditions as may be required by the district engineer for special conditions on a particular adopted section;

(C) comply with §12.3 of this subchapter if participation includes that Program;

(D) furnish adequate supervision by one or more adults for participants who are 15 years of age or younger;

(E) conduct at least two safety meetings per year and ensure participants of the group attend at least one safety meeting before participating in the cleanup of the adopted section;

(F) adopt the section of highway for a minimum period of two years;

(G) adopt only those sections of highway determined by the department to be appropriate for project development and maintenance;

(H) provide for the establishment of plant material;

(I) water all plant material except seeding at least twice per month during the months of April through September, and at least once per month during the months of October through March, unless in the opinion of the department, sufficient natural rainfall has occurred;

(J) remove weeds and vegetative matter from within the watering basins of all installed plant material at least once per month during the months of April through September, and at least once every other month during the months of October through March;

(K) assure that the fold-down traffic control signs are folded open during project participation and returned to the closed position after project completion each day;

(L) assure each individual participant of the group wears department-furnished safety vests while on the adopted section;

(M) neither possess nor consume alcoholic beverages while on the adopted section;

(N) maintain a first-aid kit and adequate drinking water while on the adopted section; and

(O) act as an independent contractor during project participation.

(2) A group may not subcontract or assign its project responsibilities to any other group, organization, or enterprise, unless expressly authorized by the department.

(3) The department will:

(A) work with the group to determine the specific section of the state highway right-of-way to be adopted;

(B) comply with §12.3 of this subchapter if litter control is included as a portion of the application;

(C) review the group's design plan for project development and reserves the right to require modifications to the design prior to approval; and

(D) provide for the installation of suitable Adopt-a-Highway for Landscaping signs in accordance with existing regulations relating to the Adopt-a-Highway Program, including §12.3(f)(3) of this subchapter.

(f) General limiting conditions and eligibility. The Program is subject to the following conditions.

(1) Only highway right-of-way eligible for the Program for litter control and only those sections which are deemed appropriate for landscape development, as determined by the department, may be adopted. Unless otherwise approved by the department, controlled access highways or routes within urban or metropolitan areas are not eligible for adoption.

(2) The department may consider such factors as width of right-of-way, geometrics, congestion, and sight distance of roadways in determining what highway shall be eligible for adoption.

(3) Limits for adopted sections for landscape development will be subject to the approval of the department.

(4) Plant material will be limited to native and adapted trees, shrubs and wildflower and grass seeding activities.

(5) Groups currently participating in the Adopt-a-Highway Program which submit an application under subsection (c) of this section to participate in the Program may only adopt within the limits of the original adopted section. Project maintenance shall be performed for a period as specified by the department, such period being not less than two consecutive years following the completion of the project development.

(6) Sections currently adopted under the Adopt-a-Highway Program shall not be eligible for adoption under the Adopt-a-Highway for Landscaping Program by any other group until the original adoption under the Adopt-a-Highway Program has expired.

(7) Signs shall be four feet by four feet and shall be the least expensive and most effective for each situation.

(8) With the exception of the Adopt-a-Highway Program, work under the Adopt-a-Highway for Landscaping Program will not be combined with any other landscape-related program sponsored by the department.

(9) If any actions are determined to be contrary to any legislative restrictions or any restrictions on the use of appropriated funds for political activities, the department, at its sole discretion, will take all necessary remedial actions, including, but not limited to, the removal of signs displaying the group's name or acronym.

(g) Modification/renewal/termination of the agreement. The agreement may be modified in any manner at the sole discretion of the department. The group will have the option of renewing the agreement subject to the approval of the district engineer and the continuation of the Program. The department may terminate the agreement and remove the signs upon 30-day notice, if in its sole judgment it finds and determines that the group is not meeting the terms and conditions of the agreement.

§12.5. Landscape Cost Sharing Program.

(a) Purpose. The Landscape Cost Sharing Program (Program) allows private businesses, civic organizations, and local governments an opportunity to support the aesthetic improvement of the state highway system by sharing the project development, establishment, and maintenance cost of landscaping the state highway system. This section sets forth policies and procedures governing the Program.

(b) Participation.

(1) Eligible entities. A local government or a private business or civic may share in the cost of the development, establishment, and maintenance of the landscaping of a segment of the state highway system upon approval of the district engineer. A private business or civic organization is eligible to participate:

(A) as a donor through the local by providing to the local government donations in an amount equal to not less than 25% of the local government's share of the project cost; or

(B) as a non-governmental donor by providing donations directly to the department if the donor is located in the county or a county adjacent to the county in which the project site is located.

(2) Compliance with other rules. The department will process a donation under paragraph (1)(B) of this subsection in accordance with the requirements of Chapter 1, Subchapter G of this title (relating to Donations). If a provision of this section conflicts with a provision of Chapter 1, Subchapter G of this title, this section will prevail.

(3) Sign. The local government or donor will receive recognition of the donation by the erection, at the project site, of a sign announcing participation by the donor in the Program.

(c) Application.

(1) A local government or donor that desires to participate or to continue to participate in the Program shall submit an application to the district engineer of the district in which the project site is located.

(2) The application shall be in the form prescribed by the department and shall at a minimum include:

(A) the date of application;

(B) the name, telephone number, and complete mailing address of the local government or donor;

(C) the highway section the local government or donor is interested in developing;

(D) the project concept plan, containing sketches, drawings, estimates, specifications, and descriptive text as may be required by the department to evaluate the project under required general, site, and design considerations, to determine the proposed design intent, and to estimate the amount of department participation; and

(E) a statement, chart, or spreadsheet based on the project concept plan, which illustrates the recommended responsibilities of the department and the local government and, if applicable, the donor (this statement, chart, or spreadsheet shall contain fully itemized cost figures for each portion of the project as may be required for the department to evaluate the recommended fair-market values for acceptable material and services proposed).

(d) Conditions. In order to participate in the Program, each project must meet the department's approval under general, site, and design considerations.

(1) General considerations. Normally, work on state highway right-of-way will be performed by state forces or by contractors selected and administered by the department. An exception will be granted to allow a local government or donor to perform work on state highway right-of-way when approved by the district engineer.

(A) A local government or donor may participate in the joint beautification of the existing state highway system subject to the following restrictions.

(i) If the project is determined by the department to be a highway-landscaping project, the department will evaluate accepting labor, equipment, materials, design services, and cash as the contribution toward the proposed project.

(ii) If the project is determined by the department to be a pedestrian landscaping project, the department's participation will be limited to furnishing materials only for installation.

(B) Unless waived by the department, projects shall exceed $25,000 if constructed by the department.

(C) The cost of any previous work by the local government or donor shall not be included as a portion of the contribution toward the project.

(D) For a project to be evaluated by the department for work under the Program, the minimum value of acceptable non-cash contributions plus cash contributions by the local government or donor must equal or exceed $2,500.

(E) If the department is to provide for the project, applicable statutes, rules, and procedures relating to the purchase of materials using state funds will apply.

(F) If the department is to provide for the construction of any portion of the project, applicable statutes, rules, and procedures relating to scheduling, processing, and administering a highway improvement project through the department's highway letting process will apply.

(2) Site considerations. For sites to be approved by the department, the following site conditions must be met. The site must:

(A) not be scheduled for future construction as defined within the department's current unified transportation plan which would conflict with the activities proposed on the project;

(B) contain sufficient right-of-way to reasonably permit planting and landscaping operations without conflicting with safety, geometric, and maintenance considerations;

(C) not contain overhead or underground utilities, driveways, pavement, sidewalks, or highway system fixtures including traffic signage or signalization which will conflict with the planting or landscaping operations proposed under the project; and

(D) not obstruct or interfere with existing drainage conditions along the site.

(3) Design considerations. For sites to be approved by the department, the following design considerations must be met.

(A) The project design, as shown on the project concept plan, must be acceptable to the department.

(B) Unless otherwise approved by the department, the project design may not include the following design elements:

(i) plant material or fixtures which, in the opinion of the department, require an intensive level of continued establishment and maintenance in order to assure the effectiveness and function within the design;

(ii) flagpoles or pennant poles;

(iii) fountains or water features; and

(iv) statuary, sculpture, or other art objects.

(C) The following items, if considered by the department as an acceptable element of the project design plan, may not be included as a contribution cost, and will not be furnished or installed by the department:

(i) benches and pedestrian seating;

(ii) pedestrian or historic lighting or illumination systems; and

(iii) trash or refuse receptacles.

(D) The local government or donor must fully illustrate the recommended division of responsibilities as necessary for the department to evaluate the proposed manner of project implementation, establishment, and maintenance if applicable. The illustration of recommended project responsibilities shall at a minimum include:

(i) preparing the project design plan, provided that the cost of providing the project design plan for a pedestrian landscaping project shall be the sole responsibility of the local government or donor, and shall not be included as a portion of its contribution toward the project;

(ii) furnishing and installing required material; and

(iii) performing project establishment and maintenance, if required, provided that the cost of performing project establishment and maintenance on a pedestrian landscaping project shall be the sole responsibility of the local government or donor and shall not be included as a portion of its contribution toward the project.

(E) The local government or donor must fully itemize and document the proposed cash and non-cash contribution available to support the project. This itemization and documentation shall include at a minimum the following items:

(i) amount of cash to be provided to the department;

(ii) non-cash value of each individual item of material to be furnished by the local government or donor;

(iii) cost of each individual item or material to be furnished by the department;

(iv) non-cash value of labor and equipment necessary to install each individual item of material if performed by the local government or donor;

(v) cost of installing each individual item of material if performed by the department; and

(vi) non-cash value of the project design plan if furnished by the local government or donor, provided the maximum acceptable non-cash value of furnishing the project design plan, based upon the selected project cost, including project establishment and maintenance for highway landscaping projects and excluding project establishment and maintenance for pedestrian landscaping projects, shall not exceed 8.5% for projects up to and including $200,000, and 7.5% for projects greater than $200,000.

(e) Amount of departmental participation.

(1) Highway landscaping projects within the existing city limits of a city. The department, after approving the project under general, site, and design considerations, will participate in up to 50% of the total cost of the project including project establishment and maintenance, and preparation of the project design plan.

(2) Pedestrian landscaping within the existing city limits of a city. The department, after approving the project under general, site, and design considerations, will participate by furnishing material only up to but not exceeding 50% of the total cost of project development, excluding project establishment and maintenance and the preparation of the project design plan.

(3) Highway landscaping projects outside the existing city limits of a city. The department, after approving the project under general, site, and design considerations, will participate in up to 50% of the total project development, establishment, maintenance and design cost.

(4) Pedestrian landscaping projects outside existing city limits. Unless otherwise approved, the department will not participate in the cost of these projects under the Program.

(f) Agreement.

(1) If the proposed project as submitted under subsection (c) of this section is approved by the department, the local government or donor shall enter into a written agreement with the department providing participation in the Program. The agreement becomes effective when finally executed by the department and shall terminate upon satisfactory completion of the work as stipulated within the agreement. Work on any phase of the project may not begin until the agreement is fully executed by both parties.

(2) The agreement shall be in the form prescribed by the department and shall at a minimum include the following terms.

(A) The project design plan shall consist of plans, sketches, drawings, notes, estimates, and specifications as required by the department.

(B) Any changes to the agreement shall be enacted by written amendment.

(C) The parties shall not assign or otherwise transfer their obligations under this agreement except with prior written consent of the other party.

(D) The project design plan shall be subject to the review and satisfactory approval by the department prior to a departmental bid opening.

(E) Violation or breach of contract terms shall be grounds for termination of the agreement by the department. In the event of disputes as to obligations under the agreement, the department's decision shall otherwise be final and binding.

(F) The local government or donor and its contractors, if any, shall to the extent provided by law, furnish certificates of insurance, guarantees of self insurance if appropriate, and indemnification as may be prescribed by the department.

(G) The local government or donor shall provide, erect, and maintain to the satisfaction of the department any barricades, signs, and traffic handling devices necessary to protect the safety of the travelling public while performing any work on the project.

(H) The department's employees shall not accept any benefits, gifts, or other.

(3) The agreement shall include the funding arrangement and payment schedule.

(g) General limiting conditions and eligibility. Because of administrative, legislative, and financial constraints, the Program shall be subject to the following terms.

(1) The department will consider such factors as width of right-of-way, geometrics, congestion, sight-distance, and maintenance requirements in determining the acceptability and/or amount of departmental participation in any proposed project.

(2) Signage for the Program shall be four feet by four feet and shall be the least expensive and most effective for each situation. Exceptions to the standard signage must be approved by the department to ensure the safety of the traveling public. All costs associated with non-standard signage shall be paid by the local government or donor and shall not be included as a portion of its contribution toward the project.

(3) Work under the Program shall not be combined with any other landscape-related programs sponsored by the department.

(4) If any actions are determined to be contrary to any legislative restrictions or any restrictions on the use of appropriated funds for political activities, the department shall have the right to take any and all necessary remedial actions, including, but not limited to, the removal of the signs displaying the local governmental entity's or donor's name.

(h) Modification/termination of agreement. The agreement as cited in subsection (f) of this section may be modified in any manner at the sole discretion of the department.

§12.6. Adopt-a-Freeway Program.

(a) Purpose. The Adopt-a-Freeway Program (Program) allows private businesses, civic organizations, and local governments an opportunity to support the department's landscape programs by adopting a section of urban freeway for the purpose of project development and project establishment and maintenance on that section. This section sets forth policies and procedures governing the Program.

(b) Participation in program.

(1) Local government. A local government, upon approval by the district engineer, may adopt a section of urban state highway right-of-way for the purpose of project design, project development, and project establishment and maintenance by assuming the responsibility for all design, construction, establishment, and maintenance costs involved in the project.

(2) Donor.

(A) An eligible private business or civic organization may participate in the Program by providing to the local government cash or non-cash donations in an amount equal to not less than 25% of the project cost. The donor will receive recognition of the donation by the erection at the project site of a sign announcing participation by the donor in the Program.

(B) A private business or civic organization is eligible to participate in the Program as a donor if the business or civic organization is located in the county or a county adjacent to the county in which the adopted section is located.

(c) Application.

(1) A local governmental entity which desires to participate or to continue to participate in the Program shall submit an application to the district engineer of the district in which the adopted section is located.

(2) The application shall be in the form prescribed by the department and shall at a minimum include:

(A) date of application;

(B) the name and complete mailing address of the local government;

(C) the name, telephone number, and complete mailing address of a contact person for the local government;

(D) the highway section the local government is interested in adopting;

(E) if provided by the local government, the project design plan, specifications, and estimates for the work the local government is interested in performing; and

(F) if provided by the department, the estimates, specifications, full descriptive text, sketches, or samples of work proposed by the local government as may be required by the department to produce the project design plan; and

(G) a resolution by the local government that includes:

(i) a statement that it approves participation in the Program;

(ii) a statement that it agrees to accept the responsibility of the project; and

(iii) a statement that the local government agrees and is authorized to enter into the agreement as defined in subsection (d) of this section.

(d) Agreement.

(1) If the application submitted under subsection (c) of this section is approved by the department, the local government shall enter into a written agreement with the department providing for participation in the Program.

(2) The agreement shall be in the form prescribed by the department and shall contain at a minimum the following terms.

(A) The local government shall comply with the terms and conditions set forth in the agreement.

(B) All costs of project design, development, establishment, and maintenance shall be the sole responsibility of the local government. Prior to the date scheduled for contract award the local government shall remit to the department an amount equal to the remainder of the local government's funding share for the project.

(C) If prepared by the local government, the project design plan shall be subject to the review and satisfactory approval by the department prior to a departmental bid opening.

(D) The local government shall agree to provide funding for project establishment, and maintenance contracts let for construction by the department for a period as specified by the department, such period being not less than five consecutive years following the completion of the project development contract.

(E) A list of the respective responsibilities of the local government and the department as cited in subsection (f) of this section.

(F) The local government shall agree to provide necessary indemnification as may be required by the department.

(e) Responsibilities of local government and department.

(1) A local government who desires to participate in the Program shall be subject to the following requirements and responsibilities relating to project development.

(A) If the project design plan is furnished by the local government, the local government must provide:

(i) for the department's review, the project design plan;

(ii) for the department's review, specifications, general notes, and estimates based upon the project design plan as may be necessary to fully document the project development;

(iii) after the department's review, all required revisions to the project design plan, specifications, general notes, and estimates as may be required; and

(iv) after revisions to the project design plan, specifications, general notes, and estimates have been made to the department's satisfaction, one set of reproducible mylars to the format and time schedule as may be required by the department, and three sets of 8 1/2 inches by 11 inches contract documents including specifications, general notes, and estimates.

(B) If the project design plan is to be furnished by the department, the local government must provide:

(i) information which establishes the proposed design concept as may be required by the department (this information may be in the form of descriptive text, sketches, or copies of developments similar to the type of project development proposed by the local government); and

(ii) a check, payable to the Texas Department of Transportation, in the full amount of the design fee.

(C) The local government must provide a check, payable to the Texas Department of Transportation, in the full amount of the final departmental estimate for project development, no later than 60 days prior to the date of the project's scheduled bid opening.

(D) The local government must provide a check, payable to the Texas Department of Transportation, in the full amount of the final departmental estimate for project establishment and maintenance. Prior to the department's scheduled date for contract award,

the local government shall remit to the department an amount equal to the remainder of the local government's funding share for the project.

(2) The department, conditioned on approving the project as submitted by the local government, will be responsible for providing the following services.

(A) Project design plan:

(i) if submitted by the local government the project design plan will be reviewed; and

(ii) if requested by the local government the project design plan will be prepared.

(B) Project development:

(i) scheduling the project for the first available departmental bid opening;

(ii) awarding the construction contract; and

(iii) administering the project during construction.

(C) Project establishment and maintenance:

(i) providing plans, specifications, and estimates as may be required for the establishment and maintenance project;

(ii) scheduling the establishment and maintenance project for the first available departmental bid opening;

(iii) awarding the establishment and maintenance contract; and

(iv) administering the project.

(f) General limiting conditions and eligibility. The Program shall be subject to each of the following conditions.

(1) No section will be approved for adoption if any portion of the section is scheduled for future construction within the department's current unified transportation plan.

(2) Designs which reflect the character of adjacent developments will be accepted by the department provided such designs do not include logos of private entities, civic organizations, or local governments and provided that the local government will provide funding for adequate project development, establishment and maintenance as required by the department.

(3) All major routes including controlled access routes on the highway system within the urban and metropolitan areas will be eligible for adoption.

(4) Signage announcing participation in the Program shall be four feet by four feet and shall be the least expensive and most effective for each situation.

(5) Special landscape features such as fountains, retaining walls, paving or walkway treatment, architectural lighting or landscape treatments which require, in the opinion of the department, high-level maintenance may be submitted and proposed for approval by the department.

(6) Work under the Program will not be combined with any other landscape-related programs sponsored by the department.

(7) The project design plan, if provided by the department, will be scheduled for preparation within the constraints of the department's existing resource capability.

(g) Modification/termination of agreement. The agreement as cited in subsection (d) of this section may be modified at the sole discretion of the department or commission. The agreement may also be terminated as provided in the agreement by mutual agreement and consent of the local government and the department, or by the department, after a 30-day notice, for failure by the local government to fulfill its responsibilities.

§12.7. Landscape Partnership Program.

(a) Purpose. The Landscape Partnership Program (program) allows private businesses, civic organizations, and local governments an opportunity to support the aesthetic improvement of the state highway system by donating the project development, establishment, and maintenance of a landscaped section of the state highway system. This section sets forth policies and procedures governing the program.

(b) Participation.

(1) Eligible entities. A local government or a private business or civic organization may develop, establish, and maintain the landscape of a section of the state highway system upon approval of the district engineer. A private business or civic organization is eligible to participate:

(A) as a donor through the local government by providing donations to the local government; or

(B) as a nongovernmental donor by providing donations directly to the department.

(2) Compliance with other rules. The department will process a donation under paragraph (1)(B) of this subsection in accordance with the requirements of Chapter 1, Subchapter G of this title (relating to Donations). If a provision of this section conflicts with a provision of Chapter 1, Subchapter G of this title, this section will prevail.

(3) Sign. A sign may be erected at the project site, announcing participation in the program. The sign will be erected by the donor and will be maintained for the duration of the project agreement.

(c) Application.

(1) A local government or donor that desires to participate or to continue to participate in the program shall submit an application to the district engineer of the district in which the project site is located.

(2) The application shall be in the form prescribed by the department and shall at a minimum include:

(A) the date of application;

(B) the name, telephone number, and complete mailing address of the local government or donor;

(C) the highway section the local government or donor is interested in developing, establishing, and maintaining; and

(D) the project concept plan containing sketches, drawings, specifications, and descriptive text as may be required by the department to evaluate the project under required general, site, and design consideration, to determine the proposed design intent.

(d) Conditions. In order to participate in the program, each project must meet the department's approval under general, site, and design considerations.

(1) General considerations. Normally, work on state highway right of way will be performed by state forces or under contracts awarded and administered by the department. Under this program, an exception will be granted to allow a local government or donor to perform work on state highway right of way if the project is approved by the district engineer.

(2) Site considerations. For sites to be approved by the department, the following site conditions must be met. The site must:

(A) not be scheduled for future construction, as defined within the department's current unified transportation plan, that would conflict with the activities proposed on the project;

(B) contain sufficient right of way to reasonably permit planting and landscaping operations without conflicting with safety, geometric, and maintenance considerations;

(C) not contain overhead or underground utilities, driveways, pavement, sidewalks, or highway system fixtures including traffic signage or signalization that would conflict with the planting or landscaping operations proposed under the project; and

(D) not contain existing drainage conditions that will be obstructed or otherwise interfered with by the project.

(3) Design considerations. For sites to be approved by the department, the following design considerations must be met.

(A) The project design, as shown on the project concept plan, must be acceptable to the department.

(B) Unless otherwise approved by the department, the project design may not include the following design elements:

(i) plant material or fixtures that, in the opinion of the department, require an intense level of continued establishment and maintenance in order to assure the effectiveness and function within the design;

(ii) flagpoles or pennant poles;

(iii) fountains or water features;

(iv) statuary, sculpture, or other art objects; and

(v) logos or other advertising.

(e) General limiting conditions and eligibility. Because of administrative, legislative, and financial constraints, the program shall be subject to the following terms.

(1) The department will consider such factors as width of right of way, geometrics, congestion, sight distance, and maintenance requirements in determining the acceptability of any proposed project.

(2) Signage for the program shall be four feet by four feet and shall conform to the current Texas Manual on Uniform Traffic Control Devices. All costs associated with signage shall be paid by the local government or donor.

(3) Work under the program shall not be combined with any other landscape-related programs sponsored by the department.

(f) Agreement.

(1) If the proposed project as submitted under subsection (c) of this section is approved by the department, the local government or donor shall enter into a written agreement with the department providing participation in the program. Work on any phase of the project may not begin until the agreement is fully executed by both parties.

(2) The agreement shall be in the form prescribed by the department and shall at a minimum include the following terms.

(A) The project design plan shall consist of plans, sketches, drawings, notes, estimates, maintenance work schedules, and specifications as required by the department.

(B) Any changes to the agreement shall be enacted by written amendment.

(C) The parties shall not assign or otherwise transfer their obligations under this agreement, except with prior written consent of the other party.

(D) The project design plan shall be subject to the review and satisfactory approval by the department prior to installation.

(E) Violation or breach of contract terms shall be grounds for termination of the agreement by the department. In the event of disputes as to obligations under the agreement, the department's decision shall be final and binding.

(F) The local government or donor and its contractors, if any, shall to the extent provided by law, furnish certificates of insurance, guarantees of self insurance if appropriate, and indemnification as may be prescribed by the department.

(G) The local government or donor shall provide, erect, and maintain to the satisfaction of the department any barricades, signs, and traffic handling devices necessary to protect the safety of the traveling public while performing any work on the project.

(H) The agreement shall be for a period of not less than two years. If after two years, the local government or donor desires to continue the project, the agreement shall be subject to renewal.

(3) A donation schedule, if applicable, shall be outlined in the agreement.

(g) Modification/termination of agreement. The agreement as cited in subsection (f) of this section may be modified in any manner at the sole discretion of the department.

(1) If the project is not installed within one year, the agreement becomes void.

(2) If the local government or donor fail to maintain the project according to the schedule outlined in the agreement, the project will be subject to removal at the department's discretion.

§12.8. General Sign Restrictions.

(a) The department is generally prohibited by law from expending any funds, directly or indirectly, for the purpose of influencing the outcome of any election or the passage or defeat of any legislation, and will not erect a sign in violation of this prohibition.

(b) The department will remove a sign erected under this subchapter which is damaged due to vandalism, and will not replace the sign within the terms of the agreement unless the group remits to the department an amount equal to the cost of the replacement sign.

§12.9. Approval and Appeal.

(a) A district engineer who receives an application submitted under this subchapter may defer approval to the executive director or the executive director's designee.

(b) If a district engineer denies, in whole or in part, approval of an application submitted under this subchapter, the applicant may appeal that action to the executive director or the executive director's designee.

§12.10. Termination or Revision of a Program.

A program established under this subchapter may at any time and for any reason be terminated or revised at the sole discretion of the commission.

§12.11. Adopt-an-Airport Program.

(a) Purpose. The Adopt-an-Airport Program (Program) allows private citizens an opportunity to support the department's beautification programs by adopting an airport for the purposes of beautifying and creating a better image and enhancing public awareness for the airport. This section sets forth policies and procedures to be used in administering the Program.

(b) Participation.

(1) Airport.

(A) Only publicly-owned airports included in the Texas Airport System Plan (TASP) are eligible to participate in the Adopt-an-Airport Program.

(B) Eligible airports shall execute an agreement with the department to define their respective responsibilities before the airport may be adopted.

(2) Groups.

(A) The following groups are eligible to participate in the Program:

(i) members or employees of civic and nonprofit organizations;

(ii) employees of private businesses and governmental entities; and

(iii) families.

(B) To be eligible a group must be located or reside in the city or county in which the adopted airport is located.

(c) Application.

(1) The authorized representative of a group that desires to participate, or to continue to participate, in the program shall submit an application to the district engineer of the district in which the airport to be adopted is located.

(2) The application shall be in a form prescribed by the department and shall at a minimum include:

(A) the date of application;

(B) the name and complete mailing address, including street address, of the group;

(C) the name, telephone number, and complete mailing address of the group's authorized representative;

(D) the name of the airport the group is interested in adopting; and

(E) what activities the applicant proposes for maintenance or beautification.

(3) If the group meets the criteria of this section, the district engineer will approve the adoption unless he or she determines that to do so would endanger the traveling public, or otherwise not be in the best interest of the airport.

(d) Agreement.

(1) If the district engineer approves the application submitted by the group under subsection (c) of this section, the authorized representative of that group shall execute a written agreement with the sponsor and the department providing for the group's participation in the Program.

(2) The agreement shall be in the form prescribed by the department and shall include:

(A) an acknowledgment by the group of the possible hazardous nature of the work involved in participating in the Program;

(B) an acknowledgment that the members of the group agree jointly and severally to be bound by and comply with the terms of the agreement; and

(C) a statement of the respective responsibilities of the group and the department as contained in subsection (e) of this section.

(e) Responsibilities of group and department.

(1) Groups must:

(A) appoint or select an authorized representative to serve as spokesperson for the group;

(B) obey and abide by all laws and regulations relating to safety and such other terms and conditions as may be required by the sponsor and the department for special conditions on a particular adopted airport;

(C) furnish adequate supervision by one or more adults for participants of a group who are 15 years of age or younger;

(D) conduct at least one safety meeting per year and ensure participants of the group attend a safety meeting before participating in the beautification of the adopted airport;

(E) adopt an airport for a minimum period of two years;

(F) pick up litter a minimum of four times a year and at such additional times as required by the sponsor or the department, if the group's responsibility is controlling and reducing litter;

(G) obtain required supplies and materials from the sponsor or the department during regular business hours;

(H) wear department furnished safety vests during the tasks being performed;

(I) place litter in trash bags furnished by the department and place filled trash bags at locations as determined by the sponsor or the department, if the group's responsibility is controlling and reducing litter;

(J) return all unused materials and supplies to the sponsor or the department within one week following cleanup unless the materials and supplies are necessary for continued beautification;

(K) neither possess nor consume alcoholic beverages while on the adopted airport; and

(L) maintain a first-aid kit and adequate drinking water while on the adopted airport.

(2) The department will:

(A) work with the group and the sponsor to determine the specific tasks to be performed;

(B) erect a sign on the closest highway right of way, normally near the airport pointer sign, with the group's name or acronym displayed;

(C) provide safety vests, trashbags, and safety literature;

(D) remove the filled trashbags after the pickup; and

(E) remove litter from the adopted section only under unusual circumstances, such as removal of large, heavy, or hazardous items.

(f) General limiting conditions. The Program is subject to the following conditions.

(1) The department may consider such factors as airport size and activity, geometrics, congestion, and visability restrictions in determining which airports shall be eligible for adoption.

(2) If any actions are determined to be contrary to any legislative restrictions on the use of appropriated funds for political activities, the department, at its sole discretion may take any and all nec-

essary remedial actions, including, but not limited to, the removal of signs displaying the group's name or acronym.

(3) Adopt-an-Airport signs shall be four feet by four feet and shall be the least expensive and most effective for each situation. A sign will not state the full name or official title of an elected official.

(4) A group may not subcontract or assign its responsibilities to any other group, organization, or enterprise without the express written authorization of the department.

(5) The department shall not have the right to control the group in performing the agreed upon tasks and/or of picking up litter from the airport adopted by the group; and, in picking up litter, the group shall act as an independent contractor.

(g) Modification/renewal/termination of the agreement. The agreement may be modified in any manner at the discretion of the department. The group will have the option of renewing the agreement subject to the approval of the department and the sponsor, and the continuation of the Program. The department may terminate the agreement and remove the signs upon 30-day notice, if in its sole judgment it finds and determines that the group is not meeting the terms and conditions of the agreement.

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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Bob Jackson
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: November 13, 2011
For further information, please call: (512) 463-8683

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CHAPTER 21. RIGHT OF WAY
SUBCHAPTER K. CONTROL OF SIGNS ALONG RURAL ROADS

43 TAC §21.406

The Texas Department of Transportation (department) proposes amendments to §21.406, Exemptions for Certain Populous Counties, concerning changes to population references in the rules.

EXPLANATION OF PROPOSED AMENDMENTS

Section 56, Article III of the Texas Constitution, generally prohibits the legislature from passing local laws regulating the affairs of political subdivisions. To avoid that prohibition some statutes use population brackets to limit their application to classes of political subdivisions. Unless expressly provided otherwise, a statutory reference to population means the population according to the most recent federal census. As population data changes with the release of each federal census, the political subdivision for which a population bracket was designed may no longer be in the bracket. Therefore, it is usual for the legislature to enact a bill that updates population references in the statutes as necessary after each federal census. The bill reflecting the 2010 federal census changes is House Bill 2702 (HB 2702), 82nd Legislature. Because the bill is essentially enacted simultaneously with the release of the census information, it results in no substantive change in the law.

HB 2702 changes some statutory references that affect existing rules of the Texas Transportation Commission (commission). The amendments made by this rule are being made in conjunction with other rules that change population references in Title 43 of the Texas Administrative Code to conform those references to the changes made by HB 2702.

Amendments to §21.406(a) change "population of 2.4 million or more" to "population of 3.3 million or more" to conform to the change made to Transportation Code, §394.063(a) by Section 130 of HB 2702 and in §21.406(b) to conform to the changes made to Transportation Code, §394.061 by Section 129 of HB 2702.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each year of the first five years the amendments as proposed are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the amendments.

Bob Jackson, General Counsel, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the amendments.

PUBLIC BENEFIT AND COST

Mr. Jackson has also determined that for each year of the first five years in which the amendments are in effect, the public benefit anticipated as a result of enforcing or administering the amendments will be to have commission rules conform to the statutes of the state. There are no anticipated economic costs for persons required to comply with the amendments as proposed. There will be no adverse economic effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments to §21.406 may be submitted to Bob Jackson, General Counsel, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on November 14, 2011.

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §394.004, which provides the commission with the authority to establish rules relating to regulation of outdoor signs on rural roads.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 394, Subchapter D.

§21.406. Exemptions for Certain Populous Counties.

(a) This subchapter does not apply to an off-premise portable sign in an unincorporated area of a county with a population of 3.3 [~~2.4~~] million or more, according to the most recent federal census, if the county either prohibits or regulates the location, height, size, anchoring, or use of such a portable sign.

(b) This subchapter does not apply to an on-premise sign in an unincorporated area of a county with a population of 3.3 [~~2.4~~] million or more or a county that borders such a county if:

(1) the county has adopted an ordinance to regulate on-premise signs; or

(2) the commissioner's court of the county, by order, has authorized the commission to regulate on-premise signs in the unincorporated area of the county in accordance with a municipal or county regulation.

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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Bob Jackson
General Counsel
Texas Department of Transportation
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For further information, please call: (512) 463-8683

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CHAPTER 25. TRAFFIC OPERATIONS
SUBCHAPTER F. HAZARDOUS MATERIAL ROUTING DESIGNATIONS

43 TAC §25.101, §25.103

The Texas Department of Transportation (department) proposes amendments to §25.101, Purpose, and §25.103, Routing Designations by Political Subdivisions, concerning changes to population references in the rules.

EXPLANATION OF PROPOSED AMENDMENTS

Section 56, Article III of the Texas Constitution, generally prohibits the legislature from passing local laws regulating the affairs of political subdivisions. To avoid that prohibition some statutes use population brackets to limit their application to classes of political subdivisions. Unless expressly provided otherwise, a statutory reference to population means the population according to the most recent federal census. As population data changes with the release of each federal census, the political subdivision for which a population bracket was designed may no longer be in the bracket. Therefore, it is usual for the legislature to enact a bill that updates population references in the statutes as necessary after each federal census. The bill reflecting the 2010 federal census changes is HB 2702, 82nd Legislature. Because the bill is essentially enacted simultaneously with the release of the census information, it results in no substantive change in the law.

HB 2702 changes some statutory references that affect existing rules of the Texas Transportation Commission (commission). The amendments made by this rule are being made in conjunction with other rules that change population references in Title 43 of the Texas Administrative Code to conform those references to the changes made by HB 2702.

Amendments to §25.103 change "population of more than 750,000" to "population of more than 850,000" to conform to the change made to Transportation Code, §644.202(b) by Section 177 of HB 2702.

Additionally, the amendments make nonsubstantive changes to §25.103, as well as §25.101, updating obsolete statutory references.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each of the first five years the amendments as proposed are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the amendments.

Bob Jackson, General Counsel, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the amendments.

PUBLIC BENEFIT AND COST

Bob Jackson, General Counsel, has also determined that for each year of the first five years in which the sections are in effect, the public benefit anticipated as a result of enforcing or administering the amendments will be to have commission rules conform to the statutes of the state. There are no anticipated economic costs for persons required to comply with the sections as proposed. There will be no adverse economic effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments to §25.101 and §25.103 may be submitted to Bob Jackson, General Counsel, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on November 14, 2011.

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §644.201, which provides the commission with the authority to establish rules relating to the routing of nonradioactive hazardous materials.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 644, Subchapter E.

§25.101. Purpose.

Transportation Code, §644.201 [~~Texas Civil Statutes, Article 6675d, Section 3A~~] designates the department as the state routing agency for non-radioactive hazardous materials (NRHM), in accordance with Title 49, Code of Federal Regulations, Part 397, Subpart C. Effective January 1, 1998, the department is required to approve all new NRHM routing designations or revisions to routing designations established prior to January 1, 1998 by the Texas Department of Public Safety.

§25.103. Routing Designations by Political Subdivisions.

(a) Purpose. Title 49, Code of Federal Regulations (C.F.R.), Part 397, Subpart C, authorizes a political subdivision of a state to establish NRHM route designations on roads and highways open to the public under the jurisdiction of the political subdivision. Transportation Code, §644.202 [~~Texas Civil Statutes, Article 6675d, §7(f)~~] requires a municipality with a population of more than 850,000 [~~750,000~~] to develop a route for commercial motor vehicles carrying NRHM on a road or highway in the municipality and to submit the proposed route to the department for approval. This section prescribes the responsibilities of political subdivisions in establishing NRHM route designations and requires a political subdivision proposing the establishment of a new or revised NRHM routing designation to comply with this section in order to ensure that all route designations are properly established.

(b) Costs. The political subdivision is responsible for all costs of NRHM route development, including proposal preparation, public hearings, signs, sign supports, sign installation, and sign maintenance.

(c) Initial contact. A political subdivision considering the establishment of a NRHM route shall contact the local district office of the department and any other political subdivisions within a 25 mile radius of any point along the proposed NRHM route, and shall consult with those entities during the process for determining the best NRHM route. Coordination with the Texas Department of Public Safety and the local emergency planning council or committee is encouraged.

(d) Route analysis and proposal. A political subdivision intending to establish a NRHM routing designation shall fully consider and address in writing all of the federal standards and factors listed in 49 C.F.R. §397.71(b) in the route determination process. When analyzing these standards and factors, the political subdivision shall use the most current version of the United States Department of Transportation publication entitled "Guidelines for Applying Criteria to Designate Routes for Transporting Hazardous Materials" or an equivalent routing analysis tool to develop a route proposal. If an equivalent routing analysis tool is used, the political subdivision shall include in its route proposal a written explanation of how the tool is equivalent to the United States Department of Transportation standards.

(e) Local public hearing. A political subdivision shall hold at least one public hearing on any proposed NRHM routing designation. Public hearings may take the form of a city council or commissioners court meeting and shall conform with all applicable state laws governing public meetings, including the Texas Open Meetings Act, Government Code, Chapter 551. Public notification of the hearing shall comply with the following criteria.

(1) The public shall be given 30 days prior notice of the hearing through publication in at least two newspapers of general circulation in the affected area, one of which is a newspaper with statewide circulation.

(2) The notice shall contain a complete description of the proposed route, including the location, route name, highway number if the route is on the state highway system, and beginning and ending points of the route, together with the date, time, and location of the public hearing.

(3) The notice shall initiate a 30-day public comment period and shall inform the public where to send any written comments.

(f) Proposal submission. A political subdivision that has conducted a local public hearing in compliance with subsection (e) of this section shall submit eight copies of the NRHM route designation proposal and one original color map of the proposed NRHM route to the department for approval. The proposal and map shall be submitted to the Texas Department of Transportation, Traffic Operations Division, 125 East 11th Street, Austin, Texas 78701-2483. The proposal shall include:

(1) documentation demonstrating compliance with Title 49, C.F.R. [~~Code of Federal Regulations~~], Part 397, Subpart C, and this section;

(2) a complete description of the proposed route; and

(3) a signature of approval by an authorized official of the political subdivision such as the mayor, city manager, county judge or an equivalent level of authority.

(g) Proposal review. The department will provide the public with notice through publication in the *Texas Register*, a 30-day period in which to comment, and will conduct a public hearing to receive additional comments on the proposed NRHM routing designation. The public hearing will be conducted before the executive director or the designee of the executive director. The department will publish a notice satisfying the criteria identified in subsection (e) of this section in two newspapers of general circulation in the affected area. Public hearings under this subsection will be held in Austin, Texas.

(h) Consultation with other states or Indian tribes. At least 60 days prior to establishing the NRHM routing designation, the department will provide written notice to the officials responsible for NRHM highway routing in all other affected states or Indian tribes. If no response is received within 60 days from the date of receipt of the notification of the proposed routing designation, the routing designation will be considered approved by the affected states or Indian tribes. The department will attempt to resolve any concerns or disagreement expressed by any consulted states or Indian tribes related to the proposed routing designation. If these concerns or disagreements are not resolved, the department will petition the Federal Highway Administration for resolution of the dispute in accordance with 49 C.F.R. §397.75.

(i) Authorization and approval. If the department determines that a route has met all of the criteria for approval, the executive director will approve the NRHM routing designation, notify the political subdivision in writing that the proposed routing designation is authorized, and issue appropriate notice to the Federal Highway Administration and the Texas Department of Public Safety. A political subdivision that is issued a letter of approval shall designate the NRHM route by ordinance, resolution, rule, regulation, or other official order, and shall forward a copy of the order to the department within 30 days of receipt of the letter of approval.

(j) Route signing. After receipt of department approval and passage of the order, the political subdivision shall submit the proposed sign and installation locations of the NRHM route designation to the local district office for approval. All signs must conform to the latest version of the Texas Manual on Uniform Traffic Control Devices. Sign installations shall be coordinated with the local district office prior to placement.

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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Bob Jackson
General Counsel
Texas Department of Transportation
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CHAPTER 26. REGIONAL MOBILITY AUTHORITIES
SUBCHAPTER G. REPORTS AND AUDITS

43 TAC §§26.61 - 26.63, 26.65

The Texas Department of Transportation (department) proposes amendments to §26.61, Written Reports, §26.62, Annual Audits, and §26.63, Other Reports, and new §26.65, Annual Reports to the Commission, all concerning reports and audits of regional mobility authorities (RMA).

EXPLANATION OF PROPOSED AMENDMENTS AND NEW SECTION

Transportation Code, Chapter 370, Subchapter B, provides that after approval by the Texas Transportation Commission (commission), an RMA may be created by one or more counties or by the city of El Paso, Laredo, Brownsville, McAllen, or Port Aransas. A county may become part of an existing RMA if the addition is approved by the commission. Under certain conditions, a county may be allowed to withdraw from an RMA. A county or city that is a part of an RMA has the authority to oversee the activities of the RMA. A city that is part of an RMA is distinguished from a city that merely lies within the boundaries of an authority. Such a city has no oversight authority for the RMA.

Chapter 26, Subchapter G of the department's rules requires RMAs to file several reports with the department. These reports include the annual operating and capital budgets adopted by the RMA under the trust agreement or indenture securing bonds issued for a project and amendments or supplements to such a budget, financial information required to be disclosed under Rule 15c2-12 of the United States Securities and Exchange Commission (17 C.F.R. §240.15c2-12), statements of surplus revenue held by the RMA and the intended use of the surplus revenue, and an independent auditor's reviews of the reports of investment transactions required by law and prepared by an RMA's investment officers under Government Code, §2256.023. An RMA is also required to submit an annual financial and compliance audit of its books and records to the department and any other reports and information regarding its activities that are requested by the commission or the executive director of the department. While state statutes require commission or department approval of some activities of an RMA, such as approval of the construction of a transportation project that will connect to the state highway system or a department rail facility or approval of an application for federal highway or rail funds, neither the commission nor the department has general oversight responsibilities for an RMA. The information should more appropriately be given to the public entity or entities that oversee the operation of the RMA and the purpose of the amendments under this rule is to require an RMA to deliver the information to the public entity or entities.

Amendments to §26.61, Written Reports, change the entity to which an RMA submits certain information from the department to each county or city that is a part of the RMA. Subsection (a) applies to financial and operating reports specified in that subsection and subsection (b) applies to an independent auditor's review of specified investment reports.

Amendments to §26.62, Annual Audits, require that an annual financial and compliance audit of an RMA's books and records be submitted to each county or city that is a part of the RMA rather than to the executive director of the department, as required under the current section. The amendments also delete subsection (e), which requires audit work papers to be made available to the department.

Amendments to §26.63, Other Reports, require an RMA to provide other reports and information relating to the RMA's activities if requested by the counties or cities that are parts of the RMA rather than on request of the commission or department. The amendments also change the heading of the section to more clearly indicate the entities to which the reports are to be made.

New §26.65 relates to annual reports that an RMA is required to provide to the commission. Instead of providing the reports and audits required under §§26.61 - 26.63 to the commission, new §26.65(a) requires an RMA to submit to the executive director of the department an annual report, in the form prescribed by the department, that provides a checklist of each duty that the RMA is required to perform under Subchapter G of Chapter 26 and that indicates that the RMA has performed that requirement for that fiscal year. Each report must be approved by the board of the RMA and certified by the chief administrative officer of the RMA. New §26.65(b) requires an RMA to provide to the commission an annual progress report on each transportation project or system of projects of the RMA, including the initial project for which the RMA was created. These reports are intended to provide the commission and department with the information they need to perform their statutory duties related to RMAs.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each of the first five years in which the amendments and new section as proposed are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the amendments and new section.

Ed Pensock, Interim Director, Texas Turnpike Authority Division, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the amendments and new section.

PUBLIC BENEFIT AND COST

Mr. Pensock has also determined that for each year of the first five years in which the sections are in effect, the public benefit anticipated as a result of enforcing or administering the amendments will be increased accountability between RMAs and the public entities which they report to and represent. There are no anticipated economic costs for persons required to comply with the sections as proposed. There will be no adverse economic effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments to §§26.61 - 26.63 and new §26.65 may be submitted to Ed Pensock, Interim Director, Texas Turnpike Authority Division, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on November 14, 2011.

STATUTORY AUTHORITY

The amendments and new section are proposed under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §370.038, which provides the commission with the authority to establish rules related to regional mobility authorities, and Transportation Code, §370.187, which provides the commission with the authority to establish rules for approval of a regional mobility authority's construction of a transportation project that will connect to the state highway system or to a department rail facility.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 370.

§26.61. Written Reports.

(a) Financial and operating reports. An RMA shall submit the following financial and operating reports to each county or city that is a part of the RMA [~~the department~~]:

(1) the annual operating and capital budgets adopted by the RMA each fiscal year pursuant to the trust agreement or indenture securing bonds issued for a project, and any amended or supplemental operating or capital budget;

(2) annual financial information and notices of material events required to be disclosed under Rule 15c2-12 of the United States Securities and Exchange Commission (17 C.F.R. §240.15c2-12); and

(3) to the extent not otherwise disclosed in another report required under this subsection, a statement of any surplus revenue held by the RMA and a summary of how it intends to use the surplus revenue.

(b) Investment reports. An RMA shall submit to each county or city that is a part of the RMA [~~the department~~] an independent auditor's review, if required by law, of the reports of investment transactions prepared by an RMA's investment officers under Government Code, §2256.023.

(c) Certification. Reports submitted under this section must be approved by official action of the board and certified as correct by the chief administrative officer of the RMA.

(d) Submission dates. Reports required by subsection [~~subsections~~] (a)(1) and (3) of this section must be submitted [~~to the executive director~~] within 90 days after the beginning of the fiscal year or the adoption of any amended or supplemental budget. Reports required by subsection (a)(2) and subsection (b) of this section must be submitted [~~to the executive director~~] within 30 days after disclosure under Rule 15c2-12 or approval of the independent auditor's report.

§26.62. Annual Audits.

(a) General. The RMA shall maintain its books and records in accordance with generally accepted accounting principles in the United States, as promulgated by the Government Accounting Standards Board, the Financial Accounting Standards Board, or pursuant to applicable federal or state laws or regulations, and shall have an annual financial and compliance audit of such books and records in accordance with this section.

(b) Submission date. The annual audit shall be submitted to each county or city that is a part of the RMA [~~the executive director~~] within 120 days after the end of the fiscal year.

(c) Certification. The financial and compliance audit must be conducted by an independent certified public accountant in accordance with generally accepted auditing standards, as modified by the governor's Uniform Grant Management Standards, or the standards of the Office of Management and Budget Circular A-133, Audits of States, Local Governments and Non-profit Organizations, as applicable.

(d) Paperwork retention period. All work papers and reports shall be retained for a minimum of four years from the date of the audit report, unless the counties or cities that are parts of the RMA require a longer [~~the department notifies the RMA in writing to extend the~~] retention period.

~~[(e) Availability of audit work papers. If requested by the department, audit work papers shall be made available to the executive director, within 30 days of request, at any time during the retention period.]~~

§26.63. Other Reports to Counties and Cities.

The RMA will provide other reports and information regarding its activities promptly when requested by the counties or cities that are parts of the RMA [~~commission or the executive director~~].

§26.65. Annual Reports to the Commission.

(a) Compliance Report. Within 30 days after the end of the fiscal year of an RMA, the RMA shall submit to the executive director a report that lists each duty that the RMA is required to perform under this subchapter and that indicates that the RMA has performed that requirement for that fiscal year. Each report submitted under this subsection must be in the form prescribed by the department, approved by official action of the board, and certified as correct by the chief administrative officer of the RMA.

(b) Project Report. Not later than December 31 of each year, an RMA shall submit to the commission a written report that describes the progress made during that year on each transportation project or system of projects of the RMA, including the initial project for which the RMA was created.

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 30, 2011.

TRD-201104108
Bob Jackson
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: November 13, 2011
For further information, please call: (512) 463-8683

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CHAPTER 27. TOLL PROJECTS

The Texas Department of Transportation (department) proposes amendments to §27.40, Purpose, §27.42, Creation, and §27.73, Commission Approval of County Toll Project, concerning changes to population references in the rules.

EXPLANATION OF PROPOSED AMENDMENTS

Section 56, Article III of the Texas Constitution, generally prohibits the legislature from passing local laws regulating the affairs of political subdivisions. To avoid that prohibition some statutes use population brackets to limit their application to classes of political subdivisions. Unless expressly provided otherwise, a statutory reference to population means the population according to the most recent federal census. As population data changes with the release of each federal census, the political subdivision for which a population bracket was designed may no longer be in the bracket. Therefore, it is usual for the legislature to enact a bill that updates population references in the statutes as necessary after each federal census. The bill reflecting the 2010 federal census changes is HB 2702, 82nd Legislature. Because the bill is essentially enacted simultaneously with the release of the census information, it results in no substantive change in the law.

HB 2702 changes some statutory references that affect existing rules of the Texas Transportation Commission (commission). The amendments made by this rule are being made in conjunction with other rules that change population references in Title 43 of the Texas Administrative Code to conform those references to the changes made by HB 2702.

Amendments to §27.40 and §27.42 change "population of 1.5 million or more" to "population of two million or more" to conform to the change made to Transportation Code, §366.031(a) by Section 127 of HB 2702.

Additional amendments to §27.42(b)(3)(A) and (c)(2) update references to the Texas Transportation Plan by changing the reference to statewide transportation plan to conform to current terminology usage.

Amendments to §27.73(a) change "population of more than 1.5 million" to "population of more than two million" to conform to the change made to Transportation Code, §362.055 by Section 126 of HB 2702.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each of the first five years the amendments as proposed are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the amendments.

Bob Jackson, General Counsel, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the amendments.

PUBLIC BENEFIT AND COST

Bob Jackson, General Counsel, has also determined that for each year of the first five years in which the sections are in effect, the public benefit anticipated as a result of enforcing or administering the amendments will be to have commission rules conform to the statutes of the state. There are no anticipated economic costs for persons required to comply with the sections as proposed. There will be no adverse economic effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments to §§27.40, 27.42, and 27.73 may be submitted to Bob Jackson, General Counsel, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on November 14, 2011.

SUBCHAPTER D. REGIONAL TOLLWAY AUTHORITIES

43 TAC §27.40, §27.42

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §366.031, which provides the commission with the authority to establish rules relating to the creation of a regional tollway authority.

CROSS REFERENCE TO STATUTE

Transportation Code, §362.055 and §366.031.

§27.40. Purpose.

Transportation Code, Chapter 366, authorizes two or more counties, if one of the counties has a population of not less than 300,000 and the counties form a contiguous territory, to create a regional tollway authority for the purpose of the expansion and improvement of transportation facilities and systems in this state. Unless one of the counties has a population of two [~~1.5~~] million or more, the creation of a regional tollway authority requires that the counties gain the approval of the Texas Transportation Commission. Transportation Code, §201.113 authorizes the Texas Transportation Commission and a regional tollway authority to enter into an agreement for the improvement by a regional tollway authority of portions of the state highway system. This subchapter prescribes the policies and procedures governing commission approval of the creation of a regional tollway authority and an improvement to the state highway system by a regional tollway authority.

§27.42. Creation.

(a) Purpose. Transportation Code, §366.031 authorizes two or more counties to create a regional tollway authority if: one of the counties has a population of not less than 300,000; the counties form a contiguous territory; and each county, acting through its respective commissioners court, passes an order to propose creation of a regional tollway authority. Unless one of the counties has a population of two [~~more than 1.5~~] million or more, §366.031 requires the approval of the commission for the creation of a regional tollway authority. This section prescribes the policies and procedures governing commission approval of the creation of a regional tollway authority.

(b) Application. To secure commission approval under this section for the creation of a regional tollway authority, the commissioners courts shall jointly submit to the executive director, in a form prescribed by the department, a written request for approval. The request shall be accompanied by:

(1) from each member county, each incorporated city within those counties, and each metropolitan planning organization with jurisdiction in those counties, a resolution of the entity's governing body indicating its support;

(2) a description of how the existence of a regional tollway authority would expand the availability of funding for transportation projects or reduce direct state costs;

(3) a description of the first turnpike project the regional tollway authority intends to undertake including, but not limited to:

(A) an explanation of how the project will be consistent with the appropriate policies, strategies and actions of the statewide transportation plan [~~Texas Transportation Plan~~] and, if appropriate, with the metropolitan transportation plan developed by the metropolitan planning organization;

(B) if the project is in a Clean Air Act nonattainment area, an explanation of how the project will be consistent with the transportation air quality goals outlined in the State Implementation Plan; and

(C) a study of the potential social, economic, and environmental impacts of the initial project.

(c) Approval.

(1) The executive director will determine the sufficiency of the information provided, and if determined to be in compliance with subsection (b) of this section, will submit the application to the commission for approval.

(2) The commission may grant approval for creation of a regional tollway authority if it finds that creation:

(A) will result in construction of a project consistent with the appropriate policies, strategies, and actions of the statewide transportation plan [~~Texas Transportation Plan~~] at an earlier date than the department would otherwise construct the project, and that project is needed to address a severe safety issue, substantially reduce severe traffic congestion, or substantially improve air quality in a nonattainment area more quickly than the department would otherwise attain these goals;

(B) will result in direct benefit to the state, local governments, and the traveling public;

(C) will improve the efficiency of the state's transportation systems and would neither duplicate nor conflict with the opera-

tions of the department, including the Texas Turnpike Authority Division of the department;

(D) will expand the availability of funding for transportation projects or reduce direct state costs;

(E) is supported by each member county, each incorporated city within those counties, and each metropolitan planning organization with jurisdiction within those counties; and

(F) is in the best interest of the state.

(d) Social, environmental, and economic impact. In evaluating the proposed creation of a regional tollway authority, the commission will consider the potential social, environmental, and economic impacts of the initial project.

(e) Contingencies. The commission may make its approval contingent upon the proposed regional tollway authority applicant complying with identified revisions to the proposed project or complying with other conditions determined by the commission as necessary to provide for the health or safety of the traveling public.

(f) Order of approval or disapproval. Approval or disapproval of the creation of a regional tollway authority shall be by written order of the commission, and shall include the rationale, findings, and conclusions on which approval or disapproval is based.

(g) Department responsibility. Approval of the creation of a regional tollway authority shall in no way constitute nor be construed as department assumption of any liability, responsibility, or duty for financing, design, construction, maintenance, or operation of any project under the jurisdiction of the regional tollway 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 30, 2011.

TRD-201104109
Bob Jackson
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: November 13, 2011
For further information, please call: (512) 463-8683

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SUBCHAPTER F. COUNTY TOLL ROADS AND FERRIES

43 TAC §27.73

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §366.031, which provides the commission with the authority to establish rules relating to the creation of a regional tollway authority.

CROSS REFERENCE TO STATUTE

Transportation Code, §362.055 and §366.031.

§27.73. Commission Approval of County Toll Project.

(a) Purpose. Transportation Code, Chapter 284, authorizes a county to construct a toll road project. Transportation Code, §362.051 provides that a governmental or private entity must obtain the commission's approval before beginning construction of a toll project that is to be a part of the state highway system. Transportation Code, §284.008(c) specifies that a county's toll road project will become a part of the state highway system when all the bonds and interest on the bonds of the project are paid, thereby requiring commission approval of a county toll road project under Transportation Code, §362.051. This section prescribes the procedure by which a county may obtain commission approval under Transportation Code, §362.051. This section does not apply to a county toll project for which the commission has adopted an order under Transportation Code, §284.008(d), stating that the project will not become a part of the state highway system under §284.008(c). This section also does not apply to a county with a population of more than two [~~1.5~~] million.

(b) Request. To secure approval of a toll road project under this section, a county shall submit a written request for approval to the executive director. The request must be accompanied by:

(1) a summary of the anticipated financing plan for purposes of seeking the approval described in subsection (e)(2) of this section;

(2) traffic and revenue forecasts;

(3) a detailed schematic indicating the location of interchanges and mainlanes;

(4) a report identifying relocations or reconstruction to state highway system facilities anticipated in connection with the proposed toll road project;

(5) an evaluation of the toll road project's integration into the state highway system;

(6) documentation demonstrating that the environmental review and public involvement for the project have been conducted in the manner prescribed by Chapter 2, Subchapter C of this title (relating to Environmental Review and Public Involvement for Transportation Projects); and

(7) a written commitment to comply with the design and construction standards prescribed in §27.74 of this subchapter (relating to Design and Construction Standards for Toll Road Projects) when developing the toll road project.

(c) Environmental review and public involvement.

(1) When a county proposes to develop a toll road project under this section, the county shall conduct a study of the social and environmental impacts of the project in accordance with Chapter 2, Subchapter C, of this title.

(2) The county shall provide for public involvement by complying with §2.43(c) of this title (relating to Non Federal-Aid Transportation Projects).

(3) When a county proposes to develop a toll road project under this section and requests federal-aid or federal-aid and state highway funds to assist with the project, the project shall be developed in accordance with §2.50 of this title (relating to Financial Assistance for Toll Facilities and Pass-Through Toll Projects).

(4) When a county proposes a toll road project under this section and no federal-aid or state highway funds are used, the county shall complete environmental studies and public involvement in accordance with all applicable federal and state requirements and in accordance with Chapter 2, Subchapter C, of this title.

(d) Respective roles and responsibilities. The county shall request that the department make a determination of the respective roles

and responsibilities of the county and the department under Chapter 2, Subchapter C, of this title. The county shall comply with the department's directives. The directives will specify who will conduct the following work, either by the county or by the department:

(1) preparation and completion of environmental studies;

(2) submission of appropriate environmental documentation for department review;

(3) preparation of any document revisions;

(4) submission of copies of the environmental studies and documentation adequate for distribution;

(5) preparation of legal and public notices for department review and use;

(6) arrangements for appropriate public involvement, including court reporters and accommodations if requested for persons with special communication or physical needs related to the public hearing;

(7) preparation of public meeting and hearing materials;

(8) preparation of any responses to comments;

(9) preparation of public meeting and public hearing summary and analysis, the comment and response reports, and submission of a verbatim transcript of any public hearing and a signed certification that the hearing has been held in accordance with §2.43(c) of this title (relating to Non Federal-Aid Transportation Projects), the Civil Rights Act of 1964, and the Civil Rights Restoration Act of 1987; and

(10) submission of documentation showing that all EPIC have been or will be completed, including copies of permits or other approvals required prior to construction.

(e) Approval. In deciding whether to approve a county toll road project, the commission will consider whether:

(1) the toll road project may be effectively integrated into the state highway system;

(2) the department is able to construct any connecting roads necessary for the toll road project to generate sufficient revenue to pay the debt incurred for its construction; and

(3) the environmental review and public involvement for the toll road project have been conducted in the manner prescribed by Chapter 2, Subchapter C of this title [~~(relating to Environmental Review and Public Involvement for Transportation Projects)~~].

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 30, 2011.

TRD-201104110
Bob Jackson
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: November 13, 2011
For further information, please call: (512) 463-8683

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CHAPTER 28. OVERSIZE AND OVERWEIGHT VEHICLES AND LOADS

SUBCHAPTER G. PORT OF BROWNSVILLE PORT AUTHORITY PERMITS

43 TAC §§28.90 - 28.92

The Texas Department of Transportation (department) proposes amendments to §§28.90 - 28.92, concerning Port of Brownsville Port Authority Permits.

EXPLANATION OF PROPOSED AMENDMENTS

The proposed amendments grant the Port of Brownsville additional authority to issue permits for the operation of overweight vehicles on the designated highways within the port facilities.

Amendments to §28.90 add language to allow the Port of Brownsville to issue permits for the operation of overweight vehicles on State Highway 48/State Highway 4 past the entrance of the Port of Brownsville to any location along State Highway 48 within the port facility. This will provide the Port of Brownsville with the ability to extend its permitting process to other businesses that are within the port area.

Amendments to §28.91 add language expanding the route for the overweight permits to include any location along that highway within the Port of Brownsville. State Highway 48 travels through the Port of Brownsville and is parallel to the Brownsville Ship Channel. The extension authorized by this language change will allow the permits issued by the Port of Brownsville to be used for travel within the port area along State Highway 48. This will allow the Port to work on permitting issues with additional businesses within the area.

The language in §28.91(h) is amended to accommodate the change to the route in §28.91(g) by removing the reference to the specific starting and ending points of the route. The new language references the portions of the roadways for which the Port of Brownsville may issue a permit. This change addresses the current language revisions and will also be appropriate if future revisions become necessary.

Amendments to §28.92 are made so that it is consistent with the changes made to the route in §28.91. The changes to this section authorize the appropriate route information to be included on the permit application.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each of the first five years in which the amendments as proposed are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the amendments.

Carol Davis, Director Motor Carrier Division, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the amendments.

PUBLIC BENEFIT AND COST

Ms. Davis has also determined that for each year of the first five years in which the sections are in effect, the public benefit anticipated as a result of enforcing or administering the amendments will be increased efficiency in the issuance of permits for the Port of Brownsville area. There are no anticipated economic costs for persons required to comply with the sections as proposed. There will be no adverse economic effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments to §§28.90 - 28.92 may be submitted to Carol Davis, Director Motor Carrier Division, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on November 14, 2011.

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE

Transportation Code §§623.210 - 623.219.

§28.90. Purpose.

In accordance with Transportation Code, Chapter 623, Subchapter K, the department may authorize the Brownsville Navigation District of Cameron County, Texas (Port of Brownsville) to issue permits for the movement of oversize or overweight vehicles carrying cargo on State Highway 48/State Highway 4 between the Gateway International Bridge and any location along that highway within [~~the entrance to~~] the Port of Brownsville, or on U.S. Highway 77/U.S. Highway 83 and State Highway 48/State Highway 4 between the Veterans International Bridge at Los Tomates and any location along that highway within [~~the entrance to~~] the Port of Brownsville. This subchapter sets forth the requirements and procedures applicable to the issuance of permits by the Port of Brownsville for the movement of oversize and overweight vehicles.

§28.91. Responsibilities.

(a) Surety bond. The department may require the Port of Brownsville to post a surety bond in the amount of $500,000 for the purpose of reimbursing the department for actual maintenance costs of State Highway 48/State Highway 4 and U.S. Highway 77/U.S. Highway 83 in the event that sufficient revenue is not collected from permits issued under this subchapter.

(b) Verification of permits. All permits issued by the Port of Brownsville shall be carried in the permitted vehicle. The Port of Brownsville shall provide access for verification of permit authenticity by law enforcement and department personnel.

(c) Training. The Port of Brownsville shall secure any training necessary for personnel to issue permits under this subchapter. The department may provide assistance with training upon request by the Port of Brownsville.

(d) Accounting. The department shall develop accounting procedures related to permits issued under this subchapter which the Port of Brownsville must comply with for the purpose of revenue collections and any payment made to the department under subsection (h) of this section.

(e) Audits. The department may conduct audits annually or upon direction by the executive director of all Port of Brownsville permit issuance activities. In order to insure compliance, audits will at a minimum include a review of all permits issued, financial transaction records related to permit issuance, review of vehicle scale weight tickets and monitoring of personnel issuing permits under this subchapter.

(f) Revocation of authority to issue permits. If the department determines as a result of an audit that the Port of Brownsville is not complying with this subchapter, the executive director will issue a notice to the Port of Brownsville allowing 30 days to correct any non-compliance issue. If after 30 days it is determined that the Port of Brownsville is not in compliance, then the executive director may revoke the Port of Brownsville's authority to issue permits.

(1) Upon notification that its authority to issue permits under this subchapter has been revoked, the Port of Brownsville may appeal the revocation to the commission in writing.

(2) In cases where a revocation is being appealed, the Port of Brownsville's authority to issue permits under this subchapter shall remain in effect until the commission makes a final decision regarding the appeal.

(3) Upon revocation of authority to issue permits, termination of the maintenance contract, or expiration of this subchapter, all permit fees collected by the port, less allowable administrative costs, shall be paid to the department.

(g) Fees. Fees collected under this subchapter shall be used solely to provide funds for the payments provided for under Transportation Code, §623.213, less administrative costs.

(1) The permit fee shall not exceed $80 per trip. The Port of Brownsville may retain up to 15% of such permit fees for administrative costs, and the balance of the permit fees shall be deposited in the state highway fund to be used for maintenance of State Highway 48/State Highway 4 and U.S. Highway 77/U.S. Highway 83.

(2) The Port of Brownsville may issue a permit and collect a fee for a permit issued under this subchapter for any vehicle or vehicle combination exceeding vehicle size or weight as specified by Transportation Code, Chapter 621, Subchapters B and C, originating at:

(A) the Gateway International Bridge traveling only on State Highway 48/State Highway 4 to any location along that highway within the Port of Brownsville;

(B) a location within the Port of Brownsville traveling on State Highway 48/State Highway 4 to the Gateway International Bridge;

(C) the Veterans International Bridge at Los Tomates, traveling on U.S. Highway 77/U.S. Highway 83 and State Highway 48/State Highway 4 [~~to the entrance~~] to any location along that highway within Port of Brownsville; or

(D) a location within the Port of Brownsville, traveling on State Highway 48/State Highway 4 and U.S. Highway 77/U.S. Highway 83 to the Veterans International Bridge at Los Tomates.

(h) Maintenance Contract. The Port of Brownsville shall enter into a maintenance contract with the department for the maintenance of the portions of State Highway 4, State Highway 48, and [~~State Highway 48/State Highway 4 between the Gateway International Bridge and the Port of Brownsville and the maintenance of~~] U.S. Highway 77/U.S. Highway 83 for which a permit may be issued under this subchapter [~~and State Highway 48/State Highway 4 between the Veterans International Bridge at Los Tomates and the Port of Brownsville~~].

(1) Maintenance shall include, but is not limited to, routine maintenance, preventive maintenance, and total reconstruction of the roadway and bridge structures as determined by the department to maintain the current level of service.

(2) The Port of Brownsville may make direct restitution to the department for actual maintenance costs in lieu of the department filing against the surety bond described in subsection (a) of this section, in the event that sufficient revenue is not collected.

(i) Reporting. Brownsville Port Authority shall provide monthly and annual reports to the department's Finance Division regarding all permits issued and all fees collected during the period covered by the report. The report must be in a format approved by the department.

§28.92. Permit Issuance Requirements and Procedures.

(a) Permit application. Application for a permit issued under this subchapter shall be in a form approved by the department, and shall at a minimum include:

(1) the name of the applicant;

(2) date of issuance;

(3) signature of the director of the Port of Brownsville;

(4) a statement of the kind of cargo being transported;

(5) the maximum weight and dimensions of the proposed vehicle combination, including number of tires on each axle, tire size for each axle, distance between each axle, measured from center of axle to center of axle, and the specific weight of each individual axle when loaded;

(6) the kind and weight of each commodity to be transported, not to exceed loaded dimensions of 12' wide, 15'6" high, 110' long or 125,000 pounds gross weight;

(7) a statement of any condition on which the permit is issued;

(8) a statement that the cargo shall be transported over the most direct route using State Highway 48/State Highway 4 between the Gateway International Bridge and any location along that highway within the Port of Brownsville, or using U.S. Highway 77/U.S. Highway 83 and State Highway 48/State Highway 4 between the Veterans International Bridge at Los Tomates and any location along that highway within the Port of Brownsville;

(9) the location where the cargo was loaded; and

(10) the date or dates on which movement authorized by the permit is allowed.

(b) Permit issuance.

(1) General.

(A) The original permit must be carried in the vehicle for which it is issued.

(B) A permit is void when an applicant:

(i) gives false or incorrect information;

(ii) does not comply with the restrictions or conditions stated in the permit; or

(iii) changes or alters the information on the permit.

(C) A permittee may not transport an overdimension or overweight load with a voided permit.

(2) Payment of permit fee. The Port of Brownsville may determine acceptable methods of payment. All fees transmitted to the department must be in U.S. currency.

(c) Maximum permit weight limits.

(1) An axle group must have a minimum spacing of four feet, measured from center of axle to center of axle, between each axle in the group to achieve the maximum permit weight for the group.

(2) Two or more consecutive axle groups must have an axle spacing of 12 feet or greater, measured from the center of the last axle of the preceding group to the center of the first axle of the following group, in order for each group to be permitted for maximum permit weight.

(3) Maximum permit weight for an axle or axle group is based on 650 pounds per inch of tire width or the following axle or axle group weights, whichever is the lesser amount:

(A) single axle--25,000 pounds;

(B) two axle group--46,000 pounds;

(C) three axle group--60,000 pounds;

(D) four axle group--70,000 pounds;

(E) five axle group--81,400 pounds; or

(F) trunnion axles--60,000 pounds if;

(i) the trunnion configuration has two axles;

(ii) there are a total of 16 tires for a trunnion configuration; and

(iii) the trunnion axle as shown in the following diagram is 10 feet in width.

Figure: 43 TAC §28.92(c)(3)(F)(iii) (No change.)

(4) A permit issued under this subchapter does not authorize the vehicle to exceed manufacturer's tire load rating.

(d) Vehicles exceeding weight limits. Any vehicle exceeding weight limits outlined in subsection (c) of this section, shall apply directly to the department for an oversize or overweight permit in accordance with §28.11 of this chapter (relating to General Oversize/Overweight Permit Requirements and Procedures).

(e) Registration. Any vehicle or combination of vehicles permitted under this subchapter shall be registered in accordance with Transportation Code, Chapter 502.

(f) Travel conditions. Movement of a permitted vehicle is prohibited when visibility is reduced to less than 2/10 of one mile or the road surface is hazardous due to weather conditions such as rain, ice, sleet, or snow, or highway maintenance or construction work.

(g) Daylight and night movement restrictions. An oversize permitted vehicle may be moved only during daylight hours; however, an overweight only permitted vehicle may be moved at any time.

(h) Restrictions.

(1) Any vehicle issued a permit by the Port of Brownsville must be weighed on scales capable of determining gross vehicle weights and individual axle loads. For the purpose of ensuring the accuracy of the permit, the scales must be certified by the Texas Department of Agriculture or accepted by the United Mexican States.

(2) A valid permit and certified weight ticket must be presented to the gate authorities before the permitted vehicle shall be allowed to exit or enter the port.

(3) The owner of a vehicle permitted under this subchapter must be registered as a motor carrier in accordance with Transportation Code, Chapters 643 or 645, prior to the oversize or overweight permit being issued. The Port of Brownsville shall maintain records relative to this subchapter, which are subject to audit by department personnel.

(4) Permits issued by the Port of Brownsville shall be in a form prescribed by the department.

(5) The maximum speed for a permitted vehicle shall be 55 miles per hour or the posted maximum, whichever is less.

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 30, 2011.

TRD-201104111
Bob Jackson
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: November 13, 2011
For further information, please call: (512) 463-8683

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WITHDRAWN RULES

Withdrawn Rules include proposed rules and emergency rules. A state agency may specify that a rule is withdrawn immediately or on a later date after filing the notice with the Texas Register. A proposed rule is withdrawn six months after the date of publication of the proposed rule in the Texas Register if a state agency has failed by that time to adopt, adopt as amended, or withdraw the proposed rule. Adopted rules may not be withdrawn. (Government Code, §2001.027)

TITLE 7. BANKING AND SECURITIES

PART 7. STATE SECURITIES BOARD

CHAPTER 115. SECURITIES DEALERS AND AGENTS

7 TAC §115.3

The State Securities Board withdraws the proposed amendment to §115.3 which appeared in the August 12, 2011, issue of the *Texas Register* (36 TexReg 5061).

Filed with the Office of the Secretary of State on September 30, 2011.

TRD-201104090
Benette L. Zivley
Securities Commissioner
State Securities Board
Effective date: September 30, 2011
For further information, please call: (512) 305-8303

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CHAPTER 116. INVESTMENT ADVISERS AND INVESTMENT ADVISER REPRESENTATIVES

7 TAC §116.3

The State Securities Board withdraws the proposed amendment to §116.3 which appeared in the August 12, 2011, issue of the *Texas Register* (36 TexReg 5062).

Filed with the Office of the Secretary of State on September 30, 2011.

TRD-201104091
Benette L. Zivley
Securities Commissioner
State Securities Board
Effective date: September 30, 2011
For further information, please call: (512) 305-8303

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TITLE 16. ECONOMIC REGULATION

PART 4. TEXAS DEPARTMENT OF LICENSING AND REGULATION

CHAPTER 83. COSMETOLOGISTS

16 TAC §§83.10, 83.20, 83.21, 83.25, 83.31, 83.70 - 83.72, 83.74, 83.80, 83.120

The Texas Department of Licensing and Regulation withdraws the proposed amendments to §§83.10, 83.20, 83.21, 83.25, 83.31, 83.70 - 83.72, 83.74, 83.80, and 83.120 which appeared in the July 1, 2011, issue of the *Texas Register* (36 TexReg 4073).

Filed with the Office of the Secretary of State on September 30, 2011.

TRD-201104133
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Effective date: September 30, 2011
For further information, please call: (512) 463-5386

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16 TAC §83.75

The Texas Department of Licensing and Regulation withdraws the proposed repeal of §83.75 which appeared in the July 1, 2011, issue of the *Texas Register* (36 TexReg 4073).

Filed with the Office of the Secretary of State on September 30, 2011.

TRD-201104134
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Effective date: September 30, 2011
For further information, please call: (512) 463-5386

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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 4. OFFICE OF THE SECRETARY OF STATE

CHAPTER 71. GENERAL POLICIES AND PROCEDURES

SUBCHAPTER A. PRACTICE AND PROCEDURE

1 TAC §71.14

The Office of the Secretary of State adopts an amendment to §71.14, Credit Card Payment Option, without changes to the proposal published in the August 26, 2011, issue of the *Texas Register* (36 TexReg 5275). The adopted section will not be republished.

The section concerns payment of fees to the Office of the Secretary of State by credit card. The amendment adds American Express to the list of accepted credit cards in subsections (a), (c), and (d)(1) because the Office of the Secretary of State now accepts this method of payment.

Subsection (c) is also amended to reflect that the credit card convenience fee is charged to payments submitted by facsimile, as well as payments submitted by the Internet or by phone.

Along with the other amendments, subsection (d) is amended to correct a nonsubstantive error. The word "and" is added between paragraphs (4) and (5).

No comments were received concerning the amendment.

Statutory authority: This amendment is adopted under the authority of the Administrative Procedure Act, Chapter 2001, Texas Government Code; the Membership Camping Resort Act, Chapter 222, Texas Property Code, which provides that the Secretary of State shall prescribe forms and set fees for registration of membership camping resorts; and §53.025, Texas Occupations Code, which requires a licensing authority to issue guidelines related to the revocation, suspension, or denial of licenses due to criminal convictions.

Cross reference to statute: No other statutes, articles, or codes are affected by the 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 30, 2011.

TRD-201104121
Lorna Wassdorf
Director, Business and Public Filings
Office of the Secretary of State
Effective date: October 20, 2011
Proposal publication date: August 26, 2011
For further information, please call: (512) 463-5562

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CHAPTER 95. UNIFORM COMMERCIAL CODE

SUBCHAPTER A. GENERAL PROVISIONS

1 TAC §95.113

The Office of the Secretary of State adopts an amendment to §95.113, Methods of Payment, without changes to the proposal published in the August 26, 2011, issue of the *Texas Register* (36 TexReg 5276). The adopted section will not be republished.

The amendment adds American Express to the list of accepted credit cards in paragraph (5) of the section because the Office of the Secretary of State now accepts this method of payment.

Paragraph (4) is also amended to reflect that the credit card convenience fee is charged to payments submitted by facsimile, as well as payments submitted by the Internet or by phone.

No comments were received concerning the amendment.

Statutory authority: The amendment is adopted under §§9.501 - 9.527, Texas Business and Commerce Code; §§35.01 - 35.09, Texas Business and Commerce Code; §§14.001 - 14.007, Texas Property Code; §§70.3031 - 70.307, Texas Property Code; §§70.401 - 70.410, Texas Property Code; Chapter 128, Texas Agriculture Code; Chapter 188, Texas Agriculture Code; §42.22, Texas Code of Criminal Procedure; and §§51.901 - 51.905, Texas Government Code, which provides the Secretary of State with the authority to adopt rules necessary to administer Subchapter D of Chapter 9, Texas Business and Commerce Code; Subchapter A of Chapter 35, Miscellaneous; Chapter 14, Uniform Federal Lien Registration Act; Subchapter D, Chapter 70, Texas Property Code; Subchapter E, Chapter 70, Texas Property Code; Subtitle H of Title 5, Texas Agriculture Code; Subtitle E of Title 6, Texas Agriculture Code; and Subchapter J of Chapter 51, Texas Government Code.

Cross reference to statute: No other statutes, articles, or codes are affected by the 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 30, 2011.

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Lorna Wassdorf
Director, Business and Public Filings
Office of the Secretary of State
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For further information, please call: (512) 463-5562

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CHAPTER 96. ELECTRIC UTILITY TRANSITION PROPERTY NOTICE FILINGS
SUBCHAPTER A. GENERAL PROVISIONS

1 TAC §96.6

The Office of the Secretary of State adopts an amendment to §96.6, Methods of Payment, without changes to the proposal published in the August 26, 2011, issue of the *Texas Register* (36 TexReg 5277). The adopted section will not be republished.

The amendment adds American Express to the list of accepted credit cards in paragraph (5) of the section because the Office of the Secretary of State now accepts this method of payment.

Paragraph (4) is also amended to reflect that the credit card convenience fee is charged to payments submitted by facsimile, as well as payments submitted by the Internet or by phone.

A new paragraph (6) concerning LegalEase is added to make §96.6 consistent with §95.113, Methods of Payment, of the Secretary of State's rules.

No comments were received concerning the amendment.

Statutory authority: The amendment is adopted under §§9.501 - 9.527, Texas Business and Commerce Code and §39.309, Texas Utilities Code, which provides the Secretary of State with the authority to adopt rules necessary to administer Subchapter D of Chapter 9, Texas Business and Commerce Code and Subchapter G of Chapter 39, Texas Utilities Code.

Cross reference to statute: No other statutes, articles, or codes are affected by the 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 30, 2011.

TRD-201104123
Lorna Wassdorf
Director, Business and Public Filings
Office of the Secretary of State
Effective date: October 20, 2011
Proposal publication date: August 26, 2011
For further information, please call: (512) 463-5562

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TITLE 4. AGRICULTURE

PART 1. TEXAS DEPARTMENT OF AGRICULTURE

CHAPTER 19. QUARANTINES AND NOXIOUS AND INVASIVE PLANTS
SUBCHAPTER R. FORMOSAN TERMITE QUARANTINE

4 TAC §19.181

The Texas Department of Agriculture (the department) adopts an amendment to §19.181 concerning a quarantine for the Formosan subterranean termite, *Coptotermes formosanus* Shiraki, without changes to the proposal published in the August 12, 2011, issue of the *Texas Register* (36 TexReg 5059). The amendment is made to add Hays County to the list of subterranean termite-infested counties in Texas. The Texas A&M University scientists recently informed the department that the subterranean termite infestation was detected in Hays County. The amendment was adopted on an emergency basis on June 27, 2011, as published in the July 15, 2011, issue of the *Texas Register* (36 TexReg 4481). The amendment is now adopted on a permanent basis to restrict the movement of quarantined articles from the infested county, and thereby delay the spread of this termite into free areas of Texas. The amendment to §19.181 adds Hays County to the list of the Formosan subterranean termite-infested counties in Texas.

No comments were received on the proposal.

The amendment to §19.181 is adopted under the Texas Agriculture Code (the Code) §71.002, which provides the department with the authority to quarantine an area if it determines that a dangerous insect pest or plant disease not widely distributed in this state exists within an area of the state; the Code, §71.003, which provides the department with the authority to declare an area pest-free and quarantine surrounding areas if it determines that an insect pest or plant disease of general distribution in this state does not exist in an area; and the Code, §71.007, which authorizes the department to adopt rules as necessary to protect agricultural and horticultural interests, including rules to provide for a specific treatment of quarantined articles.

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 27, 2011.

TRD-201104012
Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
Effective date: October 24, 2011
Proposal publication date: August 12, 2011
For further information, please call: (512) 463-4075

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TITLE 16. ECONOMIC REGULATION

PART 8. TEXAS RACING COMMISSION

CHAPTER 321. PARI-MUTUEL WAGERING
SUBCHAPTER A. MUTUEL OPERATIONS

The Texas Racing Commission adopts amendments to 16 TAC §§321.1, 321.35, 321.41, and 321.42, concerning pari-mutuel wagering definitions; claims for payment on winning pari-mutuel tickets and vouchers; cashing of outstanding tickets; and cashing of outstanding vouchers. The rule amendments are adopted without changes to the proposed text as published in the July 8, 2011, issue of the *Texas Register* (36 TexReg 4238) and will not be republished.

The adopted amendments will enable racetrack associations to pay patrons, under limited circumstances, for winning pari-mutuel tickets or vouchers that have been lost or destroyed.

The amendment to §321.1, Definitions and General Provisions, defines "Player Tracking System" to mean a system that provides detailed information about the pari-mutuel play activity of patrons who volunteer to participate. Player Tracking Systems facilitate the payment of lost or destroyed tickets and vouchers by demonstrating that particular patrons purchased those tickets and vouchers.

The amendment to §321.35, Claim for Payment, establishes the process by which a patron may file a claim for a lost ticket or voucher. The amendment also establishes the criteria that an association must follow in determining whether to pay a claim, and the process a patron may use to appeal if the association does not pay a claim.

The amendment to §321.41, Cashing Outstanding Tickets, provides that an association will not be held liable for a lost or destroyed ticket if it is cashed in accordance with amended §321.35.

The amendment to §321.42, Cashing Outstanding Vouchers, provides that an association will not be held liable for a lost or destroyed voucher if it is cashed in accordance with amended §321.35.

No comments were received regarding adoption of the amendment.

DIVISION 1. GENERAL PROVISIONS

16 TAC §321.1

The amendment is adopted under Texas Revised Civil Statutes Annotated Article 179e, §11.01, which requires the Commission to adopt rules to regulate pari-mutuel wagering on greyhound and horse racing.

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 October 3, 2011.

TRD-201104160
Mark Fenner
General Counsel
Texas Racing Commission
Effective date: October 23, 2011
Proposal publication date: July 8, 2011
For further information, please call: (512) 833-6699

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DIVISION 3. MUTUEL TICKETS AND VOUCHERS

16 TAC §§321.35, 321.41, 321.42

The amendments are adopted under Texas Revised Civil Statutes Annotated Article 179e, §11.01, which requires the Commission to adopt rules to regulate pari-mutuel wagering on greyhound and horse racing.

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 October 3, 2011.

TRD-201104162
Mark Fenner
General Counsel
Texas Racing Commission
Effective date: October 23, 2011
Proposal publication date: July 8, 2011
For further information, please call: (512) 833-6699

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TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 109. BUDGETING, ACCOUNTING, AND AUDITING
SUBCHAPTER AA. COMMISSIONER'S RULES CONCERNING FINANCIAL ACCOUNTABILITY
DIVISION 1. FINANCIAL ACCOUNTABILITY RATING SYSTEM

19 TAC §109.1002

The Texas Education Agency (TEA) adopts an amendment to §109.1002, concerning the financial accountability rating system. The amendment is adopted with changes to the proposed text as published in the June 3, 2011, issue of the *Texas Register* (36 TexReg 3383). The section establishes indicators applicable to school district financial accountability ratings. The adopted amendment updates the School Financial Integrity Rating System of Texas (School FIRST) by specifying new provisions for implementation beginning with data from fiscal year 2010-2011, including the revision of the indicator related to investment earnings for both school districts and charter schools, the deletion of one non-critical school district indicator, and the deletion of two non-critical open-enrollment charter school indicators, along with new rating worksheets and calculations that reflect these changes. The adopted amendment to the rating system provides relief from the recommended financial reserves due to current economic conditions and changes in state funding.

House Bill (HB) 3, 81st Texas Legislature, 2009, modified and renumbered the Texas Education Code (TEC), Chapter 39, Subchapter I, Financial Accountability, and established Chapter 39, Subchapter D, Financial Accountability. Rules in 19 TAC Chapter 109, Budgeting, Accounting, and Auditing, Subchapter AA, Commissioner's Rules Concerning Financial Accountability, Di-

vision 1, Financial Accountability Rating System, establish provisions that detail the purpose, ratings, types of ratings, criteria, reporting, and sanctions for the financial accountability rating system, in accordance with Senate Bill 218, 77th Texas Legislature, 2001, and HB 3. The rules include 19 TAC §109.1002, Financial Accountability Ratings, which adopts the financial accountability rating forms that explain the indicators that the TEA will analyze to assign school district and open-enrollment charter school financial accountability ratings. These forms specify the minimum financial accountability rating information that school districts and open-enrollment charter schools are to report to parents and taxpayers.

The adopted amendment to 19 TAC §109.1002 updates the rating system by specifying new provisions to be implemented beginning with data from fiscal year 2010-2011. The changes to the rating system provide relief from the recommended financial reserves due to current economic conditions and changes in state funding for school districts and open-enrollment charter schools and allow for variability in interest rates.

Specifically, the adopted amendment to 19 TAC §109.1002, Financial Accountability Ratings, updates the rating system by amending subsections (f) and (g) to specify new provisions that will be implemented beginning with data from fiscal year 2010-2011, including the revision of the indicator related to investment earnings for both school districts and charter schools, the deletion of one non-critical school district indicator, and the deletion of two non-critical open-enrollment charter school indicators, along with new rating worksheets and calculations that reflect these changes. The adopted rating system is applicable to financial accountability ratings assigned beginning with data from fiscal year 2010-2011 (the final ratings that will be issued in summer 2012).

In subsection (f), the adopted amendment modifies the financial accountability rating indicators used to determine a school district rating beginning with data from fiscal year 2010-2011 by revising the rating worksheet in Figure: 19 TAC §109.1002(f). The adopted worksheet, dated October 2011, includes 20 indicators used to calculate a maximum score of 70 points and differs from the December 2010 worksheet as follows:

Indicator 1 and Indicator 18, former Indicator 19, reflect fund balance terminology according to Governmental Accounting Standards Board (GASB) Statement No. 54, Fund Balance Reporting and Governmental Fund Type Definitions.

Indicator 2 replaces the word "unreserved" in the explanation with "unrestricted" in reference to the phrase "net asset balance." There was no change in the calculation.

Indicator 18, former Indicator 19, deletes the alternate test in reference to optimum fund balance.

Former Indicator 18, referring to a school district's optimum fund balance, was deleted as a rating indicator.

In response to public comment, Indicator 20, former Indicator 21, was revised at adoption to compare investment earnings to the average 3-month Treasury bill rate for the fiscal year.

The indicators in the worksheet were renumbered accordingly, and the ranges were revised to accurately align with the adopted indicators.

In subsection (g), the adopted amendment modifies the financial accountability rating indicators used to determine an open-enrollment charter school rating beginning with data from fiscal year 2010-2011 by revising the rating worksheet in Figure: 19 TAC §109.1002(g). The adopted worksheet, dated October 2011, includes 19 indicators used to calculate a maximum score of 65 points and differs from the December 2010 worksheet as follows:

Former Indicator 17, referring to the ability of a charter school's assets to cover two months of operating expenses, was deleted as a rating indicator.

In response to public comment, Indicator 19, former Indicator 20, was revised at adoption to compare investment earnings to the average 3-month Treasury bill rate for the fiscal year.

Former Indicator 21, referring to the ability of a charter school to operate for two months without additional funds, was deleted as a rating indicator.

The indicators in the worksheet were renumbered accordingly, and the ranges were revised to accurately align with the adopted indicators.

The ranges of points reflected for the determination of charter school ratings were corrected.

To reflect that changes were made to the figures referenced in subsections (f) and (g) since published as proposed, the date "August 2011" was changed to "October 2011." The change reflects the most current version of the financial accountability rating forms.

The adopted amendment updates the worksheet and calculations used beginning with data from fiscal year 2010-2011 to report school district and open-enrollment charter school financial accountability information. TEA staff will continue to generate school district and open-enrollment charter school financial accountability ratings based on data submitted by school districts and open-enrollment charter schools. The adopted amendment has no new locally maintained paperwork requirements.

The TEA determined that there is no direct adverse economic impact for small businesses and microbusinesses; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

The public comment period on the proposal began June 3, 2011, and ended July 5, 2011. Following is a summary of the public comments received and the corresponding agency responses regarding the proposed amendment to 19 TAC Chapter 109, Budgeting, Accounting, and Auditing, Subchapter AA, Commissioner's Rules Concerning Financial Accountability, Division 1, Financial Accountability Rating System, §109.1002, Financial Accountability Ratings.

School Districts

Indicators 16 and 17

Comment: Concerning proposed Figure: 19 TAC §109.1002(f), the Texas Classroom Teachers Association (TCTA) commented that, for Indicator 16 (student-to-teacher ratio), the rule should clarify that the definition for the term "teacher" is the same as the Texas Education Code (TEC), §5.001, in order to provide true accuracy and transparency to this metric. The TCTA further commented that otherwise, as it has in the past, the calculation will include any professional employee who is required to hold a valid teacher certificate or permit in order to perform some type of instruction to students, which can include personnel who don't teach at least an average of four hours each day in an academic instructional setting or a career and technology instructional setting.

Agency Response: The agency disagrees. In the Financial Integrity Rating System of Texas (FIRST), the number of teachers is calculated from PEIMS Code Table C021 Role-ID as defined in the FIRST software application. More specifically, a teacher is defined as a professional employee who is required to hold a valid teacher certificate or permit in order to perform some type of instruction to students. Permanent substitute teachers are also included in this total. The agency has determined that, for the purposes of financial accountability, the teacher information reflected in PEIMS provides the most accurate reflection of a district's financial obligation. The agency considers the number of personnel who do not teach at least an average of four hours each day to not have a significant effect on the student-to-teacher ratio.

Comment: Concerning proposed Figure: 19 TAC §109.1002(f), the TCTA commented that, for Indicator 16 (student-to-teacher ratio), the metric requires districts' ratios of students to teachers to fall within prescribed ranges according to district size, meaning that if districts have small student-to-teacher ratios and fall outside the prescribed range, it counts against them in their FIRST rating. The TCTA stated that it does not see a good public policy reason for punishing districts for maintaining low student/teacher ratios given the vast amount of research supporting the benefits of individualized instruction for students.

Agency Response: The agency disagrees. The low threshold of the student-to-teacher ratio ranges from 7 to 13.5. While the agency acknowledges the benefits of individualized instruction, it is appropriate for districts with ratios beyond a certain level to examine whether they result in an effective use of taxpayer funds. The financial management report procedure under the TEC, §39.083, requires a district to hold a public meeting to discuss its School FIRST results compared to the state standard. The public hearing process offers an opportunity for the district to provide more detailed statistics and explanatory information. If a district chooses to set a lower student-to-teacher ratio than the state standard, it can do so and provide its rationale to local taxpayers. Furthermore, the agency notes that this is not a critical indicator that results in automatic failure of School FIRST. Therefore, a district could earn fewer than five points on this indicator and still receive an acceptable, or higher, School FIRST rating.

Comment: Concerning proposed Figure: 19 TAC §109.1002(f) and the indicators for teacher and staff ratios (Indicators 16 and 17), the TCTA noted that the indicators focus on comparisons of ratios of students to teachers and then overall staff. The TCTA stated that what appears to be missing is an indicator that compares ratios of classroom teachers, as defined by the TEC, §5.001, to total staff, as this has been a subject of increasing interest by legislators and other policymakers. The TCTA further commented that given the increased emphasis in these tight budgetary times on the efficiency of school district expenditures, coupled with the oft-stated goal of the need to preserve classroom instruction as a budgetary priority, it would be a serious oversight for a state financial accountability rating system not to include such an indicator. Accordingly, the TCTA recommended that such an indicator be added.

Agency Response: The agency disagrees. Currently, the TEC, §44.0071, requires each fiscal year that a school district compute and report to the commissioner: (1) the percentage of the district's total expenditures for the preceding fiscal year that were used to fund direct instructional activities; and (2) the percentage of the district's full-time equivalent employees during the preceding fiscal year whose job function was to directly provide classroom instruction to students, determined by dividing the number of hours spent by employees in providing direct classroom instruction by the total number of hours worked by all district employees. This information is available on the Academic Excellence Indicator System (AEIS) report. The TEC, §39.082(c), states that the financial accountability system may not include an indicator or any other performance measure that: (1) requires a school district to spend at least 65 percent or any other specified percentage of district operating funds for instructional purposes; or (2) lowers the financial management performance rating of a school district for failure to spend at least 65 percent or any other specified percentage of district operating funds for instructional purposes. If an indicator for the ratio of classroom teachers to total staff were added, a certain percentage would have to be specified as the optimum ratio, which could be construed as requiring a specified percentage of funds to be spent on instructional purposes.

Indicator 20

Comment: Concerning proposed Figure: 19 TAC §109.1002(f), the Texas Association of School Boards (TASB) proposed that Indicator 20, former Indicator 22, be changed to determine whether investment earnings in all funds (excluding debt service funds and capital projects) meet or exceed the investment earnings at the federal funds rate minus .25%. The TASB proposed an indicator that would reduce the benchmark by 25 basis points (.25%) to take into account the fact that the benchmark is merely a rate and does not include transaction and other costs related to investing in available securities. The TASB stated that this would be based on the average balance of cash and cash equivalents over the course of the year and the monthly average federal funds rate over the course of the fiscal year. The TASB stated that its proposed indicator would be an improvement over the indicator proposed by the agency for the following reasons.

First, the indicator proposed by the agency is a fixed standard that requires rule revisions to change. As interest rates rise, the rule will have to be constantly revised to be relevant to investment return potentials. The indicator proposed by the TASB uses a benchmark that changes with regard to the economic climate and that influences the range of investment returns that are available in the capital market. The indicator proposed by the TASB should limit the need for change in the future and will result in a benchmark by which schools might compare themselves across years as a result of having a constant standard.

Second, the indicator proposed by the agency has the potential to incent poor financial practices. As written, the indicator proposed by the agency could provide districts with an incentive to take on more risk with their investments than they normally would in an effort to achieve partial or full points for this indicator. This would be counter to the Public Funds Investment Act, which places yield last in its lists of priorities regarding the investing of public funds and states that safety of principal and liquidity are to take priority over yield.

Agency Response: The agency agrees with the majority of the proposal for improvement in Indicator 20. The results of calculations based on the indicator proposed by the TASB were comparable to the average rate proposed by the agency; however, subtracting 25 basis points (.25%) resulted in many districts achieving a negative rate of return. In response to another comment, the agency has modified Indicator 20 to use a comparison to the

3-month Treasury bill rate since the investment pools used by many school districts also track the 3-month Treasury bill rate.

Comment: Concerning proposed Figure: 19 TAC §109.1002(f), an administrator from Garland Independent School District (ISD) stated that the rating worksheet for Indicator 20, former Indicator 22, needs to be amended to evaluate a district's financial management/condition for areas that the district can control. The administrator stated that 1-year Treasury bills are currently yielding approximately .14%, which makes it virtually impossible for a district of any size to earn all 5 points on this indicator. The administrator proposed revising the indicator by linking it to an index.

Agency Response: The agency agrees and has modified Indicator 20 to use a calculation that compares the district's interest earned to an average interest rate to prevent continuous rule actions to estimate interest yields.

Comment: Concerning proposed Figure: 19 TAC §109.1002(f), an administrator from Jasper ISD stated that the rating worksheet for Indicator 20, former Indicator 22, needs to be amended since interest rates have been extremely low. The administrator also stated that, with the potential funding cuts, districts will most likely have to use fund balance to offset revenue losses and, depending on their available cash flow and fund balance, this indicator may be an issue.

Agency Response: The agency agrees and has modified Indicator 20 to use a calculation that compares the district's interest earned to an average interest rate to prevent continuous rule actions to estimate interest yields.

Comment: Concerning proposed Figure: 19 TAC §109.1002(f), an administrator from Spring Branch ISD stated that the rating worksheet for Indicator 20, former Indicator 22, needs to be amended since the statewide results evidence the effect of the current economy and low interest rates on a district's ability to earn interest revenue. The administrator further stated that, while the standard of $17 to $20 interest earnings per student in funds other than the debt and capital projects funds was reflective of statewide earnings at the time it was established, the standard is not possible for most districts of size to meet given current circumstances. The administrator noted that in a steady or robust economy, earnings for districts with active portfolios may be two or three times this standard. The administrator also stated that lower district fund balances and later payments from the state leave fewer funds on hand to invest. The administrator recommended that the measure reflect the economic and interest environment of the time and suggested that a measure based on investment markets would be more logical instead of a fixed dollar measure per student.

Agency Response: The agency agrees and has modified Indicator 20 to use a calculation that compares the district's interest earned to an average interest rate to prevent continuous rule actions to estimate interest yields. In addition, the agency provides the following clarification. Comments regarding a target value of $20 in interest earnings per student are referring to Indicator 22 on the School FIRST rating worksheet dated March 2010, which was in effect for data from fiscal year 2009-2010. For data from fiscal year 2010-2011, the target value for interest earnings per student became Indicator 21, due to renumbering, and was set at $15 on the School FIRST rating worksheet dated December 2010. However, through the current rule action, which updates provisions to be implemented with data from fiscal year 2010-2011, Indicator 21 has been renumbered as Indicator 20 and the specific dollar amount was changed to an average interest rate at adoption.

Comment: Concerning proposed Figure: 19 TAC §109.1002(f), administrators from Houston ISD and Fort Bend ISD stated that the rating worksheet for Indicator 20, former Indicator 22, needs to be reformulated due to problems pertaining to the target value of $20 in interest earnings per student and commented that a fixed dollar target is not reflective of current financial market conditions existing during any fiscal period evaluated. The administrators further stated that this fixed target will result in the indicator being too easy to reach when short-term rates are high or too difficult to reach when interest rates are low. The administrators also stated that when market conditions exist whereby short-term rates are low for a long period of time (including fiscal year 2009-2010 through current), the indicator target pushes school districts to incur various risks, including interest rate risk, credit risk, and liquidity risk, in order to attain yields necessary to meet the earnings target. The administrators noted that the acceptance of these risks is in direct contradiction to prudent investment practices and the Public Funds Investment Act. The administrators recommended that an indexed target rate be established for this indicator test and provided an example of a target rate tied to the average monthly federal funds rate or 3-month Treasury rate as published by the Federal Reserve. The administrator from Fort Bend ISD also recommended that the calculation be modified to remove the negative impact on interest earnings that will materialize in the future due to the delay of the payment of state funding in August 2013 to a subsequent fiscal year and/or to reflect the impact of any potential proration of state funding.

Agency Response: The agency agrees and has modified Indicator 20 to use a calculation that compares the district's interest earned to an average interest rate to prevent continuous rule actions to estimate interest yields. In addition, the agency provides the following clarification. Comments regarding a target value of $20 in interest earnings per student are referring to Indicator 22 on the School FIRST rating worksheet dated March 2010, which was in effect for data from fiscal year 2009-2010. For data from fiscal year 2010-2011, the target value for interest earnings per student became Indicator 21, due to renumbering, and was set at $15 on the School FIRST rating worksheet dated December 2010. However, through the current rule action, which updates provisions to be implemented with data from fiscal year 2010-2011, Indicator 21 has been renumbered as Indicator 20 and the specific dollar amount was changed to an average interest rate at adoption.

Comment: Concerning proposed Figure: 19 TAC §109.1002(f), an administrator with Kirbyville Consolidated ISD stated that in regard to Indicator 20, former Indicator 22, it seems almost impossible to earn $20 per student in investment earnings in current economic times. The administrator further stated that in the past, the district received 4 points for this indicator, but, due to the market fluctuations in fiscal year 2009-2010, the district received 0 points, causing the district's overall rating to drop. The administrator noted that a district should not be held accountable for market conditions that were unpredictable and out of the district's control. The administrator asked that the TEA consider reviewing and revising the indicator to a lesser amount than $20 per student.

Agency Response: The agency agrees and has modified Indicator 20 to use a calculation that compares the district's interest earned to an average interest rate to prevent continuous rule

actions to estimate interest yields. In addition, the agency provides the following clarification. Comments regarding a target value of $20 in interest earnings per student are referring to Indicator 22 on the School FIRST rating worksheet dated March 2010, which was in effect for data from fiscal year 2009-2010. For data from fiscal year 2010-2011, the target value for interest earnings per student became Indicator 21, due to renumbering, and was set at $15 on the School FIRST rating worksheet dated December 2010. However, through the current rule action, which updates provisions to be implemented with data from fiscal year 2010-2011, Indicator 21 has been renumbered as Indicator 20 and the specific dollar amount was changed to an average interest rate at adoption.

Charter Schools

Comment: Concerning proposed Figure: 19 TAC §109.1002(g), the Texas Charter Schools Association (TCSA) commented that it recognizes that the purpose of the proposed amendment is to provide relief from indicators related to recommended financial reserves given current economic conditions and changes in state funding for open-enrollment charter schools. The TCSA further noted that it appreciates and supports the TEA's proposed rule change that revises the rating worksheet by deleting the indicators that refer to the ability of a charter school's assets to cover two months without additional funds.

Agency Response: The agency agrees.

Indicator 17

Comment: Concerning proposed Figure: 19 TAC §109.1002(g), the TCSA commented that, to provide further financial relief from current economic conditions, it recommends deleting Indicator 17, which reviews whether a charter school has a decrease in total net assets of 20% or more over two fiscal years. According to the TCSA, the proposed reduction in state funding alone is 14.5% over the next two fiscal years, and this indicator permits only an additional reduction of 5.5% in order for a score of 5 to be achieved. The TCSA further commented that a 5.5% reduction may be necessary for a small charter school to meet current year operating obligations alone.

Agency Response: The agency disagrees. Good financial management of a nonprofit organization is similar to for-profit management. For successful financial management, the board should reevaluate budgeted expenses if actual revenue falls short of the budgeted amount. Since net assets represent the difference between a nonprofit organization's assets and liabilities, a decrease of 20% or greater indicates a deterioration in the financial stability of the organization.

Indicator 19

Comment: Concerning proposed Figure: 19 TAC §109.1002(g), the TCSA commented that, to provide further financial relief from current economic conditions, it recommends deleting Indicator 19, which reviews whether a charter school's investment earnings in all net asset groups is more than $5 per student. The TCSA further stated that, considering the decrease in state funding, continued use of this indicator may prove to penalize some schools.

Agency Response: The agency agrees in part and disagrees in part. The agency will not delete the indicator but has modified Indicator 19, including the calculation, to use the same method adopted for school districts, which will focus on a comparison of the interest rate earned by the charter school to the average 3-month Treasury bill rate to allow for fluctuations with changes in interest rates.

The amendment is adopted under the Texas Education Code, §39.085, which requires the commissioner of education to adopt rules as necessary for the implementation and administration of financial accountability rating systems for school districts and open-enrollment charter schools.

The amendment implements the TEC, §§39.081-39.085.

§109.1002. Financial Accountability Ratings.

(a) In accordance with Texas Education Code (TEC), Chapter 39, Subchapter D, each school district and open-enrollment charter school must be assigned a financial accountability rating by the Texas Education Agency (TEA). The specific procedures for determining financial accountability ratings will be established annually by the commissioner of education and communicated to all school districts and open-enrollment charter schools.

(b) For fiscal years 2002-2003, 2003-2004, 2004-2005, and 2005-2006, each financial accountability rating of a school district is based on its overall performance on certain financial measurements, ratios, and other indicators established by the commissioner of education in the financial accountability rating form provided in this subsection entitled "School FIRST - Rating Worksheet," effective May 2003.
Figure: 19 TAC §109.1002(b) (No change.)

(c) For fiscal years 2006-2007 and 2007-2008, the financial accountability rating of a school district is based on its overall performance on certain financial measurements, ratios, and other indicators established by the commissioner of education in the financial accountability rating form provided in this subsection entitled "School FIRST - Rating Worksheet Effective August 2006." On this form, Indicator 13 entitled, "Was The Percent Of Operating Expenditures Expended For Instruction More Than or Equal to 65%?" was phased in over a three-year period, as follows.
Figure: 19 TAC §109.1002(c) (No change.)

(1) For fiscal year 2006-2007, the indicator was "Was The Percent Of Operating Expenditures Expended For Instruction More Than or Equal to 55%?"

(2) For fiscal year 2007-2008, the indicator was "Was The Percent Of Operating Expenditures Expended For Instruction More Than or Equal to 60%?"

(3) For fiscal year 2008-2009 and beyond, the indicator was repealed.

(d) For fiscal years 2008-2009 and 2009-2010, the financial accountability rating of a school district is based on its overall performance on certain financial measurements, ratios, and other indicators established by the commissioner of education in the financial accountability rating form provided in this subsection entitled "School FIRST - Rating Worksheet Dated March 2010."
Figure: 19 TAC §109.1002(d) (No change.)

(e) For fiscal years 2008-2009 and 2009-2010, the financial accountability rating of an open-enrollment charter school is based on its overall performance on certain financial measurements, ratios, and other indicators established by the commissioner of education in the financial accountability rating form provided in this subsection entitled "Charter School - School FIRST - Rating Worksheet Dated March 2010."
Figure: 19 TAC §109.1002(e) (No change.)

(f) Beginning with fiscal year 2010-2011, the financial accountability rating of a school district is based on its overall performance on certain financial measurements, ratios, and other indicators

established by the commissioner of education in the financial accountability rating form provided in this subsection entitled "School FIRST - Rating Worksheet Dated October 2011."
Figure: 19 TAC §109.1002(f)

(g) Beginning with fiscal year 2010-2011, the financial accountability rating of an open-enrollment charter school is based on its overall performance on certain financial measurements, ratios, and other indicators established by the commissioner of education in the financial accountability rating form provided in this subsection entitled "School FIRST for Charter Schools - Rating Worksheet Dated October 2011."
Figure: 19 TAC §109.1002(g)

(h) A financial accountability rating by a voluntary association is a local option of the district or open-enrollment charter school, but it does not substitute for a financial accountability rating by the TEA.

(i) The TEA will issue a preliminary financial accountability rating to a school district or open-enrollment charter school within 150 days of its complete financial data being made available to the TEA staff. The financial accountability rating for a particular year will always be based on complete and audited financial data from the previous fiscal year given the availability of the data. For example, the final 2010 School FIRST rating issued in August 2010 is based on complete and audited financial data for the 2008-2009 fiscal year and is the financial accountability rating for the 2009-2010 school year for the purposes of §97.1055 of this title (relating to Accreditation Status).

(1) The issuance of the preliminary or final rating will not be delayed if a district or open-enrollment charter school fails to meet the statutory deadline for submitting the annual financial and compliance report. Instead, a rating of Suspended-Data Quality under §109.1003(a)(5) of this title (relating to Types of Financial Accountability Ratings) will be issued.

(2) A district or open-enrollment charter school may submit a written appeal requesting that the TEA review a preliminary rating if the preliminary rating was based on a data error solely attributable to the TEA's review of the data for any of the indicators.

(A) The TEA office responsible for financial audits must receive the appeal no later than 30 days after the TEA's release of the preliminary rating, and the appeal must include substantial evidence that supports the district's or open-enrollment charter school's position.

(i) Only appeals that would result in a change of the preliminary rating will be considered.

(ii) The TEA staff will review information submitted by the district or open-enrollment charter school to validate the statements made to the extent possible. The TEA will examine all relevant data.

(iii) The TEA staff will prepare a recommendation and forward it to an external panel for review. This review panel will provide independent oversight to the appeals process.

(iv) The external review panel will examine the appeal, supporting documentation, staff research, and the staff recommendation. The review panel will determine its recommendation.

(v) The external review panel's recommendation will be forwarded to the commissioner.

(vi) The commissioner will make a final decision in accordance with the timeline specified in subparagraph (E) of this paragraph.

(B) Appeals received 31 days or more after the TEA issues a preliminary rating will not be considered.

(C) Errors by a district or open-enrollment charter school in recording data or submitting data through the TEA data collection and reporting system do not constitute a valid basis for appealing a preliminary rating.

(D) A district that is the fiscal agent for a shared services arrangement (SSA) and has the staff of the SSA on its payroll may appeal the two indicators related to student-to-teacher and student-to-staff ratios if it fails these indicators due to the number of staff that are SSA staff. The district must provide the TEA with the number of staff that are employees of the district and the number of staff that are part of the SSA. This adjustment should not be a factor for an open-enrollment charter school that is a fiscal agent since the SSA reporting requirements are different than a school district.

(E) If the TEA receives an appeal of a preliminary rating, a final rating will be issued to the school district or open-enrollment charter school no later than 45 days after the appeal has been received by the TEA.

(F) If the TEA does not receive an appeal of a preliminary rating, the preliminary rating automatically becomes a final rating on the 31st day after issuance of the preliminary rating.

(G) A final rating issued by the TEA pursuant to this section may not be appealed under the TEC, §7.057, or any other law or 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 28, 2011.

TRD-201104067
Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
Effective date: October 18, 2011
Proposal publication date: June 3, 2011
For further information, please call: (512) 475-1497

CHAPTER 113. TEXAS ESSENTIAL KNOWLEDGE AND SKILLS FOR SOCIAL STUDIES

The State Board of Education (SBOE) adopts the repeal of §§113.1-113.7, 113.21-113.24, and 113.31-113.39 and amendments to §§113.10, 113.17, and 113.40, concerning Texas essential knowledge and skills (TEKS) for social studies. The repeals and amendments are adopted without changes to the proposed text as published in the August 12, 2011, issue of the *Texas Register* (36 TexReg 5065) and will not be republished. The sections establish the TEKS for social studies courses in elementary, middle school, and high school. The adopted repeals remove TEKS adopted to be effective in 1998 for Kindergarten-Grade 8 and high school social studies courses and related implementation language. The adopted amendments remove reference to rules that are repealed.

In May 2010, the SBOE adopted proposed revisions to the social studies TEKS for Kindergarten-Grade 8 and for high school social studies courses with an implementation date of the 2011-2012 school year. These revisions were to supersede the original TEKS at the time of implementation; however, the original TEKS still applied for the 2010-2011 school year and needed to remain in the Texas Administrative Code for that period of time. With the implementation of the new social studies TEKS for Kindergarten-Grade 8 and for high school social studies courses in the 2011-2012 school year, the original TEKS are no longer needed and may now be repealed. Existing rules must also be amended to remove references to repealed rules.

The adopted repeals and amendments have no new procedural and reporting implications. The adopted repeals and amendments have no new locally maintained paperwork requirements.

The Texas Education Agency determined that there is no direct adverse economic impact for small businesses and microbusinesses; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

In accordance with the Texas Education Code (TEC), §7.102(f), the SBOE approved the repeals and amendments for adoption by a vote of two-thirds of its members to specify an effective date earlier than the beginning of the 2012-2013 school year. The earlier effective date will immediately repeal rules that have been superseded, as well as amend existing rules referencing the repealed rules, to avoid confusion. The effective date for the repeals and amendments is 20 days after filing as adopted.

No public comments were received on the proposal.

SUBCHAPTER A. ELEMENTARY

19 TAC §§113.1 - 113.7

The repeals are adopted under the Texas Education Code, §7.102(c)(4), which authorizes the SBOE to establish curriculum and graduation requirements, and §28.002, which authorizes the SBOE to by rule identify the essential knowledge and skills of each subject of the required curriculum that all students should be able to demonstrate and that will be used in evaluating textbooks and addressed on the assessment instruments.

The repeals implement the Texas Education Code, §7.102(c)(4) and §28.002.

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 27, 2011.

TRD-201104017
Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
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Proposal publication date: August 12, 2011
For further information, please call: (512) 475-1497

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19 TAC §113.10

The amendment is adopted under the Texas Education Code, §7.102(c)(4), which authorizes the SBOE to establish curriculum and graduation requirements, and §28.002, which authorizes the SBOE to by rule identify the essential knowledge and skills of each subject of the required curriculum that all students should be able to demonstrate and that will be used in evaluating textbooks and addressed on the assessment instruments.

The amendment implements the Texas Education Code, §7.102(c)(4) and §28.002.

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.

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Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
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Proposal publication date: August 12, 2011
For further information, please call: (512) 475-1497

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SUBCHAPTER B. MIDDLE SCHOOL

19 TAC §113.17

The amendment is adopted under the Texas Education Code, §7.102(c)(4), which authorizes the SBOE to establish curriculum and graduation requirements, and §28.002, which authorizes the SBOE to by rule identify the essential knowledge and skills of each subject of the required curriculum that all students should be able to demonstrate and that will be used in evaluating textbooks and addressed on the assessment instruments.

The amendment implements the Texas Education Code, §7.102(c)(4) and §28.002.

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.

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Cristina De La Fuente-Valadez
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For further information, please call: (512) 475-1497

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19 TAC §§113.21 - 113.24

The repeals are adopted under the Texas Education Code, §7.102(c)(4), which authorizes the SBOE to establish curriculum and graduation requirements, and §28.002, which authorizes the SBOE to by rule identify the essential knowledge and skills of each subject of the required curriculum that all students should be able to demonstrate and that will be used in evaluating textbooks and addressed on the assessment instruments.

The repeals implement the Texas Education Code, §7.102(c)(4) and §28.002.

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.

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Cristina De La Fuente-Valadez
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For further information, please call: (512) 475-1497

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SUBCHAPTER C. HIGH SCHOOL

19 TAC §§113.31 - 113.39

The repeals are adopted under the Texas Education Code, §7.102(c)(4), which authorizes the SBOE to establish curriculum and graduation requirements; §28.002, which authorizes the SBOE to by rule identify the essential knowledge and skills of each subject of the required curriculum that all students should be able to demonstrate and that will be used in evaluating textbooks and addressed on the assessment instruments; and §28.025, which authorizes the SBOE to by rule determine curriculum requirements for the minimum, recommended, and advanced high school programs that are consistent with the required curriculum under §28.002.

The repeals implement the Texas Education Code, §§7.102(c)(4), 28.002, and 28.025.

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.

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Cristina De La Fuente-Valadez
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Texas Education Agency
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For further information, please call: (512) 475-1497

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19 TAC §113.40

The amendment is adopted under the Texas Education Code, §7.102(c)(4), which authorizes the SBOE to establish curriculum and graduation requirements; §28.002, which authorizes the SBOE to by rule identify the essential knowledge and skills of each subject of the required curriculum that all students should be able to demonstrate and that will be used in evaluating textbooks and addressed on the assessment instruments; and §28.025, which authorizes the SBOE to by rule determine curriculum requirements for the minimum, recommended, and advanced high school programs that are consistent with the required curriculum under §28.002.

The amendment implements the Texas Education Code, §§7.102(c)(4), 28.002, and 28.025.

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.

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Cristina De La Fuente-Valadez
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Texas Education Agency
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CHAPTER 118. TEXAS ESSENTIAL KNOWLEDGE AND SKILLS FOR ECONOMICS WITH EMPHASIS ON THE FREE ENTERPRISE SYSTEM AND ITS BENEFITS
SUBCHAPTER A. HIGH SCHOOL

The State Board of Education (SBOE) adopts the repeal of §118.1 and §118.2 and an amendment to §118.3, concerning Texas essential knowledge and skills (TEKS) for economics. The repeals and amendment are adopted without changes to the proposed text as published in the August 12, 2011, issue of the *Texas Register* (36 TexReg 5067) and will not be republished. The sections establish the TEKS for the high school economics course. The adopted repeals remove TEKS adopted to be effective in 1998 for the Economics with Emphasis on the Free Enterprise System and Its Benefits high school course and related implementation language. The adopted amendment removes reference to a rule that is repealed.

In May 2010, the SBOE adopted proposed revisions to the TEKS for the high school economics course with an implementation date of the 2011-2012 school year. These revisions were to supersede the original TEKS at the time of implementation; however, the original TEKS still applied for the 2010-2011 school year and needed to remain in the Texas Administrative Code for that period of time. With the implementation of the new TEKS for the high school economics course in the 2011-2012 school year, the original TEKS are no longer needed and may now be repealed. Existing rule must also be amended to remove reference to the repealed rule.

The adopted repeals and amendment have no new procedural and reporting implications. The adopted repeals and amendment have no new locally maintained paperwork requirements.

The Texas Education Agency determined that there is no direct adverse economic impact for small businesses and microbusinesses; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

In accordance with the Texas Education Code, §7.102(f), the SBOE approved the repeals and amendment for adoption by a vote of two-thirds of its members to specify an effective date ear-

lier than the beginning of the 2012-2013 school year. The earlier effective date will immediately repeal rules that have been superseded, as well as amend an existing rule referencing a repealed rule, to avoid confusion. The effective date for the repeals and amendment is 20 days after filing as adopted.

19 TAC §118.1, §118.2

The repeals are adopted under the Texas Education Code, §7.102(c)(4), which authorizes the SBOE to establish curriculum and graduation requirements; §28.002, which authorizes the SBOE to by rule identify the essential knowledge and skills of each subject of the required curriculum that all students should be able to demonstrate and that will be used in evaluating textbooks and addressed on the assessment instruments; and §28.025, which authorizes the SBOE to by rule determine curriculum requirements for the minimum, recommended, and advanced high school programs that are consistent with the required curriculum under §28.002.

The repeals implement the Texas Education Code, §§7.102(c)(4), 28.002, and 28.025.

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.

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Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
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Proposal publication date: August 12, 2011
For further information, please call: (512) 475-1497

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19 TAC §118.3

The amendment is adopted under the Texas Education Code, §7.102(c)(4), which authorizes the SBOE to establish curriculum and graduation requirements; §28.002, which authorizes the SBOE to by rule identify the essential knowledge and skills of each subject of the required curriculum that all students should be able to demonstrate and that will be used in evaluating textbooks and addressed on the assessment instruments; and §28.025, which authorizes the SBOE to by rule determine curriculum requirements for the minimum, recommended, and advanced high school programs that are consistent with the required curriculum under §28.002.

The amendment implements the Texas Education Code, §§7.102(c)(4), 28.002, and 28.025.

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.

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Cristina De La Fuente-Valadez
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For further information, please call: (512) 475-1497

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TITLE 28. INSURANCE

PART 2. TEXAS DEPARTMENT OF INSURANCE, DIVISION OF WORKERS' COMPENSATION

CHAPTER 134. BENEFITS--GUIDELINES FOR MEDICAL SERVICES, CHARGES, AND PAYMENTS

SUBCHAPTER F. PHARMACEUTICAL BENEFITS

28 TAC §134.503, §134.504

The Commissioner of Workers' Compensation (Commissioner), Texas Department of Insurance, Division of Workers' Compensation (Division) adopts amendments to §134.503 (relating to Pharmacy Fee Guideline), with corresponding amendments to §134.504 (relating to Pharmaceutical Expenses Incurred by the Injured Employee). The amendments to §134.503 are adopted with changes to the proposed text as published in the July 1, 2011, issue of the *Texas Register* (36 TexReg 4092). The Division adopts the amendments to §134.504 without changes to the proposed text and the section will not be republished.

In accordance with Government Code §2001.033, the Division's reasoned justification for these amendments is set out in this order, which includes the preamble, which in turn includes the rules. The reasoned justification is contained throughout the preamble, including the reasons why the amended rules are necessary; the factual, policy and legal bases for the amended rules; a summary of comments received from interested parties, names of the entities that commented and whether they were in support of or in opposition to the adoption of the rules, and the reasons why the Division agrees or disagrees with the comments and recommendations.

The Commissioner conducted a public hearing on the proposed amendments on July 11, 2011. Three individuals provided public testimony at this hearing. The public comment period for these proposed amended rules ended on August 1, 2011. The Division received eight written public comments.

The rule revisions to §134.503 and §134.504 are necessary to adopt a pharmacy fee guideline and to implement new Labor Code §408.0281 and other legislative amendments in House Bill 528, enacted by the 82nd Legislature, Regular Session, effective June 17, 2011 (HB 528), that impact the reimbursement of pharmacy and pharmaceutical services provided in the Texas workers' compensation system. Section 134.504 is also amended and governs pharmaceutical expenses incurred by an injured employee when the injured employee elects to receive a brand name drug rather than a generic drug or over-the-counter alternative to a prescription medication that is prescribed by a health care provider. The amendments to this rule conform references

to §134.503. The Division made changes to the proposed text based on public comments. Specifically, changes were made to §134.503(c)(1)(A) and (B) and §134.503(c)(2) as described in the "Summary of Comments and Agency Responses." The Division also made other nonsubstantive changes for purposes of clarity. These changes do not materially alter issues raised in the proposal, introduce new subject matter, or affect persons, other than those previously on notice.

Labor Code §408.028(f) requires the Commissioner by rule to adopt a pharmacy fee guideline for pharmacy and pharmaceutical services. It also sets out the criteria for the fee guideline. Labor Code §408.028(f) was originally enacted by House Bill 7, 79th Legislature, Regular Session, effective September 1, 2005 (HB 7), and recently amended by HB 528. As originally enacted by HB 7, Labor Code §408.028(f) required the Commissioner, notwithstanding any other provision in Title 5 of the Labor Code, to adopt a fee schedule for pharmacy and pharmaceutical services that will: (1) provide reimbursement rates that are fair and reasonable; (2) assure adequate access to medications and services for injured employees; and (3) minimize costs to employees and insurance carriers. HB 528 amended Labor Code §408.028(f) by adding an additional criteria that the pharmacy fee guideline adopted by the Commissioner must take into consideration the increased security of payment afforded by the Texas Workers' Compensation Act (Act).

In addition to enacting Labor Code §408.028(f), HB 7 also enacted Labor Code §408.028(g). This statute provided that "insurance carriers must reimburse for pharmacy benefits and services using the fee schedule as developed by [Labor Code §408.028], or at rates negotiated by contract." HB 528 amended subsection (g) by deleting the above described text and replacing it with provisions that state, "[s]ection 413.011(d) and the rules adopted to implement that subsection do not apply to the fee schedule adopted by the commissioner under [Labor Code §408.028(f)]."

Labor Code §413.011(d) sets out criteria for fee guidelines, one of which states that the guidelines "may not provide for payment of a fee in excess of the fee charged for similar treatment of an injured individual of an equivalent standard of living and paid by that individual or by someone acting on that individual's behalf." This provision has been interpreted as the statutory justification for "usual and customary charge for the same or similar service" language that was present in the previous pharmacy reimbursement methodology. Therefore, the Division interprets the removal of Labor Code §413.011(d) from the pharmacy fee guideline considerations as legislative intent to remove the "usual and customary charge for the same or similar service" element from the reimbursement methodology. This interpretation is supported by a statement of legislative intent for HB 528, which states that the "usual and customary charge" element of the previous pharmacy reimbursement methodology was extremely costly to the overall system. The goal of the amendment according to this statement of legislative intent was to provide clarity as to the reimbursement price and to reduce disputes over the reimbursements for pharmaceutical services.

HB 528 also amended Labor Code Chapter 408, Subchapter B, by adding §408.0281 (relating to Reimbursement for Pharmaceutical Services; Administrative Violation). Labor Code §408.0281(b)(1) states that notwithstanding any provision of Chapter 1305, Insurance Code, or §504.053, Labor Code, prescription medication or services, as defined by §401.011(19)(E), may be reimbursed in accordance with the fee guidelines adopted by the Commissioner or at a contract rate in accordance with this section.

As stated, Labor Code §408.0281(b)(1) authorizes the reimbursement for prescription medication or services at a contract rate in accordance with Labor Code §408.0281. Under Labor Code §408.0281(c), an insurance carrier may pay a health care provider fees for pharmaceutical services that are inconsistent with fee guidelines adopted by the Commissioner only if the insurance carrier has a contract with the health care provider and that contract includes a specific fee schedule. An insurance carrier, or the carrier's authorized agent, may use an informal or voluntary network to obtain a contractual agreement that provides for fees different from the fees authorized under the fee guidelines adopted by the Commissioner for pharmaceutical services. If the carrier or the carrier's authorized agent chooses to use an informal or voluntary network to obtain a contractual fee arrangement, Labor Code §408.0281(c)(1) and (2) requires there to be a contractual arrangement between: (1) the carrier or its authorized agent and the informal or voluntary network that authorizes the network to contract with health care providers for pharmaceutical services on the carrier's behalf; and (2) the informal or voluntary network and the health care provider that includes a specific fee schedule and complies with the notice requirements in Labor Code §408.0281. The notice requirements in Labor Code §408.0281 generally require the informal or voluntary network, or the carrier or carrier's authorized agent, to notify each health care provider of any person, other than the injured employee, to which the network's contractual fee arrangements with that health care provider are sold, leased, transferred, or conveyed.

Finally, Labor Code §408.0281(b)(2) prohibits the delivery of prescription medication or services through a certified workers' compensation health care network under the Insurance Code Chapter 1305, or through a contract described by Labor Code §504.053(b)(2). HB 528 also amended Insurance Code §1305.101(c), which now provides that notwithstanding any other provisions of [Insurance Code Chapter 1305], prescription medication or services, as defined by Labor Code §401.011(19)(E), may not directly, or through a contract, be delivered through a certified workers' compensation health care network. Prescription medication and services shall be reimbursed pursuant to Labor Code §408.0281, other provisions of the Act, and applicable rules of the Commissioner.

The Division sought professional expertise during this rulemaking project and engaged with its system participants to obtain meaningful input. The Division contracted with Milliman, Inc. to evaluate pharmaceutical reimbursement levels under the Texas workers' compensation system and compare them to rates paid in other markets. This resulted in the Milliman Inc. report entitled *Pharmaceutical Reimbursement Comparison Report: Indexing of Texas Workers' Compensation Pharmaceutical Reimbursement and Comparison to Other Healthcare Markets, October 22, 2009* (Milliman Report). The Division held two stakeholder meetings to obtain input on issues relating to the pharmacy fee guideline such as the appropriate benchmark for the pharmacy fee guideline. The Division also posted on its website informal drafts representing two alternatives of the pharmacy fee guideline and requested system participants to provide comments on these drafts. The Division also consulted with its Medical Advisor who provided medical expertise and input.

Amended §134.503 will govern the reimbursement for all outpatient pharmacy and pharmaceutical services, excluding par-

enteral drugs, provided to injured employees in the Texas workers' compensation system. The inpatient drug and parenteral drug exclusions are continuations from the previous §134.503. Consistent with Labor Code §408.0281(b), this rule will apply to pharmacy and pharmaceutical reimbursements regardless of whether the injured employee is subject to a workers' compensation health care network certified under Chapter 1305 of the Insurance Code; is receiving medical benefits in accordance with Chapter 408 of the Labor Code; or is receiving medical benefits in accordance with Labor Code §504.053(b)(2). HB 528 and its requirements became effective on June 17, 2011. The application of this amended rule is prospective and will apply to the reimbursement of prescription drugs and nonprescription drugs or over-the-counter medications that are dispensed on or after the effective date of the amendments to this rule.

Section 134.503(c) is the pharmacy fee guideline for prescription drugs. The Division has determined that the adopted pharmacy fee guideline for prescription drugs located in §134.503(c)(1) - (2) of this adopted rule meets the statutory requirements imposed upon the Division by Labor Code §408.028(f). Specifically, the Division has determined that the reimbursement under §134.503(c) will: (1) provide reimbursement rates for prescription drugs that are fair and reasonable; (2) assure adequate access to prescription medications and services for injured employees; (3) minimize costs to injured employees and insurance carriers; and (4) take into consideration the increased security of payment afforded by the Act.

The Division's adopted pharmacy fee guideline for prescription drugs is fair and reasonable for several reasons. First, it deletes "usual and customary" from its pharmacy fee guideline and replaces it with "notwithstanding §133.20(e)(1) of this title (relating to Medical Bill Submission by Health Care Provider), the amount billed to the insurance carrier by the health care provider or pharmacy processing agent only if the health care provider has not previously billed the insurance carrier for the prescription drug and the pharmacy processing agent is billing on behalf of the health care provider." This change ensures that reimbursement rates still account for pharmacy billing practices, if the billed amount is less than the amount provided by the applicable formula in §134.503(c)(1). Furthermore, as set forth more fully below, this provides an objective standard that can easily be determined on a case-by-case basis and, therefore should lead to increased system participant clarity regarding their entitlements and obligations under the adopted pharmacy fee guideline, which will decrease fee disputes.

Second, the Division's adopted pharmacy fee guideline for prescription drugs is fair and reasonable because it retains the same reimbursement formulas that have been in §134.503 since 2002 and it ensures market stability while the Division implements other statutorily required changes. The Division is already, pursuant to HB 528, making one change to pharmacy reimbursement, replacing "usual and customary" with "amount billed," and this change is in addition to the new administrative requirements regarding informal and voluntary network contracts for prescription drugs and services. Furthermore, the Division's pharmacy closed formulary, a series of rules in 28 Texas Administrative Code (TAC) Chapter 134, Subchapter F, came into effect for new injuries on or after September 1, 2011 and will likely have an impact on services in the Texas workers' compensation system. The Division, therefore, has elected to retain its current reimbursement formula under §134.503(c)(1) in order to ease the impacts caused by these statutorily-required changes for system participants. Additionally, retaining the same reimbursement formula permits the Division to observe the system impacts of the aforementioned other statutorily required changes and gather full information before deciding to possibly change its reimbursement formula.

Lastly, the Division's adopted pharmacy fee guideline for prescription drugs is fair and reasonable because the reimbursements ensure that Texas remains typical of workers' compensation reimbursement for prescription drugs in other states. Specifically, the Milliman Report indicated that even though Texas workers' compensation reimbursement is above that seen in other health care markets, the Texas fee schedule was typical of workers' compensation fee schedules in other states. Furthermore, in reviewing other states' workers' compensation fee schedules, the Workers' Compensation Research Institute (WCRI) report, *Workers' Compensation Medical Cost Containment: A National Inventory,* January 2011, reflects a range of 84% to 140% of average wholesale price (AWP) for brand name drugs and a range of 75% to 140% of AWP for generic drugs. Dispensing fees ranged from $2.00 to $10.67. The Division, by retaining its reimbursement formula of 109% of AWP for brand name drugs and 125% of AWP for generics with an added $4.00 dispensing fee per prescription has ensured that its reimbursement levels will remain at a reasonable rate typical of workers' compensation systems in other states.

The Division's adopted pharmacy fee guideline for prescription drugs also ensures access to prescription medications and services for injured employees for several reasons. First, as stated in the Milliman Report, its allowable reimbursement exceeds the reimbursement levels seen in other non-workers' compensation markets, such as the group health model, but this excess is reasonably necessary to ensure injured employees have sufficient access to prescription medications and services. The Division's adopted pharmacy fee guideline must consider any risks of non-payment and administrative costs found in workers' compensation, but not found in other markets. Specifically, pharmacists who choose to participate in the Texas workers' compensation system and dispense drugs to injured employees must have a different business model compared to those engaged in group health or retail markets. When processing workers' compensation prescriptions, pharmacists must also verify compensability and workers' compensation insurance coverage; bill the insurance carrier; interact with pharmacy benefit managers (PBMs) or other authorized insurance carrier agents; and participate in medical necessity and/or medical fee dispute resolution processes when there are any issues related to reimbursement, non-payment or underpayment of the bill. Pharmacists essentially assume the risk of having no payment, or underpayment, as well as the cost of the medical dispute resolution and the delay resulting from it since there is no immediate adjudication of disputes. This is unlike the group health model. It should be noted that some pharmacists do utilize processing agents for billing purposes who may be willing to accept some of this risk in exchange for a portion of the pharmacists' payment; however, it is important to note that not all pharmacies utilize processing agents and not all processing agents accept risk.

Furthermore, the Division must be mindful that the pharmacies to which the pharmacy fee guideline will apply are pharmacies that have elected not to, or have been unable to, contract with insurance carriers or their authorized agents for a specific fee schedule. Therefore, these are the pharmacies that will not benefit from any expedience or other administrative advantages that may result from participating in an informal or voluntary pharmacy network. The Division's pharmacy fee guideline, therefore,

must take into account not only the additional costs of participating in the workers' compensation system but also the particular selection of pharmacies to which the reimbursements will apply in order to ensure sufficient access to prescription medications and services for injured employees. As WCRI concluded in its June 2006 study entitled *The Cost and Use of Pharmaceuticals in Workers' Compensation: A Guide for Policy Makers,* "fee schedules set at the levels of group health insurance or government programs, without companion public policies that reduce the special friction costs [of providing pharmaceutical services in workers' compensation systems], increase the risk of reducing access to care."

The Division's adopted pharmacy fee guideline also ensures that injured employees will have sufficient access to prescription medications and services because the adopted rule retains the same reimbursement formulas that have been in §134.503 since 2002 and ensures market stability. As previously stated, the Division's replacing of "usual and customary" with "amount billed," the Division's implementation of HB 528, and the Division's newly effective closed formulary will all have substantial impact on the provision of prescription medications and services in the Texas workers' compensation system. Retaining the same reimbursement formulas will ease this already significant transition and help ensure that health care providers are willing to remain in the system.

The Division's adopted pharmacy fee guideline for prescription drugs also minimizes costs to insurance carriers and injured employees and takes into consideration the increased security of payment provided by the Act for several reasons. First, the Division's adopted pharmacy fee guideline provides a wholly objective method of determining the appropriate reimbursement for any particular pharmacy bill, and, therefore, should diminish pharmacy fee disputes and dispute costs. Previously, the evidence required to prove, and varying interpretations of, "usual and customary" led to more frequent and more complicated disputes regarding reimbursement for prescription drugs and services. According to Division data, nearly 6,300, or approximately 92% of all pharmacy fee disputes filed with the Division since January 1, 2005, involved one or both parties raising the health care provider's "usual and customary charge" as an issue in the dispute. Thus, in addition to being consistent with the legislative intent discussed previously, removing the health care provider's usual and customary charge from the pharmacy fee guideline and replacing it with an objective standard is good policy.

The Division's adopted pharmacy fee guideline for prescription drugs and services also minimizes costs and takes into consideration the increased security of payment provided by the Act because it avoids any immediate, non-required reimbursement rate changes that would lead to mass transaction costs as system participants adapt their business models and contracts to recent statutorily-required changes. A change in the current reimbursement formula, in addition to the statutorily-required changes discussed above, would require a re-tooling of the reimbursement systems currently in place in the Texas workers' compensation system resulting in additional costs for insurance carriers and delayed implementation of the adopted fee structure as required by HB 528. Further, a change in the AWP benchmark at this time might only be an interim replacement until a permanent benchmark is identified and determined as a suitable replacement for AWP. This approach could result in multiple and costly programming changes throughout the system; increase confusion concerning reimbursement; and create opportunities to increase medical fee disputes.

Furthermore, because the Division's adopted pharmacy fee guideline retains the same reimbursement formulas that have existed in §134.503 since 2002, they will permit the Division to gather information on the system impacts of other statutorily-required changes to pharmaceutical reimbursements, national trends regarding the appropriate benchmarks for pharmaceutical reimbursement rates and help the Division avoid multiple interim changes that could lead to increased stakeholder costs and confusion. Additionally, the Division will be able to examine the impact the new pharmacy closed formulary has on drug utilization and pharmacy claims costs in the Texas workers' compensation system. One of the primary policy goals in adopting a pharmacy closed formulary was to reduce unnecessary utilization of certain drugs, such as specific narcotics, in the Texas workers' compensation system. Initiating a change in the pharmacy reimbursement formula while implementing the other statutorily-required changes will confound any analysis of the impact of the pharmacy closed formulary on medical costs and utilization of care. Thus, the Division must have information on the impact its pharmacy closed formulary has on these trends, and on the impacts of its other changes made in this adoption order, before it can make a fully informed and long-term decision regarding a new reimbursement formula.

Lastly, as previously stated, the Division's adopted pharmacy fee guideline for prescription drugs and services ensures that reimbursement for prescription medication in Texas remains typical of workers' compensation reimbursement for prescription drugs in other states.

Section 134.503(d) is the pharmacy fee guideline for nonprescription drugs or over-the-counter medications and complies with Labor Code §408.028(f). This adopted reimbursement continues the reimbursement for nonprescription drugs or over-the-counter medications that have existed in §134.503 since 2002. The reimbursement for nonprescription or over-the-counter medication shall be the retail price of the lowest package reasonably available that will fill the prescription. Continuing this reimbursement will assure stability in the Texas workers' compensation system, provide reimbursements that are fair and reasonable, and ensure security of payment to health care providers because the reimbursement for nonprescription drugs or over-the-counter medications is the same as the amounts charged by the health care provider to consumers purchasing these drugs and medications at retail prices. It also is an objective standard that is easily determined and therefore will ensure clarity to health care providers as to reimbursement. This reimbursement also reduces costs for insurance carriers because it caps the reimbursement at the same level as is paid by other consumers paying retail prices and limits reimbursement to lowest quantity reasonably available that will fill the prescription. Further, as stated, this reimbursement is an objective standard, easily determined, which will reduce disputes, and therefore the costs associated with disputes, over the proper reimbursement amounts for nonprescription drugs or over-the-counter medications. Finally, this reimbursement assures adequate access to medications and services for injured employees because it assures reimbursement for health care providers at levels that are the same as the amounts provided by other consumers outside the workers' compensation system.

Section 134.503(e) is the pharmacy fee guideline for cases where an amount cannot be determined under §134.503(c)(1) or (d), as applicable, and no contracted rate exists. The Division anticipates that these situations will be extremely rare. Therefore, the reimbursement amount in these cases will be an

amount that is consistent with the four factors in Labor Code §408.028(f), including providing for reimbursement rates that are fair and reasonable. In order to implement the reimbursement methodology in this subsection, this subsection requires insurance carriers to: (1) develop a reimbursement methodology(ies) for determining reimbursement under this subsection; (2) maintain in reproducible format documentation of the insurance carrier's methodology(ies) for establishing an amount; (3) apply the reimbursement methodology(ies) consistently among health care providers in determining reimbursements under this subsection; and (4) upon request by the Division, provide to the Division copies of such documentation. Imposing these requirements will reduce any uncertainty in reimbursements under this subsection. These requirements will also promote consistency in reimbursement amounts determined under this subsection and create consistency among Division fee guidelines because they are similar to the requirements imposed on insurance carriers by 28 TAC §134.1(g) of this title (relating to Medical Reimbursement) which govern fair and reasonable reimbursements under other Division fee guidelines.

Amended §134.503(f) provides that a contracted fee arrangement will govern the reimbursement of prescription medication or services, as defined by Labor Code §401.011(19)(E), if the contract complies with the provisions of Labor Code §408.0281. This is consistent with the provisions of that statute that allow for the contracting for fees that are inconsistent with the fee guidelines in this section. As stated in the discussion above regarding Labor Code §408.0281, the contract must meet several requirements before reimbursements may be made at the contracted rate. This rule therefore provides that reimbursements for prescription medication or services may be at contracted rates that are inconsistent with the pharmacy fee guideline if the contract complies with the provisions of Labor Code §408.0281 and applicable Division rules.

The adopted rule amendments set forth a framework within which system participants in the Texas workers' compensation system are provided a guideline for pharmacy fees that clarifies the Texas workers' compensation system's reimbursement for prescription drugs and nonprescription drugs or over-the-counter medications.

§134.503

Adopted §134.503(a) provides that the pharmacy fee guideline applies to prescription drugs and nonprescription drugs or over-the-counter medications as defined in §134.500 of this title (relating to Definitions) for outpatient use in the Texas workers' compensations system. The pharmacy fee guideline applies to both claims subject to a certified network and claims not subject to a certified network, including claims that are handled by a political subdivision or pool under Labor Code §504.053(b)(2). It does not apply to parenteral drugs.

Under adopted subsection (b), system participants shall apply the provisions of Chapter 133 and 134 of this title (relating to General Medical Provisions and Benefits--Guidelines for Medical Services, Charges, and Payments, respectively) for coding, billing, and reimbursement of prescription and nonprescription drugs or over-the-counter medications.

Adopted subsection (c) is the pharmacy fee guideline for prescription drugs. Subsection (c)(1)(A) and (B) establish the reimbursement formulas for prescription drugs which are consistent with the previous version of this rule. Additional language has been added to subsection (c)(1)(A) and (B) to clarify that the $4.00 dispensing fee is per prescription. Subsection (c)(1)(C) clarifies that when compounding, a single compounding fee of $15 per prescription shall be added to the calculated total for either generic or brand name drugs. Subsection (c)(2) states that notwithstanding §133.20(e)(1) of this title (relating to Medical Bill Submission by Health Care Provider), the amount billed will be the amount that is billed to the insurance carrier by the health care provider. If the health care provider has not previously billed the insurance carrier for the prescription drug, and the pharmacy processing agent is billing on behalf of the health care provider, the amount billed will be the amount that is billed to the insurance carrier by the pharmacy processing agent. Determining the amount billed under subsection (c)(2) is an objective inquiry based solely on the amount shown on that particular bill to the insurance carrier by the health care provider or pharmacy processing agent. In other words, when an insurance carrier receives a bill for pharmaceutical services from a health care provider or pharmacy processing agent, the "amount billed" that will be compared to the formula amount for generic drugs or brand name drugs will be the specific amount shown on that particular bill. Insurance carriers may not substitute any other billed amount. Adopted subsection (c)(2) replaces "usual and customary charge" with amount billed.

Adopted subsection (d) is the Division pharmacy fee guideline for nonprescription drugs or over-the-counter medications. It provides that reimbursement for nonprescription drugs or over-the-counter medications shall be the retail price of the lowest package quantity reasonably available that will fill the prescription.

Adopted subsection (e) is the Division pharmacy fee guideline when an amount cannot be determined under subsection (c)(1) or (d), as applicable, and no contract amount exists. It sets forth that, except as provided by subsection (f) of this section, reimbursement shall be an amount that is consistent with the criteria listed in Labor Code §408.028(f), including providing for reimbursement rates that are fair and reasonable. The insurance carrier shall develop a reimbursement methodology(ies) for determining reimbursement under this subsection, maintain in reproducible format documentation of the insurance carrier's methodology(ies) for establishing an amount, apply the reimbursement methodology(ies) consistently among health care providers in determining reimbursements under this subsection, and upon request by the Division, provide copies of such documentation to the Division. Reimbursement under this subsection is determined on a case-by-case basis and depends on the facts and circumstances surrounding the particular pharmaceutical service.

Adopted subsection (f) states that notwithstanding the provisions of this section, prescription medication or services, as defined by Labor Code §401.011(19)(E), may be reimbursed at a contract rate that is inconsistent with the fee guidelines as long as the contract complies with the provisions of Labor Code §408.0281 and applicable Division rules. This subsection conforms to statutory provisions of HB 528 that allow insurance carriers and health care providers to contract for fees that are inconsistent with the Division's pharmacy fee guideline in an amount greater or less than the fee guideline. Contractual reimbursements under this section are not part of the Division's pharmacy fee guideline.

Subsection (g) governs how health care providers are to be reimbursed under this section when the prescribing doctor has written a prescription for a generic drug or a prescription that does not require the use of a brand name. These provisions were located in subsection (b) of the previous rule. The adopted amendments to this subsection make clarifications in nomenclature, which are

not substantive amendments. The adopted amendments also conform references in this subsection to other parts of this section.

The amendments to subsection (h) make changes in nomenclature and conforming changes in references to other parts of this rule. These adopted amendments are not substantive.

The adopted amendments in subsection (i) also make changes in nomenclature. The adopted amendments also permit the Division to require the insurance carrier to disclose the source of the nationally recognized pricing reference used to calculate the reimbursement. This adopted amendment conforms to current nomenclature.

Adopted subsection (j) states that where any provision of this section is determined by a court of competent jurisdiction to be inconsistent with any statutes of this state, or to be unconstitutional, the remaining provisions of this section shall remain in effect.

§134.504

Section 134.504 governs pharmaceutical expenses incurred by the injured employee. The adopted amendments to §134.504 are conforming amendments to correct references in this rule to §134.503 in light of the amendments to §134.503.

SUMMARY OF COMMENTS AND AGENCY'S RESPONSES.

General: Commenters compliment the Division's proposed rules, and some state the amended rules are necessary to implement portions of HB 528. Some commenters note their appreciation of the opportunity to discuss these concepts informally prior to proposal, and in the Division's action since the passage of HB 528.

Agency Response: The Division appreciates the supportive comments.

General: A commenter suggests that minimizing pharmacy costs matters to Texas employers and their workers, and the relevant statute requires the Division to minimize pharmacy costs. The commenter cites numerous quoted premium and subscriber related figures from the Texas Department of Insurance (Department) *Setting the Standard: An Analysis of the Impact of the 2005 Legislative Reforms on the Texas Workers' Compensation System, 2010 Results, and the Department and Division's Biennial Report of the Texas Department of Insurance to the 82nd Legislature: Division of Workers' Compensation* (Biennial Report).

Agency Response: The Division agrees that minimizing costs is one of the statutory criteria required for a pharmacy fee guideline in Labor Code §408.028(f). Labor Code §408.028(f) also requires the Commissioner to adopt a pharmacy fee guideline that will provide reimbursement rates that are fair and reasonable; assure adequate access to medications and services for injured employees; and take into consideration the increased security of payment afforded by the Act. As set forth in this adoption order, the adopted pharmacy fee guideline complies with the statutory requirements in Labor Code §408.028(f).

General: A commenter states that about 75% of its pharmacy reimbursements are under contracts with a pharmacy benefit manager (PBM), which in turn contracts with the pharmacy. The commenter further states that it reimburses other pharmacies that do not contract with a PBM using an estimate of their usual and customary charges based in part on data from its PBM payments. The commenter states that its reimbursement levels are substantially less than AWP and that these reimbursement levels have caused no access problems. Additionally, the commenter understands that the Division intends that this rule would not prevent it from using its PBM arrangements.

Agency Response: The Division clarifies that Labor Code §408.0281 permits insurance carriers and health care providers to contract for rates that are inconsistent with the pharmacy fee guideline if the contract meets the requirements of that section and applicable Division rules. The Division has added the language "and applicable division rules" to adopted subsection (f) for the purpose of clarifying that the contractual fee arrangement between the insurance carrier and health care provider must also comply with any applicable Division rules. In light of HB 528 and other reasons set forth in this adoption, the Division also clarifies that insurance carrier reimbursement pursuant to the pharmacy fee guideline may no longer be based upon the health care provider's "usual and customary charges for the same or similar service." The Division disagrees with the commenter to the extent that the commenter suggests that it may reimburse a health care provider under the pharmacy fee guideline by using its own estimate of the health care provider's usual and customary charge; estimate of the health care provider's billed amount; or an estimate of the health care provider's contracted amount.

§134.503(a)(2): Because the term "parenteral drugs" is not defined in §134.500, commenters recommend added text: "This section does not apply to parenteral drugs administered intravenously by a health care provider." The commenters state it appears that the term is commonly understood to refer to any drug that is not consumed by the patient orally. Consequently, the commenters state this rule exclusion would apply not only to drugs administered intravenously, but would also apply to transdermal drugs, suppositories, and nasal inhalants. The commenters state that if the parenteral drug has a published AWP and can be safely administered by the patient, then the formulas in subsection (c) should apply for reimbursement. Other commenters believe that only medications administered intravenously are to be excluded from the fee schedule and recommend clarification. Additionally, a commenter recommends that if the Division elects to not amend the proposed language to clarify this provision of the rule, the Division's response should specifically address the points raised in this comment recommendation to make it as clear as possible that this provision shall not be used by pharmacies to "skirt" the guidelines to pursue reimbursement at a level greater than that set forth in the fee guideline. The commenter suggests this is especially important in regard to the reimbursement of compounded drugs.

Agency Response: The Division declines to make the recommended change. The Division's Medical Advisor has reviewed the comments pertaining to parenteral drugs and noted that the term "parenteral" encompasses only needle injections of substances through the skin or mucous membranes. Prescription drugs and nonprescription drugs or over-the-counter medications administered through patches, absorbable lotions or creams, as well as transdermal drugs, suppositories, and nasal inhalants are not parenteral drugs and, therefore, are subject to the requirements in the adopted rule. Reimbursement for parenteral drugs is covered by other Division fee guidelines in 28 TAC Chapter 134.

In response to the comment suggesting that certain self-administered parenteral drugs be included in the Division's pharmacy fee guideline, the Division disagrees and declines to include the

suggested changes. There may be rare instances where a patient self-injects a parenteral drug such as a diabetic patient self-injecting with insulin subcutaneously, intravenous port use for anti-neoplastic drugs by a cancer patient, and other rare circumstances when a doctor takes responsibility for the patient's training for self-administered medications intramuscularly, percutaneously, or intravenously through an established port. An attempt to prospectively bifurcate parenteral drugs based on the person administering the drug would add unnecessary complication and potential confusion to the system. The adopted reimbursement methodologies are consistent with the methodologies adopted in 2002 which have been applied by system participants with few disputes, if any, concerning appropriate reimbursement.

Further, the reference to parenteral drugs included in this paragraph is a restatement of the reference in previous rule §134.503, which was originally adopted in 2002. The use of parenteral is consistent with the Food and Drug Administration's (FDA) terminology and has not proved confusing or problematic for system participants since its original adoption. Any modification or elaboration of the term could lead to system participants' confusion over the common understanding of parenteral.

§134.503(b): A commenter states that subsection (b) directs all system participants to follow the rules in Chapters 133 and 134. The commenter states §133.240, a Chapter 133 rule, provides that when an insurance carrier remits payment to a pharmacy processing agent, the pharmacy's reimbursement shall be made in accordance with the terms of its contract with the pharmacy processing agent. The commenter states that an insurance carrier has to know the terms of the contract in order to ensure that the carrier has not made a payment that is inconsistent with the fee guideline. The Division should explain, how in the absence of the contracts, the insurance carrier can enforce a meaningful application of the statutes and rules. The commenter assumes that this was not intended, but the proposed fee guideline, as worded, could be argued to conflict with §133.240(m). The Division should clarify that the insurance carrier has the right to not pay an amount that it believes is in excess of the actual health care provider's billed or contracted amount.

Agency Response: The Division disagrees that §133.240(m) conflicts with the Division's pharmacy fee guideline. Section 133.240(m) applies when insurance carriers are reimbursing a pharmacy processing agent. An insurance carrier's reimbursement to a pharmacy processing agent must comply with the Division's pharmacy fee guideline or a contract between the insurance carrier and the pharmacy under Labor Code §408.0281. Once the pharmacy processing agent receives reimbursement, the processing agent shall reimburse the pharmacy in accordance with the terms of its contract with the pharmacy. Thus, an insurance carrier does not need to know the terms of the contract between the pharmacy processing agent and the pharmacy to comply with this adopted rule. "Amount billed" under subsection (c)(2) is determined by the amount that is billed by a pharmacy or pharmacy processing agent to an insurance carrier in accordance with subsection (c)(2)(A) and (B), and, in response to this comment, the Division has added to adopted subsection (c)(2) and (c)(2)(B) the language "to the insurance carrier" and "the insurance carrier" to clarify this point. Additionally, the Division clarifies that insurance carriers may not estimate or modify a health care provider's billed amount or account for a health care provider's appropriate level of reimbursement under its contract with a pharmacy processing agent when an insurance carrier reimburses a pharmacy or pharmacy processing agent under the Division's pharmacy fee guideline.

§134.503(b): A commenter opines that §133.307(c)(2)(H) requires a pharmacy processing agent participating in medical fee dispute resolution (MFDR) to submit to the MFDR section a signed and dated copy of an agreement between the processing agent and the pharmacy that clearly demonstrates the dates of service covered by the contract and a clear assignment of the pharmacy's right to participate in the MFDR process. If the contract is necessary for MFDR to adjudicate a dispute over the guideline amount, then the pharmacy processing agent needs to submit its contract with every bill to the insurance carrier.

Agency Response: The Division declines to make the commenter's recommended change, because the commenter's concerns are outside the scope of these rules. Neither §134.503 nor §134.504 detail the appropriate manner for submitting medical bills for pharmaceutical services; instead, these sections simply clarify that the Division's adopted billing procedures in other sections of Chapters 133 and 134 of this title govern this issue. These adopted rules, however, only address reimbursement for pharmaceutical services and, as explained above, the terms of a contract between a pharmacy and a pharmacy processing agent are not applicable to the amount an insurance carrier reimburses for pharmaceutical services adopted under this rule.

§134.503(c): A commenter recommends that to comply with its statutory duty to minimize costs, the Division should provide separate and lower fees for prescriptions filled by mail order pharmacies. If the Division insists on continuing to use AWP at all, the commenter recommends that the AWP formula for mail order pharmacies should be AWP at 85% for generic plus a $4 dispensing fee, and AWP at 95% for brand name drugs plus a $4 dispensing fee. The commenter states that mail order pharmacies are becoming more prevalent within the workers' compensation industry, and they currently compete with Main Street pharmacies, which have higher overhead costs. The one-size fits-all approach in the proposed pharmacy fee guideline fails to achieve the statutory objective of minimizing costs to employees and insurance carriers. To avoid creating an incentive for abuse, the Division should at least create a different reimbursement structure for mail order pharmacies that target workers' compensation exclusively.

Agency Response: The Division declines to add separate reimbursement methodologies in the adopted rule at this time to address mail order pharmacies. The Division does not have available data that would allow the Division to determine a rate, either higher or lower than the rates included in subsection (c), specific to mail order pharmacies. Without access to information regarding the use of mail order pharmacies and specific information concerning the cost and reimbursement structure of mail order pharmacies versus retail pharmacies, setting a unique reimbursement methodology for mail order pharmacies could lead to unintended and unforeseen consequences regarding injured employees' timely access to prescription drugs. However, if in the future the Division gains access to such information, then the Division will determine whether additional clarification to the existing pharmacy fee guideline reimbursement methodology is needed.

§134.503(c)(1): Commenters recommend amending (c)(1) to read as follows: "the fee established by the following formulas as applied only to ingredients with a National Drug Code (NDC) as dispensed and based on the average wholesale price (AWP) as reported by the original labeler of drug product to a nationally recognized pharmaceutical price guide or other publication . . .

." Commenters recommend this text to address two issues, one related to repackaging and the other related to compounding.

With regard to repackaging, commenters recommend this language because there may be more than one AWP applicable to a dispensed prescription drug either from the original manufacturer of the drug product or from a repackaging company, which breaks down that quantity into smaller units to sell to health care providers that dispense drugs. Under federal law, the repackaging company may assign and publish a new AWP for the drug. According to the commenters, this practice has been used in other jurisdictions to circumvent adopted fee schedules and grossly inflate drug reimbursement rates. The commenters state that the Division should look to various jurisdictions that have already either addressed or are in the process of addressing both compounding and repackaging issues, namely: California, Arizona, Oklahoma, Mississippi, Alabama, Georgia, and Maryland. If not, commenters suggest the Division should be open to the idea that once more data becomes available as to whether or not this is an existing problem in Texas, that they be amenable to either a rule petition or a proactive approach to address the issues at that time.

With regard to compounding, the commenters recommend this language because compounded drugs may include ingredients (saline, petroleum jelly, talc, baking soda, etc) which do not have an assigned NDC and consequently do not have a published AWP. Compounded drugs may include ingredients which do not have an assigned NDC and consequently do not fit the definition of "nonprescription drugs or over-the-counter medications" found in §134.500(8) and would not be reimbursed under §134.503(d). Commenters state that an unscrupulous pharmacy or processing agent may attempt to circumvent the pharmacy fee schedule by arguing that an amount cannot be determined in accordance with subsections (c)(1) or (d). If that argument is correct, then reimbursement would default to fair and reasonable standards consistent with Labor Code §408.028(f). This could lead to costly fee disputes over compounded drugs that contain ingredients that are not labeled and packaged in compliance with state or federal law and for which there is no discernible therapeutic value to the injured employee.

Agency Response: The Division declines to adopt the commenters' recommended text. For the reasons stated in this adoption order, the Division has allowed for the use of AWP assigned to the NDC number of the drug dispensed. The commenters state that the repackaging issue has been used in other jurisdictions to circumvent adopted fee schedules and to grossly inflate drug reimbursement rates. However, the Division does not possess any data or other information that shows that this practice of circumventing adopted fee schedules and grossly inflating drug reimbursement rates is occurring in Texas. Studies published by entities such as the National Council on Compensation Insurance and the California Workers' Compensation Institute have attempted to quantify the cost impact of drug repackaging, but these studies only focus on repackaging costs as they relate to physician dispensing of prescription drugs. Texas statutes do not currently permit physician dispensing of prescription drugs, except in limited rural areas of the state. Should Texas statutes change to allow greater physician dispensing of prescription drugs, the Division will revisit this issue to determine if additional rulemaking is needed. Further, the Division notes that the adopted text in subsection (c)(1) is similar to text that has existed in §134.503 since 2002 and this adopted paragraph will not require the industry to implement any changes. In light of the absence of data showing such harm, there appears to be no cost benefit in adopting the recommended text.

With regard to the commenters' compounding issue, the Division determines that the suggested text is not necessary. Under the adopted rule, each prescription drug included in a compound drug will be reimbursed in accordance with the applicable formula in subsection (c)(1)(A) or (B) which will include the $4.00 dispensing fee per prescription. Subsection (c)(1)(C) also includes a single $15.00 compounding fee per prescription.

Pharmacists are required to list each drug included in the compound and calculate the charge for each drug separately in accordance with §134.502(d)(2). The inclusion of a substance without an NDC number will not cause the application of adopted subsection (e) in determining reimbursement for the individual prescription components of the compound drug that do have an NDC number. If an amount for any individual component of a compound drug cannot be determined under subsection (c)(1) or (d), reimbursement for that individual component will be governed by subsection (e) of this section.

§134.503(c)(1): Commenters raised concerns that with the deletion of an AWP pricing book reference (e.g., Red Book and First Data Bank), stating that the proposed language of a nationally recognized published pricing data will create conflict and potential disputes over the pricing difference between the sources, including the pricing data in effect on the day the prescription drug is dispensed. A commenter inquires if the pharmacies are billing off of one source, but the payers are paying off a different source, who wins, and whose source is to take precedence. Such discrepancies can cause difficulties in creating a business model with some degree of certainty. Commenters specifically recommend that the rule identify one publication, and that publication be MediSpan since MediSpan is updated more frequently and therefore contains the most current pricing data. A commenter recommends the rule be amended to allow a single nationally recognized pharmaceutical guide that will provide for cost control and a fair rate of reimbursement.

Agency Response: The Division declines to make the recommended change and clarifies that the deletion of the examples from the adopted rule does not change the previous requirement to use a nationally recognized source of AWP to establish the reimbursement amount. The examples are removed to accommodate the potential for change in publishers of such data, which could cause confusion among system participants, and avoid the impression that the Division endorses any specific AWP price guide. The use of multiple nationally recognized pricing guides has been in place in the Texas workers' compensation system since 2002 with few disputes.

§134.503(c)(1): Commenters support the proposed pharmacy fee guideline that maintains the current reimbursement rates based on AWP. Commenters indicate that while the health care industry continues to look for a better pricing benchmark, AWP remains the most widely accepted standard at this time. A commenter describes the high degree of risk involved in providing prescription care to injured employees and believes a state fee schedule should act as a safety net to the injured employees allowing pharmacies the ability to reduce the uncertainty in obtaining prescription care. The commenter further cites the March 2010 study conducted by WCRI that evaluated pharmaceutical spending in 16 states, including Texas, asserting that the drivers of cost within the workers' compensation system center on utilization and prescribing patterns. The commenter

states the study also indicates that lowering fee schedules do little to influence prescriber behavior, and instead block access to care.

Agency Response: The Division appreciates the supportive comments. The Division agrees that AWP remains the most widely accepted standard at this time and notes numerous resources were researched and considered in the development of this adopted rule, including those noted by the commenters. Additionally, the Division notes that the requirements of the Division's adopted fee guideline are set forth in Labor Code §408.028(f).

§134.503(c)(1): A commenter recommends AWP be replaced with a standard that minimizes costs. In proposing to continue the use of the existing rule's AWP formula, the proposed pharmacy fee guideline violates and exceeds the statutory authority of the Division set forth in the Act because continued use of AWP does nothing to minimize costs as required by Labor Code §408.028(f)(3), and the notice of the proposed rule states no factual basis for believing that continued use of AWP does minimize cost. The commenter further opines that the proposed rule contains no discussion of the facts of AWP whatsoever, while recent national development facts on AWP that are readily available, and not disputed, show reliance on AWP reimbursement as fundamentally flawed. Additionally, the commenter contends that the notice of the proposed rulemaking states no factual basis for believing that continued use of AWP is: [1] necessary to ensure adequate access to medications and services to injured workers as required by Labor Code §408.028(f)(2); [2] necessary to ensure fair and reasonable reimbursement rates as required by Labor Code §408.028(f)(1); and [3] appropriate when the Division takes into consideration the increased security of payment afforded by this subtitle, as required by Labor Code §408.028(f)(4). The commenter urges the Division to either provide explanation of legal and factual reasons why this perceived threat to the company's cost savings does not exist, or commit to changes to the proposed rule that will eliminate the perceived threat.

Agency Response: The Division declines to change the AWP benchmark at this time. The Division notes that any benchmark by itself does not determine a final reimbursement rate. The use of AWP is but one component of the reimbursement formula adopted by the Division to establish reimbursement rates for pharmaceutical services. There are alternative benchmarks; however, they serve as a point by which to multiply the rate of reimbursement.

The Division held meetings with system participants on February 2, 2010 and again on November 16, 2010, and one agenda topic for discussion was the use of AWP versus other benchmarks. A presentation with a summary of seven common pricing benchmarks was provided at the February 2, 2010 meeting, and further details of each benchmark were presented in breakout sessions at the two Division Education Conferences in 2010. Throughout this rulemaking process, there have been discussions with system participants about the use and necessity of an alternative benchmark, and the majority of system participants agreed with the conclusions of the Division that there is no suitable replacement for AWP in the industry at this time.

Furthermore, AWP is the most commonly used benchmark in the health care industry as well as workers' compensation systems, based on an excerpt from the Milliman Report, "The most common formula for defining pharmacy reimbursement levels in all markets (e.g., commercial, Medicare, Medicaid, workers' compensation), is a percentage of AWP (most commonly a discount) plus a dispensing fee for a prescription." Additionally, WCRI's *Workers' Compensation Medical Cost Containment: A National Inventory, 2011* shows that out of 34 workers' compensation state jurisdictions that provide pharmacy reimbursement direction, 29 use AWP as their benchmark.

§134.503(c)(1)(A) - (C): Commenters suggest reliance on Centers for Medicare and Medicaid Services (CMS) methodologies in accordance with the provisions of Labor Code §413.011 may not be appropriate at this time with regard to the pharmacy fee schedule; but also suggests that once CMS adopts a singular and consistent methodology for pharmaceutical reimbursement, the Division may have to abandon the current AWP methodology and adopt the CMS methodology with minimal modifications in order for the system to have a statutorily valid pharmacy fee guideline.

Agency Response: This adoption continues the use of AWP as the benchmark for pharmaceutical reimbursement in the adopted rule. As pharmacy reimbursement benchmarks and methodologies continue to evolve, the Division will monitor and consider these developments for possible future rulemaking.

§134.503(c)(1) - (2): A commenter recommends keeping as a reimbursement limit the pharmacy's usual and customary charge, or replacing it with retail cash price, with the following suggested language: "the health care provider's retail cash price that it charges to walk-in customers." The commenter suggests pharmacies might argue that the removal from the rule of the pharmacy's "usual and customary charge for the same or similar service" as one of the lesser reimbursement levels to which reimbursement is limited, and its replacement with "amount billed by the health care provider," allows pharmacies to bill more to workers' compensation insurers for prescriptions to covered workers than they can bill other patients, and that the insurer would be required to pay the higher amount up to (under the current proposal) the AWP-plus formula amount. Such a rule would violate the minimize costs statutory requirement and unconstitutionally delegate pharmacy reimbursement to the pharmacy itself. The commenter's company would directly and immediately be threatened to increase, rather than minimize, the portion of its pharmacy reimbursements that go to pharmacies that do not contract with its PBM.

Agency Response: The Division declines to make the recommended changes. The commenter's alternate language would result in some form of a "usual and customary charge" consideration by the insurance carrier, which would circumvent the statutory amendments in HB 528 that eliminate the Division's requirement to consider "usual and customary charge" when developing a pharmacy fee guideline. Also, as set forth in this adoption order, the adopted pharmacy fee guideline in this rule complies with the cost saving provisions in Labor Code §408.028(f).

Additionally, the Commissioner received a letter of legislative intent of HB 528 and specifically of House Floor Amendment No. 1, responding to submitted public comment. The letter notes that the commenter, by stating that the pharmacy fee guideline rule should include reimbursement at usual and customary rates, ignores the changes in statute made by HB 528 on this specific topic. HB 528 repealed the HB 7 provision regarding §408.028(g) and further amended subsection (g) by setting forth that Labor Code §413.011(d), and the rules adopted to implement that subsection, do not apply to the pharmacy fee schedule. The statement of legislative intent stated that the use of "usual and customary" in the pharmacy fee guideline was extremely costly to the overall system because of the very large

number of pharmacy fee disputes filed with the Division that involved application of that term.

Furthermore, the amount billed under adopted subsection (c)(2) is a more objective inquiry than "usual and customary" and is determined based solely by the billed amount the health care provider or pharmacy processing agent submits on the medical bill. This objective approach allows for more consistent application of the pharmacy fee guideline, thereby eliminating fee disputes over what constitutes a health care provider's "usual and customary charge."

§134.503(c)(1)(A) - (B): A commenter recommends that if the Division is not willing or not able to change the basis of an acquisition-cost basis formula from AWP at this time, the Division must at least consider changing the formula from AWP plus to AWP minus. The commenter recommends the Division adopt an AWP formula at 96% of AWP for brand name drugs, and 88% of generics, in each case plus a $4 dispensing fee. This commenter contends that the notice of the proposed rulemaking states no factual basis for believing that continued use of AWP plus 25% for generics and plus 9% for brand name formulas: [1] minimizes costs as required by Labor Code §408.028(f)(2); [2] is necessary to ensure adequate access to medications and services to injured workers as required by Labor Code §408.028(f)(2); [3] is necessary to ensure fair and reasonable reimbursement rates as required by Labor Code §408.028(f)(1); and [4] is appropriate when the Division takes into consideration the increased security of payment afforded by this subtitle, as required by Labor Code §408.028(f)(4). The commenter provides excerpts from the Division's report from Milliman entitled *Pharmaceutical Reimbursement Comparison Report,* that the commenter believes support the commenter's recommendation of an AWP minus reimbursement approach, and that such a formula produces reimbursements that pharmacies accept as fair and reasonable.

Agency Response: The Division declines to adopt the AWP formulas recommended by the commenter. For the reasons set out in this adoption order, the adopted pharmacy fee guideline meets the requirements under Labor Code §408.028(f) at this time. The Division notes that the reimbursement rates included in the adopted §134.503 (relating to Pharmacy Fee Guideline) are the same rates as provided in previous §134.503 (relating to Reimbursement Methodology). Consistent application of the methodology should not result in any cost increase to insurance carriers. The rates included in the Milliman Report reflect average reimbursement for all carriers and include reimbursements greater than and less than 96% of AWP for name brand drugs, and greater than and less than 88% of AWP for generic drugs. Further, the range of reimbursements extends from 41% to 132% of AWP for brand name drugs, and 16% to 142% of AWP for generic drugs. Although the Milliman Report indicates Texas workers' compensation reimbursement is significantly above that seen in other health markets that included Medicare, Medicaid, and commercial group health plans, Milliman notes that based on their research citing WCRI and NCCI, the Texas fee schedule was typical of workers' compensation fee schedules in other states.

Furthermore, in reviewing states' workers' compensation pharmacy fee schedules, the WCRI report, *Workers' Compensation Medical Cost Containment: A National Inventory,* January 2011, reflects a range of 84% to 140% of AWP for brand name drugs and a range of 75% to 140% of AWP for generic drugs. Dispensing fees across state systems ranged from $2.00 to $10.67.

Regarding the assertion that an AWP minus reimbursement rate would result in an amount that is fair and reasonable, the Division believes that the previous and adopted reimbursement rates produce fair and reasonable reimbursement. Individual pharmacies may agree to rates that differ from the adopted reimbursement rates, which would also be considered fair and reasonable. The lowest common denominator does not necessarily indicate a global fair and reasonable amount that would meet the requirements of the Texas workers' compensation system or the requirements of the Labor Code.

§134.503(c)(1)(C): Commenters state that it appears the Division intends for compounded drugs to be reimbursed by the insurance carrier by applying the formulas in (1)(A) or (B) with a single compounding fee of $15 per prescription replacing the $4 dispensing fee found in those paragraphs of subsection (c)(1), and if such is the intention, then clarification is needed in the rule.

Agency Response: The Division disagrees that the $15 compounding fee replaces the $4.00 dispensing fee. The Division clarifies that the single compounding fee of $15 per prescription is in addition to the calculations of subsection (c)(1)(A) and (B) that includes a single $4.00 dispensing fee per prescription. There is not a separate dispensing fee for each component of a compounded drug. In order to make this clarification understood, the Division has added the terms, "per prescription" in both paragraph (1)(A) and (B) of the adopted rule. This added text makes clear that there will be one $4.00 dispensing fee per prescription for both generic and brand name drugs. This adoption order maintains the previous methodology and reimbursement practice.

§134.503(c)(1)(C): A commenter states that inappropriate use of compound drugs has been a major cost driver of workers' compensation medical costs in a number of states and there is no clinical evidence for the efficacy of non-FDA-approved compound drugs. Additionally, the majority of compound drugs that are administered topically have no proven clinical impact. The commenter suggests the proposed rules should require preauthorization for any use of a compound drug and justification set forth based on the patient's ability to tolerate a drug's inert substances.

The commenter recommends the following clarifying language to place restrictions on the use of compounding, and to dictate how compound drugs, when appropriate to dispense, should be reimbursed: "When compounding is medically necessary to treat the injured worker and has been preauthorized, the National Drug Code number and the actual amount used for each ingredient in the compound shall be provided and the charge for each drug is to be calculated separately using paragraph (1)(A) or (B) of the subsection, with a single dispensing fee of $15 per prescription. If information pertaining to the original labeler of the underlying drug product used for the compound is not provided, the insurance carrier shall select the most reasonable and closely related AWP for reimbursement."

Agency Response: The Division declines to make the recommended changes. This commenter's concerns regarding preauthorization, billing, and bill processing requirements are addressed in other rules of Chapters 133 and 134 of the Division rules, and those rules are not within the scope of this adoption order. Subjective determinations of the "most reasonable and closely related AWP for reimbursement" where a specific NDC number was billed for the prescription drug, would cause unnecessary disputes.

The Division notes, however, that if an insurance carrier cannot determine reimbursement under §134.503(c)(1), (d), or (f), then the reimbursement rates shall be fair and reasonable in accordance with §134.503(e).

§134.503(c)(2): A commenter recommends the rule should delete "or pharmacy processing agents" because this phrase could be interpreted to allow pharmacy processing agents, which provide no health care at all, to set their own billed amounts for drugs and services provided by actual pharmacies, marked-up, and make insurers pay those marked-up charges all the way to AWP plus. The mark-up in the billed amounts by a pharmacy processing agent is not for health care. This unintended consequence would create an unwarranted burden on the system when no access problem justifies a large increase. Further, nothing in Labor Code §413.0111 or §408.028, or any other amendment to the Labor Code requires, or even authorizes, the Division to allow a processing agent who purchases receivables to mark-up the pharmacy's own retail cash price and make the insurer pay the marked-up amount billed by the processing agent. With HB 528, Labor Code §408.0281 provides in part, "notwithstanding any other provision of the Act, an insurance carrier may pay a health care provider fees for pharmaceutical services that are inconsistent with the fee guidelines. . . ." With the cited definition of processing agent from §133.2(7), the commenter suggests that if proposed (c)(2) did allow a pharmacy processing agent to set its own amount charged, different from and marked-up from, the pharmacy's retail cash price, it not only would violate the statutory requirement to minimize costs, but would conflict with other rules governing the limited role of pharmacy processing agents. Also, the Division would have to demonstrate how allowing processing agents to mark-up would minimize pharmacy costs to insurers.

Agency Response: The Division declines to delete "or pharmacy processing agents" from the adopted rule because Labor Code §413.0111 specifically directs the Commissioner to adopt rules that authorize pharmacies to use agents or assignees to process claims and act on behalf of the pharmacies under terms and conditions agreed on by the pharmacies. The Legislature recognized the role of pharmacy processing agents as system participants in the Texas workers' compensation system as necessary when the Legislature enacted HB 7 during the 79th Legislature, Regular Session, and effective September 1, 2005. No provisions of Labor Code §413.0111 concerning the role of pharmacy processing agents in the reimbursement of prescription medication and services has been changed or repealed by HB 528.

The Division did not intend to allow for a situation where a pharmacy processing agent could mark-up a pharmacy bill. The Division has therefore changed the text in adopted subsection (c)(2) to prevent mark-ups of pharmacy bills. Adopted subsection (c)(2) now provides, "notwithstanding §133.20(e)(1) of this title (relating to Medical Bill Submission by Health Care Provider), the amount billed to the insurance carrier by the: (A) health care provider; or (B) pharmacy processing agent only if the health care provider has not previously billed the insurance carrier for the prescription drug and the pharmacy processing agent is billing on behalf of the health care provider."

Various scenarios may arise in the application of adopted subsection (c)(2). First, if a health care provider bills an insurance carrier for a pharmaceutical service the amount billed under subsection (c)(2) will be the amount included on the DWC-66 form or its electronic equivalent. Second, if a pharmacy processing agent bills an insurance carrier for a pharmaceutical service on behalf of the health care provider and the health care provider has not submitted a bill for that service, the amount billed under subsection (c)(2) is the amount included on the DWC-66 form or its electronic equivalent as submitted by the pharmacy processing agent. Third, if a health care provider submits a bill for a pharmaceutical service to an insurance carrier and subsequently a pharmacy processing agent submits a bill for the same pharmaceutical service, the amount billed under subsection (c)(2) is the amount listed on the health care provider's DWC-66 form or its electronic equivalent. The Division notes that regardless of these scenarios a contractual fee arrangement that is in place between the health care provider and insurance carrier and that complies with applicable provisions of the Act and applicable Division rules will govern reimbursement for the pharmaceutical service.

The Division clarifies that determining the amount billed pursuant to §134.503(c)(2) is an objective inquiry, and is determined solely by the billed amount the health care provider, or pharmacy processing agent, submits on the particular DWC-66 form or its electronic equivalent. For example, when the insurance carrier receives a bill for pharmaceutical services from a pharmacy or a pharmacy processing agent, the amount billed to be compared to the formula amount in §134.503(c)(1) will be the amount billed as reflected on the bill. Accordingly, insurance carriers may not substitute any other billed amount.

§134.503(c)(2): The commenter recommends deleting the language in proposed §134.503(c)(2) that makes §133.20(e) inapplicable to the reimbursement calculation. The proposed §134.503(b) requires all system participants to use the Chapter 133 and 134 billing and coding rules. However, proposed §134.503(c)(2) makes §133.20(e) (relating to the prohibition against billed charges exceeding the health care provider's usual and customary charge) inapplicable to the reimbursement calculation. Rule 133.20(e) helps to minimize costs to employees and insurance carriers under §408.028(f).

Agency Response: The Division declines to make the recommended change. As already stated, the Division has removed "usual and customary charge" from this fee guideline due to the legislative directive in HB 528. The reason for the exclusion of §133.20(e)(1) in the proposed and adopted rule is to ensure there is no conflict between these two sections since the "usual and customary charge" language of §133.20(e)(1) is no longer included in §134.503.

§134.503(d): A commenter recommends the following changes that add the word "generic" to the proposed language: "Reimbursement for nonprescription drugs or over-the-counter medications shall be the retail price of the lowest 'generic' package quantity reasonably available." The commenter recommends the deletion of the proposed language at the end of the subsection that states, "that will fill the prescription." The recommended language changes are because of concerns regarding the manner in which the proposed rules relate to non-prescription and over-the-counter medications. The commenter asserts that consistent with the treatment of prescription drugs, there should be a specified requirement that generic over brand name medications be used where a generic is readily available.

Agency Response: The Division declines to make the change. The Division notes that adopted rule governs the reimbursement of prescription, non-prescription and over-the-counter alternatives to prescription drugs and that §134.502 of this title (relating to Pharmaceutical Services) provide guidance to doctors regarding the prescription of over-the-counter alternatives to

prescription drugs. Additionally, the Division is unaware of any specific problems regarding the use and reimbursement of over-the-counter alternatives to prescription drugs, and suggests that the use of over-the-counter drugs is not a significant cost driver in the Texas workers' compensation system. Although costs are a consideration, the administrative burden to establish and implement a new, more explicit and demanding process for injured employees and health care providers to obtain over-the-counter alternatives to prescription drugs is potentially a cost increase to the system rather than a savings. Further, complicating the purchase and reimbursement of over-the-counter alternatives could potentially encourage the use of prescription drugs rather than the less expensive over-the-counter alternative, which would negate the legislative intent of allowing clinically appropriate over-the-counter alternatives to prescription drugs as a cost-savings measure in the Texas workers' compensation system.

§134.503(f): A commenter supports the ability to contract for amounts different from the fee schedule as stated in subsection (f) of the proposed rule.

Agency Response: The Division appreciates the supportive comment.

§134.503(f): Commenters suggest that additional clarification is needed that the contract has to be between the person paying the bill and the person submitting the bill. A commenter states, "We get concerned when one of our members is a third-party biller and they get bills in, and then suddenly they're getting subjected to contract rates, and they didn't sign a contract."

Agency Response: The Division disagrees. HB 528 sets out when pharmacy reimbursement may be made pursuant to a contract. Labor Code §408.0281(c) authorizes an insurance carrier to pay a health care provider fees for pharmaceutical services that are inconsistent with fee guidelines adopted by the Commissioner only if the insurance carrier has a contractual relationship with the health care provider and that contract includes a specific fee schedule. HB 528 also allows insurance carriers or their authorized agents to use informal and voluntary networks to obtain these contracts with health care providers. Accordingly, if there is a contractual relationship between the insurance carrier and the health care provider that complies with HB 528, HB 528 permits the insurance carrier to reimburse at the contracted rate. Neither the insurance carrier nor the health care provider can nullify their contractual relationship because the health care provider decides to use a processing agent.

§134.503(f): A commenter states that they have contacted insurance carriers and their contracted PBMs in an attempt to comply with the electronic billing rules. The commenter states that the responses from the PBMs have consistently stated that the pharmacy must enter into a discounted network pharmacy contract. The commenter states that in their review of §133.501 of this title, there does not appear to be any sections allowing insurance carriers and PBMs to enforce their contracted rates or force a non-network pharmacy to sign their contract: only that they accept the Division's standard of the NCPDP 5.1. The commenter recommends further clarification on the rules adopted for the electronic submission of pharmacy bills.

Agency Response: This comment concerns the application of the Division's electronic billing rules, and is outside the scope of these adopted rules. As always, the Division encourages parties to file complaints with the Division if they believe another party is violating the Act or Division rules.

§134.503(g)(1) and (2): A commenter raises concerns with the substitution of "health care provider" for "pharmacist" relating to the dispensing of drugs as physician dispensing of drugs in workers' compensation has been a major problem in many states, and the Texas Legislature just recently rejected a bill that would permit physicians to directly dispense drugs under limited circumstances. The word "pharmacist" is recommended to be retained in the rule to prevent any ambiguity regarding physician dispensing, and so that it is clearly understood that only pharmacists should be allowed to dispense medications.

Agency Response: The Division disagrees that the adopted language is ambiguous. The statutes and rules governing physician dispensing of drugs are fully addressed by the Medical Practice Act and Pharmacy Act under the Occupations Code and related Medical Board rules regarding the authority of physicians to supply drugs. The term "health care provider" also conforms to Division nomenclature. This rule is not intended to allow the dispensing of drugs outside of what currently is permissible under the Medical Practice Act and the Pharmacy Act under the Occupations Code, and limited by the health care provider's license and scope of practice.

Additionally, the commenter's issues were raised and addressed in the rulemaking process for the Division's recently adopted pharmacy closed formulary rules, and consequently these proposed changes in subsection (g) of this section are conforming changes for consistently applied terminology throughout Chapter 133 Subchapter F.

NAMES OF THOSE COMMENTING FOR AND AGAINST THE SECTIONS.

For: Healthesystems and Injured Workers' Pharmacy.

For, with changes: American Insurance Association, Insurance Council of Texas, Progressive Medical, Inc., Property Casualty Insurers Association of America, StoneRiver Pharmacy Solutions, Texas Mutual Insurance Company, and Workers' Compensation Pharmacy Alliance.

Against: None.

Neither for or Against: None.

These rule amendments are adopted under the Labor Code §§408.028, 408.0281, 408.027, 401.011, 402.021, 408.021, 413.0111, 402.00111, 402.00116, 402.00128, 402.061, and 504.053; and Insurance Code Chapter 1305.

The Labor Code §408.028(e) requires the Commissioner by rule to allow an employee to purchase a brand name drug rather than a generic pharmaceutical medication or over-the-counter alternative to a prescription medication if a health care provider prescribes a generic pharmaceutical or an over-the-counter alternative to a prescription medication. The injured employee shall be responsible for paying the difference between the cost of the brand name drug and the cost of the generic or over-the-counter alternative to a prescription medication. The injured employee may not seek reimbursement for the difference in cost from an insurance carrier and is not entitled to use the medical dispute resolution provisions of Labor Code Chapter 413 with regard to the prescription. The Labor Code §408.028(f) requires the Commissioner by rule to adopt a fee schedule for pharmacy and pharmaceutical services that will provide reimbursement rates that are fair and reasonable; assure adequate access to medications and services for injured employees, minimize costs to employees and insurance carriers and take into consideration the increased security of payment afforded by this subtitle. The La-

bor Code §408.028(g) provides that the Labor Code §413.011(d) and the rules adopted to implement that subsection do not apply to the fee schedule adopted by the Commissioner under the Labor Code §408.028(f).

HB 528 amends the Labor Code by adding §408.0281 (relating to Reimbursement for Pharmaceutical Services; Administrative Violation). Section 408.0281(b) sets forth that notwithstanding any provision of the Insurance Code Chapter 1305 (relating to Workers' Compensation Health Care Networks) or the Labor Code §504.053 (relating to Election), prescription medication or services, as defined by §401.011(19)(E), may be reimbursed in accordance with the fee guidelines adopted by the Commissioner or at a contract rate in accordance with this section. Section 408.0281(b)(2) also provides that prescription medication or services may not be delivered through a workers' compensation health care network under Insurance Code Chapter 1305, or a contract concerning workers' compensation insurance coverage for employees of political subdivisions as described by the Labor Code §504.053(b)(2). Under the Labor Code §408.0281(c), HB 528 authorizes the reimbursement of prescription medication or services that is inconsistent from the fee guidelines the Commissioner adopts only if the insurance carrier has a contract with the health care provider and that contract includes a specific fee schedule. An insurance carrier or the carrier's authorized agent may use an informal or voluntary network to obtain a contractual agreement that provides for fees different from the fees authorized under the fee guidelines adopted by the Commissioner for pharmaceutical services.

The Labor Code §408.027(f) provides that except for the Labor Code §408.0281, any payment made by an insurance carrier to a health care provider under §408.027 shall be in accordance with the fee guidelines authorized under the Act, if the health care service is not provided through a workers' compensation health care network under Insurance Code Chapter 1305 or at a contracted rate for that health care service if the health care service is provided through a workers' compensation health care network under Insurance Code Chapter 1305.

The Labor Code §401.011 contains definitions used in the Texas workers' compensation system (in particular, §401.011(19)(E), the definition of "health care," which includes a prescription drug, medicine or other remedy, §401.011(22), the definition of "health care provider," and §401.011(22-a), the definition of "health care reasonably required").

The Labor Code §402.021 states that the workers' compensation system of this state must provide timely, appropriate, and high-quality medical care supporting restoration of the injured employee's physical condition and earning capacity.

The Labor Code §408.021 states that an injured employee who sustains a compensable injury is entitled to all health care reasonably required by the nature of the injury as and when needed.

The Labor Code §413.0111 requires that a rule on reimbursement of prescription medication or services must authorize pharmacies to use agents or assignees to process claims and act on behalf of pharmacies.

The Labor Code §402.00111 provides that the Commissioner shall exercise all executive authority, including rulemaking authority, under the Labor Code and other laws of this state. Section 402.00116 grants the powers and duties of chief executive and administrative officer to the Commissioner and the authority to enforce Labor Code Title 5, other workers' compensation laws of this state, and other laws granting jurisdiction to or applicable to the Division or Commissioner. Section 402.00128 provides general operational powers to the Commissioner to conduct daily operations of the Division and implement Division policy including the duty to delegate, assess and enforce penalties and enter appropriate orders as authorized by Labor Code Title 5. Section 402.061 provides the Commissioner the authority to adopt rules as necessary to implement and enforce the Act. Section 413.0511 requires that the Medical Advisor must make recommendations regarding the adoption of rules and policies concerning health care.

The Labor Code §504.053(b)(2) provides that if a political subdivision or a pool determines that a workers' compensation health care network certified under Insurance Code Chapter 1305, is not available or practical for the political subdivision or a pool, it may provide medical benefits to its injured employees by directly contracting with health care providers or by contracting through a health benefits pool established under the Local Government Code Chapter 172.

Insurance Code Chapter 1305 is the Workers' Compensation Health Care Network Act that authorizes the establishment of certified networks for the provision of workers' compensation medical benefits. In particular, §1305.101(c) sets forth that prescription medication and services may not directly or through a contract be delivered through a workers' compensation health care network and that prescription medication and services shall be reimbursed as provided by the Labor Code §408.0281, other provisions of the Act and applicable rules of the Commissioner.

§134.503. Pharmacy Fee Guideline.

(a) Applicability of this section is as follows:

(1) This section applies to the reimbursement of prescription drugs and nonprescription drugs or over-the-counter medications as those terms are defined in §134.500 of this title (relating to Definitions) for outpatient use in the Texas workers' compensation system, which includes claims:

(A) subject to a certified workers' compensation health care network as defined in §134.500 of this title;

(B) not subject to a certified workers' compensation health care network; and

(C) subject to Labor Code §504.053(b)(2).

(2) This section does not apply to parenteral drugs.

(b) For coding, billing, reporting, and reimbursement of prescription drugs and nonprescription drugs or over-the-counter medications, Texas workers' compensation system participants shall apply the provisions of Chapters 133 and 134 of this title (relating to General Medical Provisions and Benefits--Guidelines for Medical Services, Charges, and Payments, respectively).

(c) The insurance carrier shall reimburse the health care provider or pharmacy processing agent for prescription drugs the lesser of:

(1) the fee established by the following formulas based on the average wholesale price (AWP) as reported by a nationally recognized pharmaceutical price guide or other publication of pharmaceutical pricing data in effect on the day the prescription drug is dispensed:

(A) Generic drugs: ((AWP per unit) x (number of units) x 1.25) + $4.00 dispensing fee per prescription = reimbursement amount;

(B) Brand name drugs: ((AWP per unit) x (number of units) x 1.09) + $4.00 dispensing fee per prescription = reimbursement amount;

(C) When compounding, a single compounding fee of $15 per prescription shall be added to the calculated total for either paragraph (1)(A) or (B) of this subsection; or

(2) notwithstanding §133.20(e)(1) of this title (relating to Medical Bill Submission by Health Care Provider), the amount billed to the insurance carrier by the:

(A) health care provider; or

(B) pharmacy processing agent only if the health care provider has not previously billed the insurance carrier for the prescription drug and the pharmacy processing agent is billing on behalf of the health care provider.

(d) Reimbursement for nonprescription drugs or over-the-counter medications shall be the retail price of the lowest package quantity reasonably available that will fill the prescription.

(e) Except as provided by subsection (f) of this section, if an amount cannot be determined in accordance with subsections (c)(1) or (d) of this section, reimbursement shall be an amount that is consistent with the criteria listed in Labor Code §408.028(f), including providing for reimbursement rates that are fair and reasonable. The insurance carrier shall:

(1) develop a reimbursement methodology(ies) for determining reimbursement under this subsection;

(2) maintain in reproducible format documentation of the insurance carrier's methodology(ies) for establishing an amount;

(3) apply the reimbursement methodology(ies) consistently among health care providers in determining reimbursements under this subsection; and

(4) upon request by the division, provide to the division copies of such documentation.

(f) Notwithstanding the provisions of this section, prescription medication or services, as defined by Labor Code §401.011(19)(E), may be reimbursed at a contract rate that is inconsistent with the fee guideline as long as the contract complies with the provisions of Labor Code §408.0281 and applicable division rules.

(g) When the prescribing doctor has written a prescription for a generic drug or a prescription that does not require the use of a brand name drug in accordance with §134.502(a)(3) of this title (relating to Pharmaceutical Services), reimbursement shall be as follows:

(1) the health care provider shall dispense the generic drug as prescribed and shall be reimbursed the fee established for the generic drug in accordance with subsection (c) or (f) of this section; or

(2) when an injured employee chooses to receive a brand name drug instead of the prescribed generic drug, the health care provider shall dispense the brand name drug as requested and shall be reimbursed:

(A) by the insurance carrier, the fee established for the prescribed generic drug in accordance with subsection (c) or (f) of this section; and

(B) by the injured employee, the cost difference between the fee established for the generic drug in subsection (c) or (f) of this section and the fee established for the brand name drug in accordance with subsection (c) or (f) of this section.

(h) When the prescribing doctor has written a prescription for a brand name drug in accordance with §134.502(a)(3) of this title, reimbursement shall be in accordance with subsection (c) or (f) of this section.

(i) Upon request by the health care provider or the division, the insurance carrier shall disclose the source of the nationally recognized pricing reference used to calculate the reimbursement.

(j) Where any provision of this section is determined by a court of competent jurisdiction to be inconsistent with any statutes of this state, or to be unconstitutional, the remaining provisions of this section shall remain in effect.

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 October 3, 2011.

TRD-201104142
Dirk Johnson
General Counsel
Texas Department of Insurance, Division of Workers' Compensation
Effective date: October 23, 2011
Proposal publication date: July 1, 2011
For further information, please call: (512) 804-4703

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 1. GENERAL LAND OFFICE

CHAPTER 15. COASTAL AREA PLANNING
SUBCHAPTER A. MANAGEMENT OF THE BEACH/DUNE SYSTEM

31 TAC §15.37

The General Land Office (GLO) adopts new §15.37, relating to Certification Status of City of Freeport Dune Protection and Beach Access Plan, without changes to the proposed text as published in the May 27, 2011, issue of the *Texas Register* (36 TexReg 3260) and the rule text will not be republished. The newly adopted §15.37 certifies as consistent with state law the City of Freeport's Dune Protection and Beach Access Plan (Plan) that was adopted by the City of Freeport's City Council Members by ordinance number 2010-2263 on October 4, 2010 and was submitted to the GLO for formal certification on February 10, 2011.

The adopted Plan may be viewed on the City's website at: http://www.freeport.tx.us/default.aspx?name=public_notices. Copies of the local government dune protection and beach access plan are available from City of Freeport which can be reached (979) 233-3526.

BACKGROUND

Pursuant to the Open Beaches Act (Texas Natural Resources Code, Chapter 61), the Dune Protection Act (Texas Natural Resources Code, Chapter 63), and the Beach/Dune Rules (31 TAC §§15.1 - 15.21), a local government with jurisdiction over Gulf beaches must submit a beach management plan to the GLO for certification. The GLO is required to review the plan and certify

by rule that the plan is consistent with the Open Beaches Act, the Dune Protection Act, and the Beach/Dune Rules. The certification by rule reflects the state's approval of the plan, but the text of the plan is not adopted by the GLO, 31 TAC §15.3(o)(4).

The City of Freeport is a coastal community in Brazoria County which is located 50 miles south of Houston and borders the Gulf of Mexico. The City is bordered by the Brazos River to the southwest and the Cities of Lake Jackson and Clute to the north. The City is bordered by Oyster Creek to the east and the ETJ extends from the eastern city limits of the Village of Surfside Beach to the San Luis Pass on Follets Island. In 2003, the city annexed 3.5 miles (5.6 km) of beach bounded on the north by the Village of Quintana and continuing south to the mouth of the Brazos River. In addition, the City annexed approximately 1,000 feet of Gulf facing beach from northeast boundary of the Village of Surfside Beach on Follets Island.

The Gulf beaches and adjacent areas governed by the Plan are the Gulf beaches within the corporate limits of the City of Freeport with respect to administration of the Dune Protection Act. The County has delegated authority to the City of Freeport for administration of the Dune Protection Act pursuant to Texas Natural Resources Code §63.011(a). With respect to administration of the Open Beaches Act, the Gulf beaches within the corporate limits of the City of Freeport will be governed by the City of Freeport's Dune Protection and Beach Access Plan (City's Plan).

THE 2010 CITY OF FREEPORT'S ADOPTION OF THE PLAN

The City of Freeport City Council passes and adopted Ordinance No. 2010-2263 on October 4th, 2010 and was submitted to the GLO on February 10, 2010 for review and certification. The GLO reviewed the Plan and has determined that it meets the minimal standards for certification as required by rules for management of the beach/dune system (31 TAC §§15.1 - 15.21) adopted by the GLO. Accordingly, the GLO certifies the 2010 Plan approved by the City of Freeport City Council on July 14, 2010, as consistent with state law, in accordance with the Beach/Dune Rules at 31 TAC §15.3(o)(4); §61.015(b) of the Open Beaches Act; and §63.054(c) of the Dune Protection Act and hereby approves and certifies the City's 2010 Plan with no variances from the Beach/Dune Rules.

REASONED JUSTIFICATION

The justification for the adopted rule certifying the City's 2010 Plan is that the City will be providing increased services under the authority of a dune protection and beach access plan. The City will provide improved beach-related services to the public including: funding for ensuring safe use of and access to and from the public beach, including vehicular controls, management, and parking regulations; acquisition and maintenance of off-beach parking areas and access ways; construction of accessible (ADA) dune walkovers; sanitation and litter control, including providing and servicing trash receptacles and conducting a trash abatement program; beach maintenance, including removal of debris and raking of seaweed; law enforcement; beach/dune system education; beach/dune protection and restoration projects; providing public facilities such as portable and fixed restroom facilities, showers, and picnic areas; and permitting of recreational and refreshment vendors. In addition, the public benefit anticipated as a result of enforcing the section will be increased flood protection for private and public property and beachfront structures; guaranteed preservation and enhancement of public beach use, recreation and access; natural resource and habitat protection; maintenance of the sediment supply to slow erosion; and establishment and maintenance of beach-related facilities and services.

SUMMARY AND RESPONSE TO COMMENTS

No public comments were received during the thirty (30) day comment period.

CONSISTENCY WITH CMP

The addition of §15.37 relating to Certification Status of City of Freeport's Dune Protection and Beach Access Plan is subject to the Coastal Management Program (CMP) as provided in Texas Natural Resources Code §33.2053(a)(10) and 31 TAC §505.11(a)(1)(J), relating to the Actions and Rules Subject to the CMP, and must be consistent with the applicable CMP goals and policies under §501.26, relating to Policies and Construction in the Beach/Dune System. The GLO has reviewed the adopted rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Council (Council). The adopted rule is consistent with the GLO Beach/Dune regulations that the Council has determined to be consistent with the CMP. Consequently, the Land Office has determined that the adopted rule is consistent with the applicable CMP goals and policies.

ENVIRONMENTAL REGULATORY ANALYSIS

The GLO has evaluated the adopted rulemaking action in light of the regulatory analysis requirements of Texas Government Code §2001.0225, and determined that the action is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the statute. "Major environmental rule" means a rule, the specific intent of which is to protect the environment or reduce risks 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 the state or a sector of the state. The adopted rule is not anticipated to 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 the state or a sector of the state because the adopted rulemaking implements legislative requirements in Texas Natural Resources Code §§61.011, 61.015(b), and 61.022(e), which provide the GLO with the authority to adopt rules to preserve and enhance the public's right to use and have access to and from the public beaches of Texas and to certify that plans to impose or increase public beach access, parking, or use fees are consistent with state law.

STATUTORY AUTHORITY

This new section is adopted under the Texas Natural Resources Code §§61.011, 61.015(b), and 61.022 (c) and 61.070, which provide the GLO with the authority to adopt rules to preserve and enhance the public's right to use and have access to and from the public beaches of Texas and to certify that plans to impose or increase public beach access, parking, or use fees are consistent with state law. In addition, Texas Natural Resources Code §63.121 provides the GLO with authority to adopt rules for the protection of critical dune areas.

Texas Natural Resources Code §§61.011, 61.015, 61.022, and 63.121 are affected by the adopted 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 28, 2011.

TRD-201104066
Larry Laine
Chief Clerk, Deputy Land Commissioner
General Land Office
Effective date: October 18, 2011
Proposal publication date: May 27, 2011
For further information, please call: (512) 475-1859

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PART 2. TEXAS PARKS AND WILDLIFE DEPARTMENT

CHAPTER 65. WILDLIFE

SUBCHAPTER N. MIGRATORY GAME BIRD PROCLAMATION

31 TAC §§65.318, 65.320, 65.321

The Texas Parks and Wildlife Commission in a duly noticed meeting held on August 25, 2011, adopted amendments to §§65.318, 65.320, and 65.321, concerning the Migratory Game Bird Proclamation. Section 65.318 is adopted with changes to the proposed text as published in the May 27, 2011, issue of the *Texas Register* (36 TexReg 3262). Section 65.320 and §65.321 are adopted without changes to the proposed text and will not be republished.

The proposed text published in the May 27, 2011, issue of the *Texas Register* included amendments to §65.315 and §65.319, which address early-season species of migratory game birds (dove, rails, gallinules, snipe, and teal). Those sections were adopted in the July 29, 2011, issue of the *Texas Register* (36 TexReg 4801), and included the early Canada goose season that was originally published in proposed §65.318, concerning Open Seasons and Bag and Possession Limits--Late Season.

The change to §65.318 alters paragraph (4) to correct an incomplete reference to the applicability of seasons and bag limits during the youth-only waterfowl season and eliminates the proposed early Canada goose season in paragraph (2)(B)(ii)(II), which, as noted, has already been adopted.

The amendment to §65.318 retains the season structure and bag limits from last year; however, the season dates for geese in the Eastern Goose Zone and ducks in all zones have been shifted to occur one week later in comparison to last year. Prior to 2009, the department followed hunter preference and selected season dates that run to the last day of the federal frameworks. Beginning in 2009, the department adopted seasons that closed with one week left in the framework in an attempt to increase nesting success. This season structure is not popular with waterfowl hunters, especially if adjustments based solely on calendar shift cause the season to open in late October. Therefore, in an attempt to balance the preferences of waterfowl hunters with the need to provide the resource with some respite from hunting pressure as migration to nesting areas takes place, the department adopts a season that begins in November. All other late-season migratory game bird seasons are adjusted to account for calendar shift (a year-to-year adjustment to ensure that seasons begin on the desired day of the week).

The amendment to §65.320, concerning Extended Falconry Season--Late Season Species, adjusts season dates for the take of late-season species of migratory game birds by means of falconry to reflect calendar shift and will be one week later than last year.

The amendment to §65.321, concerning Special Management Provisions, adjusts the dates for the conservation season on light geese so that they occur one week later, for reasons explained in the discussion of the amendment to §65.318.

The amendments are generally necessary to implement commission policy to provide the greatest hunter opportunity possible, consistent with hunter and landowner preference for starting dates and segment lengths, under frameworks issued by the U.S. Fish and Wildlife Service (Service).

The amendment to §65.318 will function by establishing the seasons and bag limits for the hunting of late-season species of migratory game birds.

The amendment to §65.320 will function by establishing the season length and bag limits for the take of late-season species of migratory game birds by means of falconry.

The amendment to §65.321 will function by establishing the seasons and bag limits for the hunting light geese during the light goose conservation season.

The department received 18 comments opposing adoption of the portion of proposed §65.318 that establishes season dates and bag limits for ducks, coots, and mergansers in the High Plains Mallard Management Unit (HPMMU). Of those comments, seven articulated a specific reason or rationale for opposing adoption. Those comments, accompanied by the department's response to each, follow.

Four commenters opposed adoption and stated that the season should run later than January 29th. The department disagrees with the comments and responds that January 29 is the latest day that duck hunting is allowed under the federal frameworks. No changes were made as a result of the comments.

One commenter opposed adoption and stated that the season should open in December. The department disagrees with the comment and responds that opening the season in December would result in fewer total days of hunting opportunity, which is contrary to commission policy to provide the maximum hunting opportunity possible under the federal frameworks. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the season for dusky ducks should be the same length as the season for other species of ducks. The department disagrees and responds that the department has selected the maximum number of days available under the federal frameworks for hunting dusky ducks. No changes were made as a result of the comment.

One commenter opposed adoption and stated that duck season should be concurrent with goose season. The department disagrees with the comment and responds that the duck season in the HPMMU contains the maximum number of days allowable under the federal frameworks and therefore cannot be concurrent with goose season in the Western Zone. No changes were made as a result of the comment.

The department received 253 comments supporting adoption of the portion of proposed §65.318 that establishes season dates and bag limits for ducks, coots, and mergansers in the High Plains Mallard Management Unit.

The department received 75 comments opposing adoption of the portion of proposed §65.318 that establishes season dates and bag limits for ducks, coots, and mergansers in the North Zone. Of those comments, 46 articulated a specific reason or rationale for opposing adoption. Those comments, accompanied by the department's response to each, follow.

Thirty-five commenters opposed adoption and stated that the season should open later and run later. The department disagrees with the comments and responds that the season as adopted runs to the end of the federal framework and cannot run any later by federal law. Therefore, a later opener would only result in reduced hunting opportunity. No changes were made as a result of the comments.

Four commenters opposed adoption and stated that the split in the North Zone should not be concurrent with the split in the South Zone. The department disagrees with the comments and responds that it is commission policy to attempt to create opportunity during peak waterfowl migrations and time periods when most of the public is most able to take advantage of it. For duck seasons, the department believes it is important to provide opportunity during the holiday season and for as many weekends as possible. Under the federal frameworks, Texas is allowed 74 days of opportunity between September 24, 2011 and January 29, 2012. The purpose of a split is to allow an opportunity for ducks to congregate and recover from hunting pressure. Conventional thinking is that splits ideally should be at least two weeks in duration. Concurrent splits are therefore necessary because staggered splits would take hunting opportunity away in at least one zone during peak migration in December. No changes were made as a result of the comments.

Three commenters opposed adoption and stated that there should be a continuous season with no split. The department disagrees with the comments and responds that the purpose of a split is to allow an opportunity for ducks to recover from hunting pressure and rally. No changes were made as a result of the comments.

Two commenters opposed adoption and stated that the season in the North Zone should be concurrent with the season in the HPMMU. The department disagrees with the comment and responds that under the federal frameworks, the season in the North Zone cannot exceed 74 days. No changes were made as a result of the comments.

Two commenters opposed adoption and stated that the season for dusky ducks should be the same length as the season for other species of ducks. The department agrees with the comments but responds that the department has selected the maximum number of days available under the federal frameworks for hunting dusky ducks. No changes were made as a result of the comments.

The department received 336 comments supporting adoption of the portion of proposed §65.318 that establishes season dates and bag limits for ducks, coots, and mergansers in the North Zone.

The department received 66 comments opposing adoption of the portion of proposed §65.318 that establishes season dates and bag limits for ducks, coots, and mergansers in the South Zone. Of those comments, 24 articulated a specific reason or rationale for opposing adoption. Those comments, accompanied by the department's response to each, follow.

Ten commenters opposed adoption and stated that opening day should be later. The department disagrees with the comment and responds the season cannot be opened later and both run until the end of the federal framework and contain a split. Department surveys indicate that a majority of hunters prefer that the season run as late as federal frameworks allow and that the season contain a split to allow ducks to rest and rally. No changes were made as a result of the comments.

Eight commenters opposed adoption and stated that the split in the South Zone should not be concurrent with the split in the North Zone. The department disagrees with the comments and responds that it is commission policy to attempt to create opportunity during peak waterfowl migrations and time periods when most of the public is most able to take advantage of it. For duck seasons, the department believes it is important to provide opportunity during the holiday season and for as many weekends as possible. Under the federal frameworks, Texas is allowed 74 days of opportunity between September 24, 2011 and January 29, 2012. The purpose of a split is to allow an opportunity for ducks to congregate and recover from hunting pressure. Conventional thinking is that splits ideally should be at least two weeks in duration. Concurrent splits are therefore necessary because staggered splits would take hunting opportunity away in at least one zone during peak migration in December. No changes were made as a result of the comments.

Three commenters opposed adoption and stated that duck season and deer season should not open on the same day. The department disagrees with the comments and responds that under federal frameworks, the department is authorized to provide 74 days of duck hunting opportunity between September 24, 2011 and January 29, 2012. Hunter surveys and public comment indicate a preference for: 1) a split season, to allow duck populations to congregate without being subjected to hunting pressure; 2) hunting opportunity over the Thanksgiving and Christmas holiday seasons; and 3) a winter segment that runs to the final day of the framework. The rule as adopted represents the department's best effort to satisfy these criteria. No changes were made as a result of the comment.

Three commenters opposed adoption and stated that there should be an early season for whistling ducks. The department agrees with the comment but responds that the federal frameworks provide 74 days of duck hunting opportunity. All duck hunting opportunity other than the special September teal season counts against the 74-day total. Survey and public comment data indicate overwhelming hunter preference for duck hunting opportunity to take place as late in the framework as possible. No changes were made as a result of the comments.

The department received 331 comments supporting adoption of the portion of proposed §65.318 that establishes season dates and bag limits for ducks, coots, and mergansers in the South Zone.

The department received 31 comments opposing adoption of the portion of proposed §65.318 that establishes season dates and bag limits for geese in the Eastern Zone. Of those comments, 15 articulated a specific reason or rationale for opposing adoption. Those comments, accompanied by the department's response to each, follow.

Fourteen commenters opposed adoption and stated that the season for white-fronted geese should run later. The department disagrees with the comments and responds that the management plan for the mid-continent population of white

fronted geese allows for 72 days of hunting in the Eastern Zone of Texas. The department has chosen to implement concurrent goose seasons for all species with the intent of facilitating easier compliance for hunters. The early autumn is also the peak of the white-fronted goose migration, which is the optimum hunting opportunity for that species. No changes were made as a result of the comments.

One commenter opposed adoption and stated that an additional week should be added to the season. The department disagrees with the comment and responds that the closing dates as adopted were chosen to optimize the impact of the light goose conservation order. In order to take advantage of the conservation order, the state is required by federal frameworks to close all other seasons for migratory birds. Therefore, allowing any season to remain open beyond January 29 in the Eastern Zone would effectively defeat the purpose of the conservation order, which is to harvest large numbers of snow geese in order to protect Canadian breeding grounds from the effects of overpopulation. No changes were made as a result of the comment.

The department received 295 comments supporting adoption of the portion of proposed §65.318 that establishes season dates and bag limits for geese in the Eastern Zone.

The department received nine comments opposing adoption of the portion of proposed §65.318 that establishes season dates and bag limits for geese in the Western Zone. Of those comments, five articulated a specific reason or rationale for opposing adoption. Those comments, accompanied by the department's response to each, follow.

Four commenters opposed adoption and stated that the season should run later. The department disagrees with the comments and responds that the closing dates as adopted were chosen to optimize the impact of the light goose conservation order. In order to take advantage of the conservation order, the state is required by federal frameworks to close all other seasons for migratory birds. Therefore, allowing any season to remain open beyond February 5 in the Western Zone would effectively defeat the purpose of the conservation order, which is to harvest large numbers of snow geese in order to protect Canadian breeding grounds from the effects of overpopulation. No changes were made as a result of the comments.

One commenter opposed adoption and stated that the bag limit for white-fronted geese should be higher. The department disagrees with the comment and responds that the bag limit adopted for white-fronted geese is the maximum allowable under the federal frameworks. No changes were made as a result of the comment.

The department received 269 comments supporting adoption of the portion of proposed §65.318 that establishes season dates and bag limits for geese in the Western Zone.

The department received 15 comments opposing adoption of the portion of proposed §65.318 that establishes season dates and bag limits for the Light Goose Conservation Season (LGCO). Of those comments, nine articulated a specific reason or rationale for opposing adoption. Those comments, accompanied by the department's response to each, follow.

Three commenters opposed adoption and stated that the LGCO should be eliminated. The department disagrees with the comments and responds that Texas must do its part in the interstate and international effort to curtail light goose populations in order to prevent habitat degradation on their Arctic breeding grounds. No changes were made as a result of the comments.

Three commenters opposed adoption and stated that the LGCO should open on the same day in both zones. The department disagrees with the comments and responds that hunting opportunity for dark geese in the Western Zone is far more significant than that for light geese. The department therefore allows the hunting of dark geese in the Western Zone for 93 days allowed under the federal frameworks, which necessitates a later start for the LGCO. No changes were made as a result of the comments.

One commenter opposed adoption and stated that the LGCO should be opened only after all available days for waterfowl hunting under the federal frameworks have been used. The department disagrees with the comment and responds that delaying the opening of the light goose conservation season would defeat its purpose. By February, large numbers of light geese have begun to migrate and the opportunity to make a significant impact on populations has passed. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the LGCO should be held during the split in the goose season. The department disagrees with the comment and responds that there is no split in the goose season. No changes were made as a result of the comment.

One commenter opposed adoption and stated that LGCO should open earlier. The department disagrees with the comment and responds that although the department makes a good-faith effort to make the LGCO meaningful (by opening the order when large numbers of light geese are still present), it must balance that commitment against the preferences of waterfowl hunters for other types of opportunity. The department believes that the season as adopted strikes a reasonable balance between hunter preference and conservation obligations. No changes were made as a result of the comment.

The department received 287 comments supporting adoption of the portion of proposed §65.318 that establishes season dates and bag limits for the Light Goose Conservation Season

The department received 21 comments opposing adoption of the portion of proposed §65.318 that establishes season dates and bag limits for sandhill cranes. Of those comments, 13 articulated a specific reason or rationale for opposing adoption. Those comments, accompanied by the department's response to each, follow.

Eleven commenters opposed adoption and stated that the season should open earlier in Zone C. The department disagrees with the comment and responds that the Endangered Species Act requires states to limit any human activity considered hazardous to endangered species, including recreational hunting of similar-appearing migratory game birds. A significant number of endangered whooping cranes, which have characteristics similar to sandhill cranes, are typically still in migration to the Aransas National Wildlife Refuge through the beginning of December. No changes were made as a result of the comments.

One commenter opposed adoption and stated that the season should extend into February. The department disagrees with the comment and responds that as a participant in the international effort to prevent continued degradation of habitat on light-geese breeding grounds, Texas implements the Light Goose Conservation Order. For the LGCO to be effective, it must open when substantial numbers of light geese are present in Texas; how-

ever, by federal law all other seasons for migratory birds must be closed. Therefore, the department must truncate some seasons in order to accommodate the LGCO. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the hunting of sandhill cranes should be allowed in East Texas. The department disagrees with the comment and responds that the closed areas in Texas are closed by federal law and the department does not have the authority to allow sandhill crane hunting in those areas. No changes were made as a result of the comment.

The department received 222 comments supporting adoption of the portion of proposed §65.318 that establishes season dates and bag limits for sandhill cranes.

The department received 23 comments opposing adoption of the portion of proposed §65.318 that establishes season dates and bag limits for the youth-only waterfowl season. Of those comments, 14 articulated a specific reason or rationale for opposing adoption. Those comments, accompanied by the department's response to each, follow.

Five commenters opposed adoption and stated that the season is too early. The department disagrees with the comments and responds that the dates for youth-only waterfowl hunting cannot be placed during segments, the splits between segments, or following the closure of duck season. Placing the youth-only days during open segments would disrupt large numbers of hunters. Placing the youth-only days during the split between segments would defeat the purpose of the split, which is to allow ducks to rest. Placing the youth-only days at the end of the season would prevent large numbers of hunters from enjoying the most preferred time of the season. Therefore, the department has determined that the weekend prior to the opening of duck season is the ideal time to locate the youth-only days. No changes were made as a result of the comments.

Three commenters opposed adoption and stated that there should be a late youth-season. The department disagrees with the comment and responds that if the commenter is addressing additional youth-only days, such days would count against the total hunting days allowed under the federal frameworks and would therefore deny rather than provide opportunity. If the commenter means that the current youth-only season should be moved from before the general season to after the general season, the department responds that large numbers of hunters would be prevented from enjoying the most preferred time of the season. No changes were made as a result of the comments.

Three commenters opposed adoption and stated that additional youth opportunity should be provided. The department disagrees with the comment and responds that the Service authorizes one weekend for youth-only waterfowl hunting and that additional days of youth hunting opportunity, since they would count against the total number of hunting days allowed in Texas, would result in a loss of hunting opportunity for a significant number of adult waterfowl hunters. No changes were made as a result of the comment.

Two commenters opposed adoption and stated that the early youth-only season interferes with the early youth-season for deer. The department disagrees with the comment and responds that the youth-only waterfowl season takes place the week before the youth-only deer season. No changes were made as a result of the comments.

One commenter opposed adoption and stated that the youth season should be eliminated. The department disagrees with the comment and responds that the youth-only season is valuable opportunity for adults to mentor youth and introduce them to the experience of waterfowl hunting. No changes were made as a result of the comment.

The department received 238 comments supporting adoption of the portion of proposed §65.318 that establishes season dates and bag limits for the youth-only waterfowl season.

The department received six comments opposing adoption of the portion of proposed §65.318 that establishes season dates and bag limits for extended falconry seasons. Of those comments, three articulated a specific reason or rationale for opposing adoption. Those comments, accompanied by the department's response to each, follow.

Two commenters opposed adoption and stated that proposed season would interfere with breeding and nesting. The department disagrees with the comments and responds that the take of migratory waterfowl by falconry is so small as to be statistically irrelevant. No changes were made as a result of the comments.

One commenter opposed adoption and stated that the season should occur in December. The department disagrees with the comment and responds that the proposed season dates were reviewed and endorsed by the department's Falconry Advisory Board as well as the Migratory Game Bird Advisory Committee. No changes were made as a result of the comment.

The department received 182 comments supporting adoption of the portion of proposed §65.318 that establishes season dates and bag limits for extended falconry seasons.

No groups or associations commented in favor of or in opposition to adoption of the proposed amendments.

The amendments are adopted under Parks and Wildlife Code, Chapter 64, which authorizes the Commission and the Executive Director to provide the open season and means, methods, and devices for the hunting and possessing of migratory game birds.

§65.318. Open Seasons and Bag and Possession Limits--Late Season.

Except as specifically provided in this section, the possession limit for all species listed in this section shall be twice the daily bag limit.

(1) Ducks, mergansers, and coots. The daily bag limit for ducks is six, which may include no more than five mallards (only two of which may be hens); three wood ducks; two scaup (lesser scaup and greater scaup in the aggregate); two redheads; two pintail; one canvasback; and one "dusky" duck (mottled duck, Mexican like duck, black duck and their hybrids) during the seasons established in subparagraphs (A)(ii), (B)(ii), and (C)(ii) of this paragraph. For all other species not listed, the bag limit shall be six. The daily bag limit for coots is 15. The daily bag limit for mergansers is five, which may include no more than two hooded mergansers.

(A) High Plains Mallard Management Unit:

(i) all species other than "dusky ducks": October 29 - 30, 2011 and November 4, 2011 - January 29, 2012.

(ii) "dusky ducks": November 7, 2011 - January 29, 2012.

(B) North Zone:

(i) all species other than "dusky ducks": November 5 - 27, 2011 and December 10, 2011 - January 29, 2012.

(ii) "dusky ducks": November 10 - 27, 2011 and December 10, 2011 - January 29, 2012.

(C) South Zone:

(i) all species other than "dusky ducks": November 5 - 27, 2011 and December 10, 2011 - January 29, 2012.

(ii) "dusky ducks": November 10 - 27, 2011 and December 10, 2011 - January 29, 2012.

(2) Geese.

(A) Western Zone.

(i) Light geese: November 5, 2011 - February 5, 2012. The daily bag limit for light geese is 20, and there is no possession limit.

(ii) Dark geese: November 5, 2011 - February 5, 2012. The daily bag limit for dark geese is five, to include not more than one white-fronted goose.

(B) Eastern Zone.

(i) Light geese: November 5, 2011 - January 29, 2012. The daily bag limit for light geese is 20, and there is no possession limit.

(ii) Dark geese:

(I) White-fronted geese: November 5, 2011 - January 15, 2012. The daily bag limit for white-fronted geese is two.

(II) Canada geese: November 5, 2011 - January 29, 2012. The daily bag limit for Canada geese is three.

(3) Sandhill cranes. A free permit is required of any person to hunt sandhill cranes in areas where an open season is provided under this proclamation. Permits will be issued on an impartial basis with no limitation on the number of permits that may be issued.

(A) Zone A: November 5, 2011 - February 5, 2012. The daily bag limit is three. The possession limit is six.

(B) Zone B: November 25, 2011 - February 5, 2012. The daily bag limit is three. The possession limit is six.

(C) Zone C: December 24, 2011 - January 29, 2012. The daily bag limit is two. The possession limit is four.

(4) Special Youth-Only Season. There shall be a special youth-only waterfowl season during which the hunting, taking, and possession of geese, ducks, mergansers, and coots is restricted to licensed hunters 15 years of age and younger accompanied by a person 18 years of age or older, except for persons hunting by means of falconry under the provisions of §65.320 of this chapter (relating to Extended Falconry Season--Late Season Species). Bag and possession limits in any given zone during the season established by this paragraph shall be as provided for that zone by paragraphs (1) and (2) of this section. Season dates are as follows:

(A) High Plains Mallard Management Unit: October 22 - 23, 2011;

(B) North Zone: October 29 - 30, 2011; and

(C) South Zone: October 29 - 30, 2011.

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 30, 2011.

TRD-201104136
Ann Bright
General Counsel
Texas Parks and Wildlife Department
Effective date: October 20, 2011
Proposal publication date: May 27, 2011
For further information, please call: (512) 389-4775

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 1. TEXAS DEPARTMENT OF PUBLIC SAFETY

CHAPTER 3. TEXAS HIGHWAY PATROL

SUBCHAPTER B. ENFORCEMENT ACTION

37 TAC §3.22

The Texas Department of Public Safety (the department) adopts amendments to §3.22, concerning Written Warning. This section is adopted without changes to the proposed text as published in the August 12, 2011, issue of the *Texas Register* (36 TexReg 5079) and will not be republished.

Amendments to §3.22 are necessary to update the rule so that it reflects the department's revised enforcement policy. The revision updates certain terminology and allows written warnings to be issued for occupant restraint violations. Written warnings may be appropriate in those instances when two individuals may be charged for a single violation or when multiple violations occur in a single traffic stop and issuing multiple citations to a single family could create an economic hardship rather than achieve voluntary compliance with the Transportation Code.

No comments were received regarding the adoption of these amendments.

The amendments are adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work.

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 30, 2011.

TRD-201104114
D. Phillip Adkins
General Counsel
Texas Department of Public Safety
Effective date: October 20, 2011
Proposal publication date: August 12, 2011
For further information, please call: (512) 424-5848

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TITLE 43. TRANSPORTATION

PART 1. TEXAS DEPARTMENT OF TRANSPORTATION

CHAPTER 25. TRAFFIC OPERATIONS
SUBCHAPTER B. PROCEDURES FOR ESTABLISHING SPEED ZONES

The Texas Department of Transportation (department) adopts amendments to §§25.21 - 25.24 and new §25.26, all concerning Procedures for Establishing Speed Zones. The amendments to §§25.21 - 25.24 are adopted without changes to the proposed text as published in the July 15, 2011, issue of the *Texas Register* (36 TexReg 4545) and will not be republished. New §25.26 is adopted without changes to the proposed text as published in the August 12, 2011, issue of the *Texas Register* (36 TexReg 5086) and will not be republished.

EXPLANATION OF ADOPTED AMENDMENTS AND NEW SECTION

House Bill 109, House Bill 1201, and House Bill 1353, 82nd Legislature, 2011, made changes to the existing statutes related to speed limits in Texas. The adopted amendments to §§25.21 - 25.24 and new §25.26 incorporate those statutory changes into the department's existing rules related to establishing speed zones. These amendments also include some additional clarifications to address procedural changes with establishing speed zones.

House Bill 109 allows a municipality or county to designate an official with transportation engineering experience in establishing speed limits to temporarily lower a prima facie speed limit at the site of a vehicular accident reconstruction.

House Bill 1201 repealed the existing statute allowing the Texas Transportation Commission (commission) to establish a speed limit of up to 85 miles per hour (mph) on a portion of the Trans-Texas Corridor. The bill allows the commission to establish up to an 85 mph speed limit on a portion of the state highway if the highway was designed to accommodate up to an 85 mph speed limit and the commission determines that such a speed limit is reasonable and safe based on an engineering and traffic investigation.

House Bill 1353 allows the department to establish up to a 75 mph speed limit on a portion of the state highway system if the commission determines that such a speed limit is reasonable and safe based on an engineering and traffic investigation. With implementation of HB 1353, the department needs to review all current 70 mile per hour zones to determine if an increase to 75 miles per hour is warranted. This new process relies on an 85th percentile engineering study. The legislation also repealed the existing 65 mph night speed limit and lower speed for large trucks.

Amendments to §25.21 delete references to night speed limits, add language allowing the commission to establish up to a 75 mph speed limit in any county of the state, and delete references to lower truck speed limits. These changes are necessary to implement House Bill 1353. The amendments also change the authority that allows the commission to set up to an 85 mph speed limit from the Trans-Texas Corridor to a highway designed to accommodate the higher speed as authorized in House Bill 1201.

The amendments to §25.21 also add language to incorporate the provisions of House Bill 109 which allows cities and counties to temporarily lower existing prima facie speed limits at the sites of vehicular accident reconstructions. The language requires that the local authority use the guidelines established for setting work zone area speed limits, notify the appropriate district engineer, and follow lane closure rules and guidelines if applicable. The language also makes it clear that the local authority does not have to follow the other rules in the subchapter on establishing speed limits. The additional requirements are not necessary as an engineering and traffic study would not be applicable.

The amendments to §25.22 make conforming changes by eliminating references to night speed limits and deleting the requirement that speed limits created within city limits over 60 mph be established by commission minute order. These amendments are necessary to conform to the requirements of House Bill 1353.

The amendment to §25.23(d)(5)(A)(ii) revises the reference to the maximum speed reduction allowed from the average speed determined by a speed limit study from 7 mph to 12 mph for high-crash locations to conform this section to the existing requirements contained in §25.23(d)(5)(A)(v). This clarification in the existing language is unrelated to the legislative changes implemented during the 82nd Legislature.

Amendments to §25.24 correct the tables describing the authority of the department, Regional Mobility Authorities, and Regional Transportation Authorities to establish speed limits on the state highway system. These changes incorporate the requirements of House Bill 1353.

New §25.26 provides a provisional traffic and engineering investigation process to implement the timely study of highways that may qualify for the new increased speed. The new section provides that the department can utilize the streamlined procedures for the increase to 75 miles per hour from a current 70 mile per hour zone. The procedure includes the completion of an 85th percentile speed check at a minimum of one location within the current speed zone. Under current speed study rules, specific speed check intervals are set out to establish the boundaries of any approved speed zone. Due to the fact that the current 70 mile per hour speed zone has been determined by a previous engineering study, additional speed check locations are not required to set the boundaries of the speed zone, therefore in some instances only one speed check location is necessary. The rules do not prohibit additional speed check locations if the department determines that additional traffic data are necessary to establish the appropriate speed limit.

New §25.26 will allow the investigation to be submitted in a summary format eliminating the need to complete a strip map. When implementing previous statewide speed limit changes, the department utilized a summary reporting option instead of the required strip map. The strip map provides illustrated documentation the department uses to establish the boundaries of the speed zone. As previously stated the boundaries of the speed zone have been established in a previous traffic and engineering study. It is unnecessary for the strip map to be submitted since the speed zone boundaries have been established.

New §25.26 provides that the other provisions of Chapter 25, Subchapter B related to establishing a speed limit apply to an increase under §25.26 unless there is a conflict. If there is a conflict, §25.26 controls. Thus, the requirements of the 85th percentile speed check procedures, such as requirements related to the length of time of the study and the number of vehicles, apply without having to restate those provisions within the rule.

COMMENTS

No comments on the proposed amendments and new section were received.

43 TAC §§25.21 - 25.24

STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §§545.353, which authorizes the commission to establish speed limits and adopt the procedures for establishing speed zones.

CROSS REFERENCE TO STATUTE

Transportation Code, §§545.352, 545.353, 545.354 - 545.3561, 545.358 and 545.362.

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 30, 2011.

TRD-201104112
Bob Jackson
General Counsel
Texas Department of Transportation
Effective date: October 20, 2011
Proposal publication date: July 15, 2011
For further information, please call: (512) 463-8683

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43 TAC §25.26

STATUTORY AUTHORITY

The new section is adopted under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §545.353, which authorizes the commission to establish speed limits and adopt the procedures for establishing speed zones.

CROSS REFERENCE TO STATUTE

Transportation Code, §§545.352, 545.353, 545.354 - 545.3561, 545.358 and 545.362.

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 30, 2011.

TRD-201104113
Bob Jackson
General Counsel
Texas Department of Transportation
Effective date: October 20, 2011
Proposal publication date: August 12, 2011
For further information, please call: (512) 463-8683

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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.

Proposed Rule Reviews

Texas Higher Education Coordinating Board

Title 19, Part 1

The Texas Higher Education Coordinating Board files this notice of intention to review Chapter 1, concerning Agency Administration. This review is in accordance with the requirements of the Texas Government Code, §2001.039.

The agency's reason for adopting the rules contained in this chapter continues to exist.

Comments on the proposed review may be submitted to Raymund A. Paredes, Commissioner of Higher Education, P.O. Box 12788, Austin, Texas 78711.

TRD-201104051
William Franz
General Counsel
Texas Higher Education Coordinating Board
Filed: September 28, 2011

♦ ♦ ♦

The Texas Higher Education Coordinating Board files this notice of intention to review Chapter 4, concerning Rules Applying to All Public Institutions of Higher Education in Texas. This review is in accordance with the requirements of the Texas Government Code, §2001.039.

The agency's reason for adopting the rules contained in this chapter continues to exist.

Comments on the proposed review may be submitted to Raymund A. Paredes, Commissioner of Higher Education, P.O. Box 12788, Austin, Texas 78711.

TRD-201104052
William Franz
General Counsel
Texas Higher Education Coordinating Board
Filed: September 28, 2011

♦ ♦ ♦

The Texas Higher Education Coordinating Board files this notice of intention to review Chapter 5, concerning Rules Applying to Public Universities and Health-Related Institutions of Higher Education in Texas. This review is in accordance with the requirements of the Texas Government Code, §2001.039.

The agency's reason for adopting the rules contained in this chapter continues to exist.

Comments on the proposed review may be submitted to Raymund A. Paredes, Commissioner of Higher Education, P.O. Box 12788, Austin, Texas 78711.

TRD-201104053
William Franz
General Counsel
Texas Higher Education Coordinating Board
Filed: September 28, 2011

♦ ♦ ♦

The Texas Higher Education Coordinating Board files this notice of intention to review Chapter 6, concerning Health Education, Training, and Research Funds. This review is in accordance with the requirements of the Texas Government Code, §2001.039.

The agency's reason for adopting the rules contained in this chapter continues to exist.

Comments on the proposed review may be submitted to Raymund A. Paredes, Commissioner of Higher Education, P.O. Box 12788, Austin, Texas 78711.

TRD-201104054
William Franz
General Counsel
Texas Higher Education Coordinating Board
Filed: September 28, 2011

♦ ♦ ♦

The Texas Higher Education Coordinating Board files this notice of intention to review Chapter 7, concerning Degree Granting Colleges and Universities Other Than Texas Public Institutions. This review is in accordance with the requirements of the Texas Government Code, §2001.039.

The agency's reason for adopting the rules contained in this chapter continues to exist.

Comments on the proposed review may be submitted to Raymund A. Paredes, Commissioner of Higher Education, P.O. Box 12788, Austin, Texas 78711.

TRD-201104055
William Franz
General Counsel
Texas Higher Education Coordinating Board
Filed: September 28, 2011

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The Texas Higher Education Coordinating Board files this notice of intention to review Chapter 8, concerning Creation, Expansion, Dissolution, or Conservatorship of Public Community College Districts. This review is in accordance with the requirements of the Texas Government Code, §2001.039.

The agency's reason for adopting the rules contained in this chapter continues to exist.

Comments on the proposed review may be submitted to Raymund A. Paredes, Commissioner of Higher Education, P.O. Box 12788, Austin, Texas 78711.

TRD-201104056
William Franz
General Counsel
Texas Higher Education Coordinating Board
Filed: September 28, 2011

♦ ♦ ♦

The Texas Higher Education Coordinating Board files this notice of intention to review Chapter 9, concerning Program Development in Public Two-Year Colleges. This review is in accordance with the requirements of the Texas Government Code, §2001.039.

The agency's reason for adopting the rules contained in this chapter continues to exist.

Comments on the proposed review may be submitted to Raymund A. Paredes, Commissioner of Higher Education, P.O. Box 12788, Austin, Texas 78711.

TRD-201104057
William Franz
General Counsel
Texas Higher Education Coordinating Board
Filed: September 28, 2011

♦ ♦ ♦

The Texas Higher Education Coordinating Board files this notice of intention to review Chapter 11, concerning Texas State Technical College System. This review is in accordance with the requirements of the Texas Government Code, §2001.039.

The agency's reason for adopting the rules contained in this chapter continues to exist.

Comments on the proposed review may be submitted to Raymund A. Paredes, Commissioner of Higher Education, P.O. Box 12788, Austin, Texas 78711.

TRD-201104058
William Franz
General Counsel
Texas Higher Education Coordinating Board
Filed: September 28, 2011

♦ ♦ ♦

The Texas Higher Education Coordinating Board files this notice of intention to review Chapter 13, concerning Financial Planning. This review is in accordance with the requirements of the Texas Government Code, §2001.039.

The agency's reason for adopting the rules contained in this chapter continues to exist.

Comments on the proposed review may be submitted to Raymund A. Paredes, Commissioner of Higher Education, P.O. Box 12788, Austin, Texas 78711.

TRD-201104059
William Franz
General Counsel
Texas Higher Education Coordinating Board
Filed: September 28, 2011

♦ ♦ ♦

The Texas Higher Education Coordinating Board files this notice of intention to review Chapter 14, concerning Research Funding Programs. This review is in accordance with the requirements of the Texas Government Code, §2001.039.

The agency's reason for adopting the rules contained in this chapter continues to exist.

Comments on the proposed review may be submitted to Raymund A. Paredes, Commissioner of Higher Education, P.O. Box 12788, Austin, Texas 78711.

TRD-201104060
William Franz
General Counsel
Texas Higher Education Coordinating Board
Filed: September 28, 2011

♦ ♦ ♦

The Texas Higher Education Coordinating Board files this notice of intention to review Chapter 15, concerning National Research Universities. This review is in accordance with the requirements of the Texas Government Code, §2001.039.

The agency's reason for adopting the rules contained in this chapter continues to exist.

Comments on the proposed review may be submitted to Raymund A. Paredes, Commissioner of Higher Education, P.O. Box 12788, Austin, Texas 78711.

TRD-201104061
William Franz
General Counsel
Texas Higher Education Coordinating Board
Filed: September 28, 2011

♦ ♦ ♦

The Texas Higher Education Coordinating Board files this notice of intention to review Chapter 17, concerning Resource Planning. This review is in accordance with the requirements of the Texas Government Code, §2001.039.

The agency's reason for adopting the rules contained in this chapter continues to exist.

Comments on the proposed review may be submitted to Raymund A. Paredes, Commissioner of Higher Education, P.O. Box 12788, Austin, Texas 78711.

TRD-201104062
William Franz
General Counsel
Texas Higher Education Coordinating Board
Filed: September 28, 2011

♦ ♦ ♦

The Texas Higher Education Coordinating Board files this notice of intention to review Chapter 21, concerning Student Services. This review is in accordance with the requirements of the Texas Government Code, §2001.039.

The agency's reason for adopting the rules contained in this chapter continues to exist.

Comments on the proposed review may be submitted to Raymund A. Paredes, Commissioner of Higher Education, P.O. Box 12788, Austin, Texas 78711.

TRD-201104063
William Franz
General Counsel
Texas Higher Education Coordinating Board
Filed: September 28, 2011

♦ ♦ ♦

The Texas Higher Education Coordinating Board files this notice of intention to review Chapter 22, concerning Grant and Scholarship Programs. This review is in accordance with the requirements of the Texas Government Code, §2001.039.

The agency's reason for adopting the rules contained in this chapter continues to exist.

Comments on the proposed review may be submitted to Raymund A. Paredes, Commissioner of Higher Education, P.O. Box 12788, Austin, Texas 78711.

TRD-201104064
William Franz
General Counsel
Texas Higher Education Coordinating Board
Filed: September 28, 2011

♦ ♦ ♦

The Texas Higher Education Coordinating Board files this notice of intention to review Chapter 25, concerning Optional Retirement Program. This review is in accordance with the requirements of the Texas Government Code, §2001.039.

The agency's reason for adopting the rules contained in this chapter continues to exist.

Comments on the proposed review may be submitted to Raymund A. Paredes, Commissioner of Higher Education, P.O. Box 12788, Austin, Texas 78711.

TRD-201104065
William Franz
General Counsel
Texas Higher Education Coordinating Board
Filed: September 28, 2011

♦ ♦ ♦

State Pension Review Board

Title 40, Part 17

The State Pension Review Board (PRB) files this notice of intention to review Texas Administrative Code, Title 40, Part 17, Chapter 604, §604.1 concerning Historically Underutilized Business Program. The review and consideration of the rule is being conducted in accordance with the Texas Government Code, §2001.039, which requires state agencies to review and consider for repeal, readoption or readoption with amendments, their administrative rules every four years.

The review will include, at the minimum, an assessment by the PRB of whether the reasons the rule was initially adopted continue to exist and whether the rule should be readopted. The text of the section will not be published.

The PRB will accept comments regarding the review. The comment period will last for 30 days after the publication of this notice in the *Texas Register.* All comments and/or questions regarding this rule review may be submitted to Christopher Hanson, Executive Director, State Pension Review Board, P.O. Box 13498, Austin, Texas 78711-3498, or e-mail prb@prb.state.tx.us. For further information, please call: (512) 463-1736.

TRD-201104203
Lynda Baker
Staff Services Officer
State Pension Review Board
Filed: October 5, 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: 19 TAC §109.1002(f)

School FIRST - Rating Worksheet Dated October 2011
School Year ____-____
Fiscal Year Ended June 30, ____ Or August 31, ____
County District # _____-_____

District Name :_____

	Critical Indicators	Check The Appropriate Box Below: Yes	No
1	Was Total Fund Balance Less Nonspendable and Restricted Fund Balance Greater Than Zero In The General Fund?		
2	Was The Total Unrestricted Net Asset Balance (Net Of Accretion OF Interest On Capital Appreciation Bonds) In The Governmental Activities Column In The Statement Of Net Assets Greater Than Zero? (If The District's Five-Year Percent Change In Students Was A 10% Increase Or More Then Answer Yes)		
3	Were There No Disclosures In The Annual Financial Report And/Or Other Sources Of Information Concerning Default On Bonded Indebtedness Obligations?		
4	Was The Annual Financial Report Filed Within One Month After November 27th or January 28th Deadline Depending Upon The District's Fiscal Year End Date (June 30th or August 31st)?		
5	Was There An Unqualified Opinion In Annual Financial Report?		
6	Did The Annual Financial Report Not Disclose Any Instance(s) Of Material Weaknesses In Internal Controls?		

	Fiscal Responsibility And Data Quality	Points	Determination of Points: 5	4	3	2	1	0
7	Was The Three-Year Average Percent Of Total Tax Collections (Including Delinquent) Greater Than 98%?		> 98%	> 95% =< 98%	> 92% =< 95%	> 89% =< 92%	> 86% =< 89%	=< 86%
8	Did The Comparison Of PEIMS Data To Like Information In Annual Financial Report Result In An Aggregate Variance Of Less Than 3 Percent Of Expenditures Per Fund Type (Data Quality Measure)?		Yes					No
9	Were Debt Related Expenditures (Net Of IFA And/Or EDA Allotment) Less Than $350 Per Student? (If The District's Five-Year Percent Change In Students Was A 7% Increase Or More, Or If Property Taxes Collected Per Penny Of Tax Effort Were More Than $200,000, Then The District Receives 5 Points)		< $350	=> $350 < $600	= > $600 < $850	= > $850 < $1,100	= > $1,100 < $1,350	=> $1,350
10	Was There No Disclosure In The Annual Audit Report Of Material Noncompliance?		Yes					No
11	Did The District Have Full Accreditation Status In Relation To Financial Management Practices? (e.g., No Monitor, Conservator, Management Team, or Board of Managers Assigned)		Yes					No
	Budgeting							
12	Was The Aggregate Of Budgeted Expenditures And Other Uses **Less Than** The Aggregate Of Total Revenues, Other Resources and Fund Balance in General Fund?		Yes					No
13	If The District's Aggregate Fund Balance In The General Fund And Capital Projects Fund Was **Less Than** Zero, Were Construction Projects Adequately Financed? (Were Construction Projects Adequately Financed Or Adjusted By Change Orders Or Other Legal Means To Avoid Creating Or Adding To The Fund Balance Deficit Situation?)		Yes					No
14	Was The Ratio Of Cash And Investments To Deferred Revenues (Excluding Amount Equal To Net Delinquent Taxes Receivable) In The General Fund Greater Than Or Equal To 1:1? (If Deferred Revenues Are Less Than Net Delinquent Taxes Receivable, Then The District Receives 5 Points)		=> 1.00	=> 0.95 < 1.00	= > 0.90 < 0.95	= > 0.85 < 0.90	= > 0.80 < 0.85	< 0.80
	Personnel							
15	Was The Administrative Cost Ratio Less Than The Threshold Ratio? (See Ranges Below)		Yes					No
16	Was The Ratio Of Students To Teachers Within The Ranges Shown Below According To District Size?		**UL <= 100%	> 100% =< 105%	> 105% =< 110%	> 110% =< 115%	> 115% =< 120%	> 120%
			***LL => 100%	=> 95% < 100%	> 90% < 95%	> 85% < 90%	> 80% < 85%	< 80%
17	Was The Ratio Of Students To Total Staff Within The Ranges Shown Below According To District Size?		**UL <= 100%	> 100% =< 105%	> 105% =< 110%	> 110% =< 115%	> 115% =< 120%	> 120%
			***LL => 100%	=> 95% < 100%	> 90% < 95%	> 85% < 90%	> 80% < 85%	< 80%
	Cash Management							
18	Was The Decrease In Unassigned Fund Balance Less Than 20% Over Two Fiscal Years? (If Total Revenues Exceeded Operating Expenditures In The General Fund, Then The District Receives 5 Points).		< 20%	=> 20% < 21%	= > 21% < 22%	= > 22% < 23%	= > 23% < 24%	=> 24%
19	Was The Aggregate Total Of Cash And Investments In The General Fund More Than $0?		Yes					No
20	Did Investment Earnings In All Funds (Excluding Debt Service Fund and Capital Projects Fund) Meet or Exceed the 3-Month Treasury Bill Rate?		Yes					No
	Total Points Per Column							

Determination Of School District Rating

A.	Did The District Answer No To Indicators 1, 2, 3, Or 4; OR Both 5 and 6 If The District Answered No To Either, The District's Rating Is SubStandard Achievement	
B.	Determine Rating By Applicable Number Of Points	Points
	Superior Achievement	>= 64 <= 70
	Above Standard Achievement	>= 58 < 64
	Standard Achievement	>= 52 < 58
	Substandard Achievement *(If Less Than 52 points, OR If The District Answered No To Indicators 1, 2, 3, Or 4, OR Both 5 And 6*	<52 OR Answered No To One Default Indicator

Administrative Cost Ratio Indicator 15	
ADA Group	Standard
10,000 and Above	0.1105
5,000 to 9,999	0.1250
1,000 to 4,999	0.1401
500 to 999	0.1561
Less than 500	0.2654
Sparse	0.3614

** UL = Upper Limit
*** LL = Lower Limit

For questions, call the Division of Financial Audits at (512) 463-9095.

Completed By:_____ Date:_____

Notes:

Disrtrict Size - Number Of Students Between			Ranges For Ratios	
			Low	High
Indicator 16				
		< 500	7.0	22
	500	999	10.0	22
	1,000	4,999	11.5	22
	5,000	9,999	13.0	22
	=> 10,000		13.5	22
Indicator 17				
		< 500	5.0	14
	500	999	5.8	14
	1,000	4,999	6.3	14
	5,000	9,999	6.8	14
	=> 10,000		7.0	14

School FIRST - Rating Worksheet Calculations Dated October 2011		
	Indicator	**Calculation Defined**
1	Was Total Fund Balance Less Nonspendable and Restricted Fund Balance Greater Than Zero In The General Fund?	A > 0 Where A = [Aggregate Of Committed or Assigned Fund Balance And Unassigned Fund Balance In General Fund At June 30 or August 31 Depending On Fiscal Year End]
2	Was the Total Unrestricted Net Asset Balance (Net of the Accretion of Interest for Capital Appreciation Bonds) in the Governmental Activities Column in the Statement of Net Assets Greater Than Zero? (If The District's Five-Year Percent Change In Students Was A 10% Increase Or More Then The District Answers Yes)	If ((C – D)/ D) X 100 < 10 % Then Continue Calculation A + B> 0 Where A = [Total Unrestricted Net Asset Balance in the Governmental Activities Column in Exhibit A-1, Statement of Net Assets in the Annual Financial Report]; B= [Accretion of Interest for Capital Appreciation Bonds]; C = [Number Of Students In Year 5 From Base Year]; D = [Number Of Students In Base Year]
3	Were There **No** Disclosures In The Annual Financial Report And/Or Other Sources Of Information Concerning Default On Bonded Indebtedness Obligations?	No Calculation Involved
4	Was The Annual Financial Report Filed Within One Month After November 27th or January 28th Deadline Depending Upon The District's Fiscal Year End Date (June 30th or August 31st)?	No Calculation Involved
5	Was There An Unqualified Opinion In Annual Financial Report?	No Calculation Involved
6	Did The Annual Financial Report **Not** Disclose Any Instance(s) Of Material Weaknesses In Internal Controls?	No Calculation Involved
7	Was The Three-Year Average Percent Of Total Tax Collections (Including Delinquent) Greater Than 98%?	((A / B) X 100) Where A = [Tax Collections For Three Years]; B = [Tax Levy For Three Years] Reported In Exhibit J-1 Schedule of Delinquent Taxes Receivable In The Annual Financial Report
8	Did The Comparison Of PEIMS Data To Like Information In Annual Financial Report Result In An Aggregate Variance Of Less Than 3 Percent Of Expenditures Per Fund Type (Data Quality Measure)?	((A / B) X 100) Of C Where A = [Absolute Value Of All Differences In Expenditures In Exhibit C-2 Statement of Revenues, Expenditures, and Changes in Fund Balance And PEIMS]; B = [Sum Of Expenditure In PEIMS Per Fund Type Presented In Exhibit C-2]; C = [Fund Class]

October 2011

School FIRST - Rating Worksheet Calculations Dated October 2011		
	Indicator	**Calculation Defined**
9	Were Debt Related Expenditures (Net Of IFA And/Or EDA Allotment) Less Than $350 Per Student? (If The District's Five-Year Percent Change In Students Was A 7% Increase Or More, Or If Property Taxes Collected Per Penny Of Tax Effort Were More Than $200,000, Then The District Receives 5 Points)	If ((B – D)/ D) X 100 < 7 % Or E / F < $200,000, Then Continue Calculation ((A - C)/ B) Where A = [Function 71 Expenditures Report In The Debt Service And General Funds (Excluding Expenditure Object Codes 6524 and 6525)]; B = [Number Of Students In Year 5 From Base Year]; C = [IFA + EDA Allotments]; D = [Number Of Students In Base Year]; E = [Total Tax Collections]; F = [Total Tax Rate In Pennies]
10	Was There **No** Disclosure In The Annual Audit Report Of Material Noncompliance?	No Calculation Involved
11	Did The District Have Full Accreditation Status In Relation To Financial Management Practices? (e.g., Monitor, Conservator, Management Team, or Board of Managers Assigned)	No Calculation Involved
12	Was The Aggregate Of Budgeted Expenditures And Other Uses **Less Than** The Aggregate Of Total Revenues, Other Resources and Fund Balance in General Fund?	(A + B) - (C + D + E) < 0 Where A = [Budgeted Appropriations In General Fund]; B = [Budgeted Other Uses In The General Fund]; C = [Budgeted Revenues In General Fund]; D = [Budgeted Other Resources In The General Fund]; E = [Fund Balance In General Fund At July 1 or September 1 Depending On Fiscal Year End]
13	If The District's Aggregate Fund Balance In The General Fund And Capital Projects Fund Was **Less Than** Zero, Were Construction Projects Adequately Financed? (Were Construction Projects Adequately Financed Or Adjusted By Change Orders Or Other Legal Means To Avoid Creating Or Adding To The Fund Balance Deficit Situation?)	If (C + D) < 0 Then Continue Calculation As (A - B - (C + D)) < 0 Where A = [Expenditures Function 81 In General Fund and Capital Projects Fund]; B = [Other Resources For Real Property Financing In General Fund and Capital Projects Fund]; C = [Fund Balance In General Fund At July 1 or September 1 Depending On Fiscal Year End]; D = [Fund Balance In Capital Projects Fund At July 1 or September 1 Depending On Fiscal Year End]
14	Was The Ratio Of Cash And Investments To Deferred Revenues (Excluding Amount Equal To Net Delinquent Taxes Receivable) In The General Fund Greater Than Or Equal To 1:1? (If Deferred Revenues Are Less Than Net Delinquent Taxes Receivable, Then The District Receives 5 Points)	If B > 0 Then Continue Calculation As (A / B) Where A = [Cash And Investments In General Fund]; B = [Deferred Revenue In General Fund – Property Tax Receivable Net Of Uncollectible]

October 2011

School FIRST - Rating Worksheet Calculations Dated October 2011		
	Indicator	**Calculation Defined**
15	Was The Administrative Cost Ratio Less Than The Threshold Ratio? (See Ranges Below)	(A>B) A = [Acceptable Administrative Cost Ratio]; B = [Administrative Cost Ratio Of The District]
16	Was The Ratio Of Students To Teachers Within The Ranges Shown Below According To District Size? (See Ranges Below)	(A / B) Where A = [Number Of Students]; B = [Number Of Teachers FTEs]
17	Was The Ratio Of Students To Total Staff Within The Ranges Shown Below According To District Size? (See Ranges Below)	(A / B) Where A = [Number Of Students]; B = [Total Staff FTEs]
18	Was The Decrease In Unassigned Fund Balance Less Than 20% Over Two Fiscal Years? (If Total Revenues Exceeded Operating Expenditures In The General Fund, Then The District Receives 5 Points).	If (A – B) > 0 And [C] X .80 > [D], Then Continue Calculation [A] - [B] Where A = [Expenditures In General Fund In Functions 11 Through 61 And Expenditure Object Codes 6100 Through 6400]; B = [Total Revenues In General Fund]; C = [Undesignated, Unreserved (Unassigned) Fund Balance In General Fund At June 30 or August 31, Depending On Fiscal Year End, Two Fiscal Years Prior]; D= [Unassigned Fund Balance In General Fund For The Last Fiscal Year]
19	Was The Aggregate Total Of Cash And Investments In The General Fund More Than $0?	A > 0 Where A = [Cash and Investments In General Fund]
20	Did Investment Earnings In All Funds (Excluding Debt Service Fund And Capital Projects Fund) Meet or Exceed the 3-Month Treasury Bill Rate?	(A / B) ≥ C Where A = [Investment Earnings In All Funds Except Debt Service Fund And Capital Projects Fund]; B = [Cash and Investments in All Funds Except Debt Service Fund and Capital Projects Fund, Averaged Current and Prior Fiscal Year-End]; C = [3-Month Treasury Bill Averaged for 12 Months from September through August of the Fiscal Year Period]

October 2011

Indicator 15	
ADA Group	Standard
10,000 and Above	0.1105
5,000 to 9,999	.1250
1,000 to 4,999	.1401
500 to 999	.1561
Less than 500	.2654
Sparse	0.3614

		Ranges for Ratios	
District Size - Number of Students Between		Low	High
Indicator 16			
	<500	7.0	22
500	999	10.0	22
1,000	4,999	11.5	22
5,000	9,999	13.0	22
=>10,000		13.5	22
Indicator 17			
	<500	5.0	14
500	999	5.8	14
1,000	4,999	6.3	14
5,000	9,999	6.8	14
=>10,000		7.0	14

For questions, call the Division of Financial Audits at (512) 463-9095.

October 2011

Figure: 19 TAC §109.1002(g)

School FIRST for Charter Schools - Rating Worksheet Dated October 2011
School Year _____ - _____
Fiscal Year Ended June 30, _____ or August 31, _____
County District # _____ - _____

Charter School Name _____

		Critical Indicators	Check The Appropriate Box Below: Yes	No
1		Did The Charter School (CS) Avoid Holds On Payments That Were Not Cleared Within 30 Days, As A Result Of Untimely Deposits To TRS Or TWC?		
2		Was The Total Net Asset Balance In The Statement Of Financial Position For The CS Greater Than Zero? (If The CS's Five-Year Percent Change In Students Was A 10% Increase Or More Then Answer Yes)		
3	*	Were There No Disclosures In The Charter Holder's (CH's) Annual Financial Report And/Or Other Sources Of Information Concerning Default On Debt?		
4	*	Was The CH's Annual Financial Report Filed Within One Month After The November 27th Or January 28th Deadline Depending Upon The CS's Fiscal Year End Date (June 30th Or August 31st)?		
5	*	Was There An Unqualified Opinion In The CH's Annual Financial Report?		
6	*	Did The CH's Annual Financial Report Not Disclose Any Instance(s) Of Material Weaknesses In Internal Controls?		

		Fiscal Responsibility And Data Quality	Points	Determination Of Points: 5	4	3	2	1	0
7		Are the CS's Liabilities Less Than 80% of Its Assets?		Yes					No
8		Did The Comparison Of PEIMS Data To Like Information In The CS's Annual Financial Report Result In An Aggregate Variance Of Less Than 3 Percent Of All Expenses (Data Quality Measure)?		Yes					No
9		Were The CS's Debt Related Expenses Less Than $200 Per Student? (If The CS's Five-Year Percent Change In Students Was A 7% Increase Or More, Then The CS Receives 5 Points)		< $200	>= $200 < $350	>= $350 <$500	>= $500 < $650	>= $650 < $800	>= $800
10	*	Was There No Disclosure In The CH's Annual Audit Report Of Material Noncompliance?		Yes					No
11		Did The CS Have Full Accreditation Status In Relation To Financial Management Practices? (e.g. No Monitor, Conservator, Management Team, Or Board of Managers Assigned)		Yes					No
		Budgeting							
12		Was The CS's Aggregate Of Budgeted Expenses Less Than The Aggregate Of Budgeted Total Revenues And Cash And Investments At Beginning Of Year?		Yes					No
13		Was The CS's Current Ratio For All Net Asset Groups Greater Than Or Equal To 1:1?		=> 1.00	=>0.95 < 1.00	=>0.90 < 0.95	=>0.85 < 0.90	=>0.80 < 0.85	< 0.80
		Personnel							
14		Was The CS's Administrative Cost Ratio Less Than The Threshold Ratio? (See Ranges Below)		Yes					No
15		Was The Ratio Of Students To Teachers Within The Ranges Shown Below According To CS Size? (See Ranges Below)		**UL<= 100% ***LL => 100%	>100% =<105% =>95% <100%	>105% =<110% =>90% <95%	>110% =<115% =>85% <90%	>115% =<120% =>80% <85%	> 120% < 80%
16		Was The Ratio Of Students To Total Staff Within The Ranges Shown Below According To The CS's Size? (See Ranges Below)		**UL <= 100% ***LL => 100%	>100% =<105% =>95% <100%	>105% =<110% =>90% <95%	>110% =<115% =>85% <90%	>115% =<120% =>80% <85%	> 120% < 80%
		Cash Management							
17		Was The Decrease In The CS's Total Net Assets Less Than 20% Over Two Fiscal Years? (Calculation Excludes Depreciation And Amortization)		< 20.00%	=>20.0% < 21.0%	=>21.0% < 22.0%	=>22.0% < 23.0%	=>23.0% < 24.0%	=> 24.0%
18		Was The CS's Aggregate Total Of Cash And Investments More Than $0?		Yes					No
19		Did The CS's Investment Earnings In All Net Asset Groups Meet or Exceed the 3-Month Treasury Bill Rate?		Yes					No
		Total Points Per Column							

Determination Of Charter School Rating

A.		Did The Charter School Answer No To Indicators 1, 2, 3, Or 4? OR Both 5 and 6? If The Charter School Answered No To Either, The Charter School's Rating Is Substandard Achievement	
B.		Determine Rating By Applicable Number Of Points	Points
		Superior Achievement	>= 60 <= 65
		Above Standard Achievement	>= 55 < 60
		Standard Achievement	>= 50 < 55
		Substandard Achievement (If Less Than 50 points, OR If The Charter School **Answered No To Indicators 1, 2, 3, Or 4, OR Both 5 And 6)**	<50 or **Answered No To One Default**

Administrative Cost Ratio Indicator 14	
ADA Group	Standard
10,000 and Above	0.1105
5,000 to 9,999	0.1250
1,000 to 4,999	0.1401
500 to 999	0.1561
Less than 500	0.2654
Sparse	0.3614

** UL = Upper Limit
*** LL = Lower Limit

* In accordance with generally accepted accounting principles established by the Financial Accounting Standards Board (FASB), the financial statements for a non-profit entity must be presented with an aggregate view of the entity as a whole. The indicators with an asterisk are based on the results of the audited financial statements for the entity as a whole. All other indicators are calculated for the financial results presented for the specific-purpose financial statements relating to the operations of the individual charter school.

For questions, call the Division of Financial Audits at (512) 463-9095.

Completed By:_____ Date:_____

Notes:

Charter School Size - Number Of Students Between			Ranges For Ratios	
			Low	High
Indicator 15				
		< 500	7.0	22
	500	999	10.0	22
	1,000	4,999	11.5	22
	5,000	9,999	13.0	22
	=> 10,000		13.5	22
Indicator 16				
		< 500	5.0	14
	500	999	5.8	14
	1,000	4,999	6.3	14
	5,000	9,999	6.8	14
	=> 10,000		7.0	14

School FIRST for Charter Schools - Rating Worksheet Calculations Dated October 2011			
		Indicator	**Calculation Defined**
1		Did The Charter School (CS) Avoid Holds on Payments That Were Not Cleared Within 30 Days, as a Result of Untimely Deposits to TRS or TWC?	No Calculation Involved; Source: e-mails from TEA Accounting regarding FSP holds (if not cleared in < 30 days)
2		Was The Total Net Asset Balance In The Statement Of Financial Position for the CS Greater Than Zero? (If The CS's Five-Year Percent Change In Students Was A 10% Increase Or More Then Answer Yes)	If ((B – C)/ C) X 100 < 10 % Then Continue Calculation A > 0 Where A = Total Net Asset Balance in the Statement of Financial Position in the Annual Financial Report; B = [Number Of Students In Year 5 From Base Year]; C = [Number Of Students In Base Year]
3	*	Were There No Disclosures In The Charter Holder's (CH's) Annual Financial Report And/Or Other Sources Of Information Concerning Default On Debt?	No Calculation Involved
4	*	Was The CH's Annual Financial Report Filed Within One Month After November 27th or January 28th Deadline Depending Upon The CS's Fiscal Year End Date (June 30th or August 31st)?	No Calculation Involved
5	*	Was There An Unqualified Opinion In The CH's Annual Financial Report?	No Calculation Involved
6	*	Did The CH's Annual Financial Report Not Disclose Any Instance(s) Of Material Weaknesses In Internal Controls?	No Calculation Involved
7		Are the CS's Liabilities Less Than 80% of Its Assets?	(B/A < .8) Where A = [Total Assets]; B = [Total Liabilities].
8		Did The Comparison Of PEIMS Data To Like Information In The CS's Annual Financial Report Result In An Aggregate Variance Of Less Than 3 Percent Of All Expenses (Data Quality Measure)?	((A / B) X 100) Where A = [Absolute Value Of All Differences In Expenses In Statement of Activities And PEIMS]; B = [Sum Of Expenses for All Expenses Presented In Statement of Activities]
9		Were The CS's Debt Related Expenses Less Than $200 Per Student? (If The CS's Five-Year Percent Change In Students Was A 7% Increase Or More, Then The CS Receives 5 Points)	If ((B – C)/ C) X 100 < 7 % Then Continue Calculation (A / B) Where A = [65XX Object Codes In All Net Asset Accounts (Excluding Expenditure Object Codes 6524 and 6525)]; B = [Number Of Students In Year 5 From Base Year]; C = [Number Of Students In Base Year]
10	*	Was There No Disclosure In The CH's Annual Audit Report Of Material Noncompliance?	No Calculation Involved

October 2011

School FIRST for Charter Schools - Rating Worksheet Calculations Dated October 2011		
	Indicator	**Calculation Defined**
11	Did The CS Have Full Accreditation Status In Relation To Financial Management Practices? (e.g. No Monitor, Conservator, Management Team, Or Board of Managers Assigned)	No Calculation Involved
12	Was The CS's Aggregate Of Budgeted Expenses Less Than The Aggregate Of Budgeted Total Revenues And Cash And Investments At Beginning of Year?	(A) < (B + C) Where A = [Budgeted Expenses in the Budgetary Comparison Schedule]; B = [Budgeted Revenues In the Budgetary Comparison Schedule]; [C = [Cash And Investments on the Statement of Financial Position At July 1 or September 1 Depending On Fiscal Year End]
13	Was The CS's Current Ratio For All Net Asset Groups Greater Than Or Equal To 1:1?	If B > 0 Then Continue Calculation As (A / B) Where A = [Current Assets in All Net Asset Groups]; B = [Current Liabilities in All Net Asset Groups]
14	Was The CS's Administrative Cost Ratio Less Than The Threshold Ratio? (See Ranges Below)	(A>B) Where A = [Acceptable Administrative Cost Ratio]; B = [Administrative Cost Ratio Of The Charter]
15	Was The Ratio Of Students To Teachers Within The Ranges Shown Below According To CS Size? (See Ranges Below)	(A / B) Where A = [Number Of Students]; B = [Number Of Teacher FTEs]
16	Was The Ratio Of Students To Total Staff Within The Ranges Shown Below According To CS Size? (See Ranges Below)	(A / B) Where A = [Number Of Students]; B = [Total Staff FTEs]
17	Was The Decrease In The CS's Total Net Assets Less Than 20% Over Two Fiscal Years? (Calculation Excludes Depreciation and Amortization)	(A + C) X .80 > (B +D), A = [Net Assets At June 30 or August 31, Depending On Fiscal Year End, Two Fiscal Years Prior]; B= [Net Assets For The Last Fiscal Year]; C=[Accumulated Depreciation, Two Fiscal Years Prior]; D = =[Accumulated Depreciation For The Last Fiscal Year]
18	Was The CS's Aggregate Total Of Cash And Investments More Than $0?	A > 0 Where A = [Cash and Investments In All Net Asset Groups]
19	Did The CS's Investment Earnings In All Net Asset Groups Meet or Exceed the 3-Month Treasury Bill Rate?	(A / B ≥ C) Where A = [Total Investment Earnings]; B = [Cash and Investments, Averaged Current and Prior Fiscal Year-End]; C = [3-Month Treasury Bill Rate Averaged for 12 Months from September through August of the Fiscal Year Period]

October 2011

Indicator 14	
ADA Group	Standard
10,000 and Above	0.1105
5,000 to 9,999	.1250
1,000 to 4,999	.1401
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		Ranges for Ratios	
School Size - Number of Students Between		Low	High
Indicator 15			
	<500	7.0	22
500	999	10.0	22
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5,000	9,999	13.0	22
=>10,000		13.5	22
Indicator 16			
	<500	5.0	14
500	999	5.8	14
1,000	4,999	6.3	14
5,000	9,999	6.8	14
=>10,000		7.0	14

* In accordance with generally accepted accounting principles established by the Financial Accounting Standards Board (FASB), the financial statements for a non-profit entity must be presented with an aggregate view of the entity as a whole. The indicators with an asterisk are based on the results of the audited financial statements for the entity as a whole. All other indicators are calculated for the financial results presented for the specific-purpose financial statements relating to the operations of the individual charter school.

For questions, call the Division of Financial Audits at (512) 463-9095.

October 2011

Figure: 25 TAC §289.204(e)

Category of License		Fee
(1)	Accelerator (Used for Production of Radioactive Material)	$17,620.00
(2)	Agency-Accepted Training Course (Involving Possession of Radioactive Material)	$4,230.00
(3)	Bone Mineral Analyzer	$2,290.00
(4)	Broad License	$23,810.00
(5)	Calibration Service (Survey Instrument)	$1,950.00
(6)	Calibration/Reference Source	$1,460.00
(7)	Decontamination Service (A) Fixed Site (B) Mobile	 $29,440.00 $9,650.00
(8)	Demonstration/Sales	$4,410.00
(9)	Environmental Laboratory	$1,800.00
(10)	Eye Applicator	$1,800.00
(11)	Fine Leak Testing Device	$5,540.00
(12)	Fixed Multi-Beam Teletherapy	$9,910.00
(13)	X-Ray Fluorescence	$2,290.00
(14)	Hand-held Light Intensifying Imaging Device	$2,290.00
(15)	Gas Chromatograph	$2,130.00
(16)	Gauge (A) Spinning Pipe-Thickness/Portable (B) Fixed	 $3,240.00 $3,410.00
(17)	General License Acknowledgement-Gauge	$1,410.00
(18)	Industrial Radiography (Fixed Facility)	$8,490.00
(19)	Industrial Radiography (Temporary Field Site)	$17,870.00
(20)	Installer, Repair, or Maintenance	$3,600.00
(21)	Irradiator (Self-Contained)	$4,690.00
(22)	Irradiator (Unshielded)	$28,900.00
(23)	In-Vitro Use of Radioactive Material	$1,090.00
(24)	In-Vitro Test Kit Manufacturer	$5,660.00
(25)	Leak Test Service	$2,130.00
(26)	Manufacturing and Commercial Distribution (A) Processor of Radioactive Material (B) Other Manufacturing and Commercial Distribution (C) Commercial Distribution Only (D) Limited Manufacturing (Loose Material)	 $56,060.00 $9,140.00 $4,230.00 $8,160.00
(27)	Medical Therapy (Sealed Source)	$4,060.00
(28)	Medical Therapy (Unsealed Source)	$3,410.00
(29)	Mineral Recovery (Byproduct Material)	$76,930.00

(30)	Mobile Scanning Service	$5,060.00
(31)	Naturally Occurring Radioactive Material (NORM) - Commercial Processing	$29,440.00
(32)	Nuclear Medicine (Diagnostic)	$3,620.00
(33)	Nuclear Pharmacy	$8,160.00
(34)	Neutron Generator Target (Sealed)	$5,920.00
(35)	Pacemaker	$1,320.00
(36)	Pipe Joint Collar Marker	$2,610.00
(37)	Radiopharmaceutical Manufacturing	$24,130.00
(38)	Remote Controlled Brachytherapy Device (Includes Low Dose-Rate and High Dose-Rate Remote Afterloaders and Intravenous Brachytherapy)	$5,330.00
(39)	Research and/or Development	$5,970.00
(40)	Source Material	$4,410.00
(41)	Special Nuclear Material	$2,610.00
(42)	Teletherapy	$4,080.00
(43)	Tracer Studies (Used in Other Than Oil and Gas Industry Wellbores)	$7,520.00
(44)	Tracer Studies (Used in Oil and Gas Industry Wellbores)	$4,540.00
(45)	Well Logging	$5,920.00
(46)	Other Specific License	$2,980.00
(47)	Additional Authorized Use Sites Where Radioactive Material Is Stored or Used Under Same License or Where Only Records Are Stored	25% of Applicable Fee Not to Exceed 50 Additional Sites
(48)	Reciprocity	Fee of Applicable Category

Figure: 25 TAC §289.204(j)

Category of Machine/Type of Use		Fee
(1)	Computerized Tomography (CT)	$1,910.00
(2)	Fluoroscopy	$940.00
(3)	Accelerator, Simulator, or Other Therapeutic Radiation Machine	$1,910.00
(4)	Radiographic Machines Only	$600.00
(5)	Podiatric Radiographic Only	$420.00
(6)	Dental Radiographic Only	$370.00
(7)	Veterinary, Including CT, Fluoroscopy, and Accelerators	$290.00
(8)	Industrial Radiography (A) Fixed Facility (B) Temporary Job Sites	 $1,960.00 $3,280.00
(9)	Other Industrial (A) Diffraction (B) Computerized Tomography (C) Fluoroscopy (D) Flash Radiography (E) Hand-held Light Intensifying Image Devices	$670.00
(10)	Morgues and Educational Facilities Utilizing Radiation Machines for Non-human Use, Including CT, Fluoroscopy, and Accelerators	$670.00
(11)	Minimal Threat Radiation Machines as Specified in 25 TAC §289.231(ll)(3) (A) Cathodoluminescence (B) Electron Beam Welding (C) Fluorescence X-Ray (D) Gauge - X-Ray (E) Ion Implantation (F) Package X-Ray (G) Particle Size Analyzer - X-Ray (H) Cabinet X-Ray (Certified) (I) Other	$290.00
(12)	Exposure Rate or Dose Measurements performed by a Licensed Medical Physicist as Specified in 25 TAC §289.226(b)(9)	$290.00

(13)	Services as Specified in 25 TAC §289.226(b)(10) (A) Exposure Rate or Dose Measurements (B) Radiation Machine Output Measurements (C) Agency-Accepted Training Courses (D) Calibration (E) Demonstration/Sales (F) Assembly, Installation or Repair (G) Equipment Performance Evaluations on Dental Radiation Machines (H) Provider of Equipment	$290.00
(14)	Laser - Medical/Research/Academic	$230.00
(15)	Laser - Industrial/Services/Entertainment	$400.00
(16)	Reciprocity	Fee of Applicable Category
(17)	Additional Authorized Use Location Where Radiation Machines or Services are Authorized Under the Same Registration	30% of Applicable Fee

Figure: 40 TAC §807.54

GRADUATED CORRECTIVE ACTIONS	
	Sanction to Representative (to serve as a representative in a school licensed in Texas)
Initial Violation	Conditional registration and retraining
Multiple Violations	Suspension of registration and retraining
Repeat Violation	Revocation or denial of registration
Felony Conviction	Denial, suspension, or revocation of registration
VIOLATIONS	
Representative Approval	
Soliciting or enrolling students without registration as a representative	
Failure to provide required or accurate information in the representative registration application	
Soliciting or enrolling students for multiple schools, without agreement of all school owners	
Soliciting or enrolling students without taking required training	
Representative Behavior	
Misrepresentation of the school's programs	
Providing incomplete or inaccurate information about the school (such as employment outcomes, extent of transferability of credits)	
Discrediting other schools	
Soliciting students in disallowed locations	
Soliciting or enrolling students into unapproved programs	
Offering students financial inducements to enroll	
Coercing students to enroll	
Administering entrance tests	
Advising students on financial aid	
Soliciting as, or on behalf of, an employment agency	
Failing to invite students to tour the school's facility and inspect the equipment	
Violating any other provision of statute or rule relating to career schools and colleges	

Figure: 40 TAC §807.353(e)

Violation	Penalty
Small school transitioning to a large school: • Failure to notify Agency of the school's status change; • Failure to timely apply; or • Failure to remit increased fees.	$250
Failure to disclose tuition, fees, or other charges, including increases, to the Agency	$250
Vacating the school facility without providing prior notification of a change of address	$250
Failure to maintain records demonstrating compliance	$250
Failure to provide complete and accurate information as required	$250
Failure to ensure representatives have taken required training	$500
Failure to provide instructors who meet necessary qualifications and notice requirements	$500
Failure to make arrangements satisfactory to the Agency for the completion of a discontinued course of instruction	$500
Failure to respond to requests or direction from the Agency	$500
Making a false statement in an application to the Agency	$500
Failure to maintain the instructors, facilities, equipment, or courses of instruction and outcomes on the basis of which approval was issued	$500
Failure to disclose limitations on transferability of courses of instruction	$500
Advertising the availability of financial aid for a program for which it is not available	$500
Failure to establish that students met the approved admission requirements	$750
Failure to submit the annual program completion, job placement, and employment data by the required due date	$750
Failure to submit annual financial statements no later than 180 days from the close of the school's or college's fiscal year	$750

Transfer of students from one school location to another school location, by an owner with multiple school locations	$750
Suspension of all classes and dismissal of all students contrary to the school's class schedule as printed in the school catalog for reasons not approved by the Agency	$750
Operating a school without a certificate	$1,000
Teaching a course of instruction or revised course of instruction that has not been approved by the Agency	$1,000
Using advertising that is false, misleading, or deceptive, including the misrepresentation of degrees other than those approved by the Coordinating Board	$1,000
Failure to notify the Agency of the discontinuance of the course of instruction or the operation of a school or college within 72 hours of cessation of classes, and to make available accurate records as required	$1,000
Solicitation of prospective students in violation of statutory and rule requirements	$1,000
Misrepresentation	$1,000
Failure to file a complete application for renewal at least 30 days before the expiration date of the certificate of approval	10% of renewal fee not less than $200 and not more than $1,000
Failure to pay any installment by the required due date	50% of the total amount of the fee
Paying refunds late	A rate established annually by the Commission

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.

Office of the Attorney General

Notice of Settlement of a Texas Water Code Enforcement Action

The State of Texas gives notice of the following proposed resolution of an environmental enforcement action under the Texas Water Code. Before the State may enter into the settlement agreement, pursuant to §7.110 of the Texas Water Code the State shall permit the public to comment in writing. The Attorney General will consider any written comments and may withdraw or withhold consent to the proposed agreement if the comments disclose facts or considerations indicating that consent is inappropriate, improper, inadequate or inconsistent with the requirements of the law.

Case Title: *State of Texas et al. v. Henry L. Zumwalt et al.*, No. D-1-GV-08-001195; In the 345th Judicial District Court, Travis County, Texas.

Background: During December 2006 through March 2007, a fire occurred in Helotes, Bexar County, Texas, at a site owned by Henry L. Zumwalt. The Texas Commission on Environmental Quality ("TCEQ") spent more than $5.7 million in putting out the fire and dealing with air and water pollution and solid waste generated by the fire. On behalf of the TCEQ, the State filed a claim in the district court to recover its costs, civil penalties and attorneys' fees. Other parties joined the action to bring claims, or were impleaded as third-party defendants.

Nature of the Settlement: All claims between and among the State, Henry L. Zumwalt, H.L. Zumwalt Construction, Inc., Oil Mop, L.L.C., and Williams Fire and Hazard Control, Inc., will be severed from the lawsuit and settled by an agreed final judgment in the district court.

Proposed Settlement: The proposed judgment provides for the recovery of response costs and attorneys' fees.

The Office of the Attorney General will accept written comments relating to the proposed judgment for thirty (30) days from the date of publication of this notice. Copies of the proposed judgment may be examined at the Office of the Attorney General, 300 W. 15th Street, 10th Floor, Austin, Texas. A copy of the proposed judgment may also be obtained in person or by mail at the above address for the cost of copying. Requests for copies of the judgment, and written comments on the same, should be directed to Thomas H. Edwards, Assistant Attorney General, Office of the Attorney General, P.O. Box 12548, Austin, Texas 78711-2548; telephone (512) 463-2012, fax (512) 320-0052.

For information regarding this publication, contact Zindia Thomas, Agency Liaison, at (512) 936-9901.

TRD-201104207
Jay Dyer
Deputy Attorney General
Office of the Attorney General
Filed: October 5, 2011

♦ ♦ ♦

Cancer Prevention and Research Institute of Texas

Request for Applications C-12-INCU-2 Texas Life Science Incubator Infrastructure Award

The Cancer Prevention and Research Institute of Texas (CPRIT) seeks infrastructure program applications to create and sustain one or more life sciences incubators in Texas. The goal of the Texas Life Sciences Incubator Infrastructure Award is the development or enhancement of incubator organizations that will provide valuable programs and services in Texas to enhance the ability to commercialize innovative, new products for the diagnosis, treatment, or prevention of cancer and to establish infrastructure that is critical to the development of a robust life sciences industry in the State. Applicants are encouraged to partner with one or more teams (academic institutions, private and public business consortia, established life sciences companies, and the investment community) to provide expert business and technical assistance to the incubator, with one institution taking leadership responsibility for the program.

Supported incubator programs should promote a culture that rewards risk-taking and entrepreneurial projects, fosters collaboration and cooperation among different Texas institutions and organizations, and creates an environment of mentoring and shared experience and skills to foster the development of new entrepreneurs. This award is intended to support incubator organizations located in the State (with Texas-based employees) providing incubator services to Texas-based translational research projects and startup companies.

No maximum is set on the amount of funding that can be requested. Funding will be tranched and will be tied to the achievement of contract-specified milestones. Funds may be used for salary and fringe benefits, research supplies, equipment, preclinical and clinical trial expenses, intellectual property acquisition and protection, external consultants and service providers, and other appropriate development costs, subject to certain limitations set forth by Texas state law.

A detailed Request for Applications (RFA) is available online at www.cprit.state.tx.us. Applications will be accepted beginning at 7:00 a.m. Central Time on October 6, 2011 through 3:00 p.m. Central Time on February 23, 2012, and must be submitted via the CPRIT Application Receipt System (www.CPRITGrants.org). CPRIT will not accept applications that are not submitted via the CPRIT Application Receipt System.

TRD-201104141
William Gimson
Executive Director
Cancer Prevention and Research Institute of Texas
Filed: October 3, 2011

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Coastal Coordination Council

Notice and Opportunity to Comment on Requests for Consistency Agreement/Concurrence Under the Texas Coastal Management Program

On January 10, 1997, the State of Texas received federal approval of the Coastal Management Program (CMP) (62 Federal Register pp.

1439-1440). Under federal law, federal agency activities and actions affecting the Texas coastal zone must be consistent with the CMP goals and policies identified in 31 TAC Chapter 501. Requests for federal consistency review were deemed administratively complete for the following project(s) during the period of September 21, 2011, through September 28, 2011. As required by federal law, the public is given an opportunity to comment on the consistency of proposed activities in the coastal zone undertaken or authorized by federal agencies. Pursuant to 31 TAC §§506.25, 506.32, and 506.41, the public comment period extends 30 days from the date published on the Texas General Land Office web site. The notice was published on the web site on October 5, 2011. The public comment period for this project will close at 5:00 p.m. on November 4, 2011.

FEDERAL AGENCY ACTIONS:

Applicant: Dow Chemical Company, Inc.; Location: The project is located in wetlands near Oyster Creek, at the applicant's Stratton Ridge Facility-Salt Dome operations, on County Road (CR) 226, in Freeport, Brazoria County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: Oyster Creek, Texas. Latitude & Longitude (NAD 83): Latitude: 29.367275460 North; Longitude: -95.367275460 West. Project Description: The applicant proposes to construct a permanent 380 foot by 210 foot (1.83 acre) well pad to drill BW-45. A total of 1.18 acres of the proposed BW-45 "footprint" falls within a jurisdictional area on the property. The area needed to drill the well is larger than that needed for operations and maintenance, therefore, the applicant proposes to work from temporary pads to minimize the permanent impact on wetlands. Following the completion of drilling, the applicant would remove all temporary pads. The well pad consists of a mixture of layers of crushed limestone and lime-stabilized soil. Construction of the pad will require removal of the soil from the top vegetation layer for placement of clay and rock. The removed soil will be placed in a nearby upland area. There would be a total of 1.2 acres of permanent impacts to jurisdictional wetlands for the installation of a well pad and permanent access road. Permanent impacts for the 932-foot-long access road will encompass an area of 31 feet by 20 feet (0.02 acres), and will be rock/gravel. There would be 1.1 acres of temporary impacts for the installation of pipelines and a temporary access road. To minimize impacts on jurisdictional wetlands, temporary matting for the access road turnaround across jurisdictional wetlands will encompass 110 feet by 20 feet (0.05 acres). No removal of the vegetative layer is proposed, allowing natural restoration to occur once the temporary pads are removed. The installation of pipelines would be within a 1.7-acre, 75-foot-wide right-of-way (ROW) and would temporarily impact 1.07 acres of jurisdictional wetlands. All temporary impacts to wetlands within the ROW will be restored to pre-construction contours. The applicant proposed to mitigate for the 1.2 acres of proposed impacts by conducting permittee responsible off-site mitigation, which entails donating 8.4 acres of land from the Justin Hurst Wildlife Management Area to offset the 1.2 acres of permanent impacts. CMP Project No.: 11-0497-F1. Type of Application: U.S.A.C.E. permit application #SWG-2011-00702 is being evaluated under §404 of the Clean Water Act (33 U.S.C.A. §1344). Note: The consistency review for this project will be conducted by the Railroad Commission of Texas under §401 of the Clean Water Act (33 U.S.C.A. §1344).

Applicant: Harry C. Shultz, Jr.; Location: The project site is located in Offatts Bayou, at 7711 Broadway, in Galveston, Galveston County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: Galveston, Texas. Latitude & Longitude (NAD 83): Latitude: 29.28555 North; Longitude: -95.85805 West. Project Description: The applicant proposes to expand an existing marina to accommodate additional vessels. Such activities include adding 38 floating docks. The applicant does not propose any mitigation. CMP Project No.: 11-0496-F1. Type of Application: U.S.A.C.E. permit application #SWG-2010-00632 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403).

Pursuant to §306(d)(14) of the Coastal Zone Management Act of 1972 (16 U.S.C.A. §§1451-1464), as amended, interested parties are invited to submit comments on whether a proposed action or activity is or is not consistent with the Texas Coastal Management Program goals and policies and whether the action should be referred to the Land Commissioner for review.

Further information on the applications listed above, including a copy of the consistency certifications or consistency determinations for inspection may be obtained from Ms. Kate Zultner, Consistency Review Specialist, P.O. Box 12873, Austin, Texas 78711-2873, or via email at kate.zultner@glo.texas.gov. Comments should be sent to Ms. Zultner at the above address or by email.

TRD-201104210
Larry L. Laine
Chief Clerk/Deputy Land Commissioner, General Land Office
Coastal Coordination Council
Filed: October 5, 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 10/10/11 - 10/16/11 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 10/10/11 - 10/16/11 is 18% for Commercial over $250,000.

The monthly ceiling as prescribed by §303.005[3] for the period of 10/01/11 - 10/31/11 is 18% for Consumer/Agricultural/Commercial/credit thru $250,000.

The monthly ceiling as prescribed by §303.005 for the period of 10/01/11 - 10/31/11 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.

[3] For variable rate commercial transactions only.

TRD-201104161
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: October 3, 2011

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Court of Criminal Appeals

Approval of Revisions to the Texas Rules of Appellate Procedure

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

Misc. Docket No. 11-005

APPROVAL OF REVISIONS TO THE TEXAS RULES OF APPELLATE PROCEDURE

ORDERED that:

1. The Texas Rules of Appellate Procedure Appendix: Certification of Defendant's Right of Appeal is amended.

2. This amendment takes effect immediately.

4. The Clerk is directed to file an original of this Order with the Secretary of State forthwith, and to cause a copy of this Order to be mailed to each registered member of the State Bar of Texas by publication in the *Texas Bar Journal.*

SIGNED AND ENTERED September 30, 2011.

Sharon Keller, Presiding Judge

Lawrence E. Meyers, Judge

Tom Price, Judge

Paul Womack, Judge

Cheryl Johnson, Judge

Michael Keasler, Judge

Barbara Hervey, Judge

Cathy Cochran, Judge

Elsa Alcala, Judge

Appendix: Certification of Defendant's Right of Appeal

No. _____

The State of Texas

v.

_____
Defendant

In the _____Court

of

_____County, Texas

TRIAL COURT'S CERTIFICATION OF DEFENDANT'S RIGHT OF APPEAL*

I, judge of the trial court, certify this criminal case:

[ ] is not a plea-bargain case, and the defendant has the right of appeal. [*or*]

[ ] is a plea-bargain case, but matters were raised by written motion filed and ruled on before trial and not withdrawn or waived, and the defendant has the right of appeal. [*or*]

[ ] is a plea-bargain case, but the trial court has given permission to appeal, and the defendant has the right of appeal. [*or*]

[ ] is a plea-bargain case, and the defendant has NO right of appeal. [*or*]

[ ] the defendant has waived the right of appeal.

_____
Judge

_____
Date Signed

I have received a copy of this certification. I have also been informed of my rights concerning any appeal of this criminal case, including any right to file a *pro se* petition for discretionary review pursuant to Rule 68 of the Texas Rules of Appellate Procedure. I have been admonished that my attorney must mail a copy of the court of appeals's judgment and opinion to my last known address and that I have only 30 days in which to file a *pro se* petition for discretionary review in the ~~court of appeals~~ Court of Criminal Appeals. TEX. R. APP. P. 68.2 I acknowledge that, if I wish to appeal this case and if I am entitled to do so, it is my duty to inform my appellate attorney, by written communication, of any change in the address at which I am currently living or any change in my current prison unit. I understand that, because of appellate deadlines, if I fail to timely inform my appellate attorney of any change in my address, I may lose the opportunity to file a *pro se* petition for discretionary review.

_____
Defendant (if not represented by counsel)
Mailing address:
Telephone number:
Fax number (if any):

_____
Defendant's Counsel
State Bar of Texas ID number
Mailing address:
Telephone number:
Fax number (if any):

* "A defendant in a criminal case has the right of appeal under these rules. The trial court shall enter a certification of the defendant's right to appeal in every case in which it enters a judgment of guilt or other appealable order. In a plea bargain case -- that is, a case in which a defendant's plea was guilty or nolo contendere and the punishment did not exceed the punishment recommended by the prosecutor and agreed to by the defendant -- a defendant may appeal only: (A) those matters that were raised by written motion filed and ruled on before trial, or (B) after getting the trial court's permission to appeal." TEXAS RULE OF APPELLATE PROCEDURE 25.2(a)(2)

TRD-201104199
Louise Pearson
Clerk of the Court
Court of Criminal Appeals
Filed: October 5, 2011

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Education Service Center Region 10

Request for Proposal #2011-17

Online Learning for Dropout Recovery Pilot (TxVSN)

Filing Authority. The Texas Virtual School Network (TxVSN) is authorized by Texas Education Code (TEC) Chapter 30A. Region 10 Education Service Center operates the network under the administrating authority of the Texas Education Agency.

Eligible Applicants. Texas public school districts and open-enrollment charter schools meeting the criteria noted in the RFP.

Description. The purpose of the TxVSN Online Learning for Dropout Recovery Pilot is to identify and recruit students who have already dropped out of Texas public schools and then provide online coursework and support services necessary for those students to earn a high school diploma. Funds from this limited pilot will be used to supplement and strengthen the drop-out recovery efforts already in place in the district or open enrollment charter school by adding rigorous online components. All online courses will be reviewed by TxVSN to ensure that national and state standards are met as articulated in TEC Chapter 30A. Research and evaluation from the Online Learning for Dropout Recovery Pilot will assist the Texas Virtual School Network in the development of a strategic plan to serve students age 25 or under within the TxVSN model.

Dates of Project. Year 1 funding is available September 1, 2011 through August 31, 2012. Funding for school Year 2 is contingent on the successful completion of objectives, compliance with guidelines, availability of funding, and the authorization of the Texas Education Agency. Awardees will submit a continuation proposal.

Project Amount. Up to $200,000 each year contingent on the number of students served and number of online courses and services provided to students who have dropped out of school.

Selection Criteria. Applications will be selected based on the independent reviewers' assessment of each applicant's ability to carry out all requirements contained in the RFP. 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. Proposals must address each requirement as specified to be considered for funding. ESC Region 10 reserves the right to select three or less of the highest-ranking proposals addressing all RFP requirements and that are most advantageous to the project.

Region 10 ESC is not obligated to approve an application, provide funds, or endorse any application submitted in response to the RFP. This RFP does not commit Region 10 ESC to pay any costs before an application is approved. The issuance of RFP 2011-17 does not obligate Region 10 ESC to award a contract or pay any costs incurred in preparing a response.

Requesting the Application. A complete copy of the Request for Proposal #2011-17 may be downloaded from the Region 10 website at www.region10.org/rfqprocess beginning.

Further Information. For clarifying information about the RFP contact Sue Hayes, Chief Financial Officer-Region 10 by email at sue.hayes@region10.org or fax to (972) 348-1113. All inquiries must be in writing.

Applicant's Conference. Two technical assistance webinars will be provided on October 11 and 12, 2011 from 10:00 to 11:00 a.m. CDT. Instructions are available in the RFP document. Recordings will be posted at www.region10.org/rfqprocess.

Deadline for Receipt of Application. Applications must be received in the Region 10 ESC business office by 4:30 p.m. (Central Daylight Savings Time), Monday, October, 31 2011, to be considered.

TRD-201104195
Wilburn O. Echols, Jr.
Executive Director
Education Service Center Region 10
Filed: October 4, 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 14, 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 14, 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: 165 Howe LP; DOCKET NUMBER: 2011-1587-WQ-E; IDENTIFIER: RN105823421; LOCATION: Carrollton, Denton County; TYPE OF FACILITY: residential construction; RULE VIOLATED: 30 TAC §281.25(a)(4), by failing to obtain a construction general permit; PENALTY: $700; ENFORCEMENT COORDINATOR: Harvey Wilson, (512) 239-0321; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(2) COMPANY: A C Mobile Incorporated; DOCKET NUMBER: 2011-1137-PST-E; IDENTIFIER: RN102807203; 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 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 make them immediately available for inspection upon request by agency personnel; PENALTY: $3,500; ENFORCEMENT COORDINATOR: Andrea Park, (512) 239-4575; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(3) COMPANY: Alstom Power Incorporated; DOCKET NUMBER: 2011-0871-AIR-E; IDENTIFIER: RN105768121; LOCATION: Houston, Harris County; TYPE OF FACILITY: metal coating; RULE VIOLATED: 30 TAC §116.110(a) and Texas Health and Safety Code (THSC), §382.0518(a) and §382.085(b), by failing to obtain permit authorization for a source of air emissions or satisfy the conditions of a Permit By Rule prior to the commencement of operations of a facility which emits air contaminants; PENALTY: $3,600; ENFORCEMENT COORDINATOR: Allison Fischer, (512) 239-2574; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(4) COMPANY: ASMATS, L.L.C. dba Crosstimbers Coastal; DOCKET NUMBER: 2011-1274-PST-E; IDENTIFIER: RN102363462; 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 the underground storage tanks for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring); PENALTY: $2,350; ENFORCEMENT COORDINATOR: Kimberly Walker, (512) 239-2596; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(5) COMPANY: Atlantic Aviation Corporation; DOCKET NUMBER: 2011-1569-WQ-E; IDENTIFIER: RN105418487; LOCATION: El Paso, El Paso County; TYPE OF FACILITY: commercial construction; RULE VIOLATED: 30 TAC §281.25(a)(4), by failing to obtain a multi-sector general permit; PENALTY: $700; ENFORCEMENT COORDINATOR: Harvey Wilson, (512) 239-0321; REGIONAL OFFICE: 401 East Franklin Avenue, Suite 560, El Paso, Texas 79901-1212, (915) 834-4949.

(6) COMPANY: Bayou Pines, LLC; DOCKET NUMBER: 2011-0973-MWD-E; IDENTIFIER: RN101513828; LOCATION: Orange County; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: TWC, §26.121(a)(1) and 30 TAC §305.65 and §305.125(2), by failing to maintain authorization to discharge wastewater; PENALTY: $4,480; ENFORCEMENT COORDINATOR: Steve Villatoro, (512) 239-4930; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(7) COMPANY: Brandon Zorn dba Zorn Recycling; DOCKET NUMBER: 2011-0483-MSW-E; IDENTIFIER: RN105705966; LOCATION: Gatesville, Coryell County; TYPE OF FACILITY: unauthorized solid waste disposal site; RULE VIOLATED: 30 TAC §330.15(c), by failing to prevent the unauthorized disposal of municipal solid waste at the facility; PENALTY: $1,040; ENFORCEMENT COORDINATOR: Brianna Carlson, (956) 430-6021; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(8) COMPANY: Buc-ees Ltd; DOCKET NUMBER: 2011-1579-WQ-E; IDENTIFIER: RN106171739; LOCATION: Lake Jackson, Comal County; TYPE OF FACILITY: commercial construction; RULE VIOLATED: 30 TAC §281.25(a)(4), by failing to obtain a multi-sector general permit; PENALTY: $700; ENFORCEMENT COORDINATOR: Harvey Wilson, (512) 239-0321; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(9) COMPANY: City of Driscoll; DOCKET NUMBER: 2010-1852-MLM-E; IDENTIFIER: RN102983442; LOCATION: Driscoll, Nueces County; TYPE OF FACILITY: landfill; RULE VIOLATED: 30 TAC §111.201 and THSC, §382.085(b), by failing to prohibit the burning of municipal solid waste (MSW) for the purpose of disposal; 30 TAC §330.15(c), by failing to prevent the unauthorized disposal of MSW; and 30 TAC §335.62 and 40 Code of Federal Regulations §262.11, by failing to conduct a hazardous waste determination for each solid waste generated; PENALTY: $12,000; ENFORCEMENT COORDINATOR: Philip Aldridge, (512) 239-0855; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5503, (361) 825-3100.

(10) COMPANY: Diamond Shamrock Refining Company, L.P.; DOCKET NUMBER: 2011-0710-AIR-E; IDENTIFIER: RN100210517; LOCATION: Moore County; TYPE OF FACILITY: petroleum refinery; RULE VIOLATED: 30 TAC §116.615(4) and §122.143(4), Federal Operating Permit (FOP) Number O1555, General Terms and Conditions and Special Terms and Conditions (STC) 14, Standard Permit Registration Number 92528, and THSC, §382.085(b), by failing to submit notification to the TCEQ within 15 working days after the start of construction of the Boiler 19 modification project, emission point number (EPN) B-11; 30 TAC §101.20(2) and §113.780, 40 Code of Federal Regulations (CFR) §63.1576(e), and THSC, §382.085(b), by failing to maintain a record of a December 5, 2010 inspection that was conducted to demonstrate compliance with the operation, maintenance, and monitoring plan of the Fluid Catalytic Cracking Unit; 30 TAC §101.20(1), 40 CFR §60.82(a), and THSC, §382.085(b), by failing to limit sulfur dioxide emissions to 4 pounds per ton of sulfuric acid production from the Acid Plant, EPN V-29; 30 TAC §101.201(a)(1)(A), FOP Number O1555, STC 2.F., and THSC, §382.085(b), by failing to determine if an emissions event is reportable within 24 hours after discovery of the event; 30 TAC §116.110(a) and THSC, §382.085(b) and §382.0518(a), by failing to obtain authorization from the TCEQ prior to modification of Boiler 19, EPN B-11; 30 TAC §116.110(a) and THSC, §382.085(b) and §382.0518(a), by failing to obtain authorization from the TCEQ prior to installation of the Soda Ash Silo and Water Treater Lime Silo Baghouses, EPNs V-13 and V-14; and 30 TAC §116.110(a) and THSC, §382.085(b) and §382.0518(a), by failing to obtain authorization from the TCEQ prior to installation of a Flare Gas Recovery System, EPN F-FGR; PENALTY: $145,211; Supplemental Environmental Project offset amount of $58,084 applied to Texas Parent-Teachers Association (PTA), Texas PTA Clean School Buses; ENFORCEMENT COORDINATOR: Trina Grieco, (210) 403-4006; REGIONAL OFFICE: 3918 Canyon Drive, Amarillo, Texas 79109-4933, (806) 353-9251.

(11) COMPANY: Edna Lumber Company Incorporated; DOCKET NUMBER: 2011-1567-WQ-E; IDENTIFIER: RN106172091; LOCATION: New Braunfels, Comal County; TYPE OF FACILITY: commercial construction; RULE VIOLATED: 30 TAC §281.25(a)(4), by failing to obtain a construction general permit; PENALTY: $700; ENFORCEMENT COORDINATOR: Harvey Wilson, (512) 239-0321; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(12) COMPANY: EXCELLENT INCORPORATED dba Kwiks Top Grocery; DOCKET NUMBER: 2011-1052-PST-E; IDENTIFIER: RN101882686; 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 the underground storage tanks for releases at a

frequency of at least once every month (not to exceed 35 days between each monitoring); PENALTY: $4,700; ENFORCEMENT COORDINATOR: Andrea Park, (512) 239-4575; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(13) COMPANY: G and G Enterprises Incorporated; DOCKET NUMBER: 2011-1666-WQ-E; IDENTIFIER: RN106176746; LOCATION: Orange, Orange County; TYPE OF FACILITY: commercial construction; RULE VIOLATED: 30 TAC §281.25(a)(4), by failing to obtain a construction general permit; PENALTY: $700; ENFORCEMENT COORDINATOR: Harvey Wilson, (512) 239-0321; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(14) COMPANY: HABIBCO, INCORPORATED dba Whistle Stop Grocery; DOCKET NUMBER: 2011-0879-PST-E; IDENTIFIER: RN101494656; LOCATION: Austin, Travis County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.49(a) and TWC, §26.3475(d), by failing to provide proper corrosion protection for the underground storage tank system; PENALTY: $2,500; ENFORCEMENT COORDINATOR: Merrilee Hupp, (512) 239-4490; REGIONAL OFFICE: 2800 South IH 35, Suite 100, Austin, Texas 78704-5712, (512) 339-2929.

(15) COMPANY: James A. Derryberry dba A1 Dirt Company; DOCKET NUMBER: 2011-1039-MLM-E; IDENTIFIER: RN106121791; LOCATION: Coldspring, San Jacinto County; TYPE OF FACILITY: unauthorized waste disposal site; RULE VIOLATED: 30 TAC §111.201 and THSC, §382.085(b), by failing to comply with the general prohibition on outdoor burning; and 30 TAC §330.15(c), by failing to prevent the unauthorized disposal of municipal solid waste; PENALTY: $3,074; ENFORCEMENT COORDINATOR: Andrea Park, (512) 239-4575; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(16) COMPANY: John A. Matlock dba Matlocks Country Corner; DOCKET NUMBER: 2011-1309-PST-E; IDENTIFIER: RN102245750; LOCATION: Combine, Kaufman County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.49(a)(1) and TWC, §26.3475(d), by failing to provide proper corrosion protection for the underground storage system; PENALTY: $1,875; ENFORCEMENT COORDINATOR: Marcia Alonso, (512) 239-2616; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(17) COMPANY: KING FUELS, INCORPORATED dba Hannas Food Store; DOCKET NUMBER: 2011-0922-PST-E; IDENTIFIER: RN101826048; 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 the underground storage tanks for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring); PENALTY: $3,850; ENFORCEMENT COORDINATOR: Rajesh Acharya, (512) 239-0577; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(18) COMPANY: Lutheran Outdoors Ministry of Texas, Incorporated; DOCKET NUMBER: 2011-1408-MWD-E; IDENTIFIER: RN102079233; LOCATION: Fayette County; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: TWC, §26.121(a)(1), 30 TAC §305.125(1), and Texas Pollutant Discharge Elimination System Permit Number WQ0012168001, Effluent Limitations and Monitoring Requirements Number 1, by failing to comply with permit effluent limits; PENALTY: $6,080; ENFORCEMENT COORDINATOR: Merrilee Hupp, (512) 239-4490; REGIONAL OFFICE: 2800 South IH 35, Suite 100, Austin, Texas 78704-5712, (512) 339-2929.

(19) COMPANY: Milagro Interests, Incorporated; DOCKET NUMBER: 2011-0517-UTL-E; IDENTIFIER: RN105910442; LOCATION: Humble, Harris County; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.39(o)(1) and §291.162(a) and (j) and TWC, §13.1395(b)(2), by failing to submit to the executive director for approval by October 1, 2010, an adoptable emergency preparedness plan that demonstrates the facility's ability to provide emergency operations; PENALTY: $315; ENFORCEMENT COORDINATOR: Miriam Hall, (512) 239-1044; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(20) COMPANY: PHUONG GIA CORPORATION dba 1 Stop; DOCKET NUMBER: 2011-1201-PST-E; IDENTIFIER: RN102718590; LOCATION: Sulphur Springs, Hopkins 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 proper release detection for the piping associated with the underground storage tanks; PENALTY: $3,880; ENFORCEMENT COORDINATOR: Marcia Alonso, (512) 239-2616; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(21) COMPANY: Prater Equipment Company Incorporated; DOCKET NUMBER: 2011-1568-WQ-E; IDENTIFIER: RN106171978; LOCATION: Santo, Palo Pinto County; TYPE OF FACILITY: commercial construction; RULE VIOLATED: 30 TAC §281.25(a)(4), by failing to obtain a construction general permit; PENALTY: $700; ENFORCEMENT COORDINATOR: Harvey Wilson, (512) 239-0321; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(22) COMPANY: U.S. Army Corps of Engineers; DOCKET NUMBER: 2011-0908-MWD-E; IDENTIFIER: RN101715340; LOCATION: Williamson County; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: TWC, §26.121(a)(1), 30 TAC §305.125(1), and TCEQ Permit Number WQ0012255002, Effluent Limitations and Monitoring Requirements Part A. Effluent Limitations, by failing to comply with permit effluent limits; and 30 TAC §305.125(1) and TCEQ Permit Number WQ0012255002, Monitoring Requirements Number 7.c., by failing to submit a noncompliance notification report for any effluent violation which deviates from the permitted effluent limitation by more than 40%; PENALTY: $14,700; ENFORCEMENT COORDINATOR: Merrilee Hupp, (512) 239-4490; REGIONAL OFFICE: 2800 South IH 35, Suite 100, Austin, Texas 78704-5712, (512) 339-2929.

(23) COMPANY: Union Tank Car Company; DOCKET NUMBER: 2011-1196-PWS-E; IDENTIFIER: RN100212828; LOCATION: Harris County; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.109(c)(3)(A)(ii), by failing to collect a set of repeat distribution coliform samples within 24 hours of being notified of a total coliform-positive result on a routine sample during the month of August 2010; and 30 TAC §290.109(f)(3) and THSC, §341.031(a), by failing to comply with the maximum contaminant level for total coliform during the month of January 2011; PENALTY: $870; ENFORCEMENT COORDINATOR: Michaelle Sherlock, (210) 403-4076; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(24) COMPANY: Victron Stores, L.P.; DOCKET NUMBER: 2011-0859-PST-E; IDENTIFIER: RN101432722; LOCATION: Southlake, Tarrant County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.10(b), by failing to maintain underground storage tank records and make them immediately available for review upon request by agency personnel; PENALTY: $2,600; ENFORCEMENT COORDINATOR:

Philip Aldridge, (512) 239-0855; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(25) COMPANY: WILLIAM GROCERY, INCORPORATED dba Jiffy Mart 4; DOCKET NUMBER: 2011-1060-PST-E; IDENTIFIER: RN102229077; LOCATION: Georgetown, Williamson 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 (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 make them immediately available for inspection upon request by agency personnel; PENALTY: $3,500; ENFORCEMENT COORDINATOR: Andrea Park, (512) 239-4575; REGIONAL OFFICE: 2800 South IH 35, Suite 100, Austin, Texas 78704-5712, (512) 339-2929.

TRD-201104177
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: October 4, 2011

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Enforcement Orders

An order was entered regarding Rodolfo Esparza, Docket No. 2010-0244-MLM-E on September 26, 2011 assessing $13,155 in administrative penalties with $9,555 deferred.

Information concerning any aspect of this order may be obtained by contacting Elvia Maske, Enforcement Coordinator at (512) 239-0789, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An order was entered regarding Lake Corpus Christi RV Park & Marina, L.L.C., Docket No. 2010-0737-PWS-E on September 26, 2011 assessing $1,681 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Epifanio Villarreal, Enforcement Coordinator at (361) 825-3425, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Byron Cory, Docket No. 2010-1005-MLM-E on September 26, 2011 assessing $4,780 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Kari L. Gilbreth, Staff Attorney at (512) 239-1320, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Weatherford Holdings, L.P., Docket No. 2010-1103-PWS-E on September 26, 2011 assessing $7,667 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Michaelle Sherlock, Enforcement Coordinator at 210-403-4076, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Aziz Dossani dba Docs Food & Deli Store, Docket No. 2010-1158-PST-E on September 26, 2011 assessing $3,173 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Rudy Calderon, Staff Attorney at (512) 239-3400, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Warren R. Blackman Jr. dba Blackmon Carcass Removal, Docket No. 2010-1537-MSW-E on September 26, 2011 assessing $10,500 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Anna M. Treadwell, Staff Attorney at (512) 239-3400, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Leon Parsons Jr., Docket No. 2010-1754-MLM-E on September 26, 2011 assessing $2,109 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Gary K. Shiu, Staff Attorney at (713) 422-8916, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Harris County Water Corporation, Docket No. 2010-1776-UTL-E on September 26, 2011 assessing $448 in administrative penalties with $89 deferred.

Information concerning any aspect of this order may be obtained by contacting Rebecca Johnson, Enforcement Coordinator at (361) 825-3420, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Devon Energy Production Company, L.P., Docket No. 2010-1830-AIR-E on September 26, 2011 assessing $72,777 in administrative penalties with $14,554 deferred.

Information concerning any aspect of this order may be obtained by contacting Miriam Hall, Enforcement Coordinator at (512) 239-1044, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Natalin Dorette Keenan, Docket No. 2010-1853-PST-E on September 26, 2011 assessing $3,675 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Sharesa Y. Alexander, Staff Attorney at (512) 239-3503, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding ATC Transport, L.L.C., Docket No. 2010-1876-WQ-E on September 26, 2011 assessing $1,050 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Tammy L. Mitchell, Staff Attorney at (512) 239-3400, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Eva Sanchez, Docket No. 2010-1882-MSW-E on September 26, 2011 assessing $2,625 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Kari L. Gilbreth, Staff Attorney at (512) 239-3400, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Seaberg Farms, Inc., Docket No. 2010-1912-PST-E on September 26, 2011 assessing $3,850 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Peipey Tang, Staff Attorney at (512) 239-3400, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Oscar Benitez dba Los Arcos Mexican Restaurant, Docket No. 2010-1939-PWS-E on September 26, 2011 assessing $3,077 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Steven M. Fishburn, Staff Attorney at (512) 239-3400, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Rene Mendez and Delores Mendez, Docket No. 2010-2028-PST-E on September 26, 2011 assessing $2,625 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Sharesa Y. Alexander, Staff Attorney at (512) 239-3503, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Best of Lama Incorporated dba Jonathans Shop N Save, Docket No. 2010-2031-PST-E on September 26, 2011 assessing $2,500 in administrative penalties with $500 deferred.

Information concerning any aspect of this order may be obtained by contacting Audra Benoit, Enforcement Coordinator at (409) 899-8799, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Adnen Saleh dba Westcreek Service Center, Docket No. 2010-2060-PST-E on September 26, 2011 assessing $5,122 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Sharesa Y. Alexander, Staff Attorney at (512) 239-3503, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Invista S.a.r.l., Docket No. 2010-2078-AIR-E on September 26, 2011 assessing $14,850 in administrative penalties with $2,970 deferred.

Information concerning any aspect of this order may be obtained by contacting Audra Benoit, Enforcement Coordinator at (409) 899-8799, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Harold G. Davis, Docket No. 2011-0074-MLM-E on September 26, 2011 assessing $2,950 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Phillip M. Goodwin, P.G., Staff Attorney at (512) 239-3400, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding MKSN INVESTMENTS, LLC dba Maxey Gas and Food Mart, Docket No. 2011-0080-PST-E on September 26, 2011 assessing $4,500 in administrative penalties with $900 deferred.

Information concerning any aspect of this order may be obtained by contacting Andrea Park, Enforcement Coordinator at (512) 239-4575, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding WESTFIELD MOBILE HOME COMMUNITY, LTD. dba Westfield Mobile Home Park, Docket No. 2011-0113-MWD-E on September 26, 2011 assessing $4,800 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Jim Sallans, Staff Attorney at (512) 239-3400, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding WTG Gas Processing, L.P., Docket No. 2011-0122-AIR-E on September 26, 2011 assessing $8,150 in administrative penalties with $1,630 deferred.

Information concerning any aspect of this order may be obtained by contacting Todd Huddleson, Enforcement Coordinator at (512) 239-2541, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Gregory Trevino, Docket No. 2011-0124-MLM-E on September 26, 2011 assessing $4,866 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Stephanie Frazee, Staff Attorney at (512) 239-3400, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding KUNWAR INCORPORATED dba Quick Stop 1, Docket No. 2011-0132-PST-E on September 26, 2011 assessing $2,250 in administrative penalties with $450 deferred.

Information concerning any aspect of this order may be obtained by contacting Stephen Thompson, Enforcement Coordinator at (512) 239-2558, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Linda W Ball dba Lazy Acres Mobile Home Park, Docket No. 2011-0156-UTL-E on September 26, 2011 assessing $735 in administrative penalties with $147 deferred.

Information concerning any aspect of this order may be obtained by contacting Andrea Byington, Enforcement Coordinator at (512) 239-2579, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Texas Parks & Wildlife Department, Docket No. 2011-0221-MWD-E on September 26, 2011 assessing $1,380 in administrative penalties with $276 deferred.

Information concerning any aspect of this order may be obtained by contacting Jeremy Escobar, Enforcement Coordinator at (361) 825-3422, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Saykot Enterprises Inc. dba South Hills Fina, Docket No. 2011-0237-PST-E on September 26, 2011 assessing $2,764 in administrative penalties with $552 deferred.

Information concerning any aspect of this order may be obtained by contacting Cheryl Thompson, Enforcement Coordinator at (817) 588-5886, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Stars Impex, Inc. dba Big Willy's 6, Docket No. 2011-0249-PST-E on September 26, 2011 assessing $5,000 in administrative penalties with $1,000 deferred.

Information concerning any aspect of this order may be obtained by contacting Thomas Greimel, Enforcement Coordinator at (512) 239-5690, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Octavio Farias, Docket No. 2011-0299-PST-E on September 26, 2011 assessing $5,500 in administrative penalties with $1,100 deferred.

Information concerning any aspect of this order may be obtained by contacting Wallace Myers, Enforcement Coordinator at (512)

239-6580, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Pampa, Docket No. 2011-0316-MWD-E on September 26, 2011 assessing $9,500 in administrative penalties with $1,900 deferred.

Information concerning any aspect of this order may be obtained by contacting Heather Brister, Enforcement Coordinator at (254) 761-3034, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Anadarko E&P Company LP, Docket No. 2011-0360-AIR-E on September 26, 2011 assessing $9,375 in administrative penalties with $1,875 deferred.

Information concerning any aspect of this order may be obtained by contacting Todd Huddleson, Enforcement Coordinator at (512) 239-2541, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding SKIDMORE WATER SUPPLY CORPORATION, Docket No. 2011-0370-PWS-E on September 26, 2011 assessing $1,280 in administrative penalties with $256 deferred.

Information concerning any aspect of this order may be obtained by contacting Andrea Byington, Enforcement Coordinator at (512) 239-2579, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Zapata County, Docket No. 2011-0371-MWD-E on September 26, 2011 assessing $13,200 in administrative penalties with $2,640 deferred.

Information concerning any aspect of this order may be obtained by contacting JR Cao, Enforcement Coordinator at (512) 239-2543, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding ExxonMobil Oil Corporation, Docket No. 2011-0374-AIR-E on September 26, 2011 assessing $10,000 in administrative penalties with $2,000 deferred.

Information concerning any aspect of this order may be obtained by contacting Raymond Marlow, P.G., Enforcement Coordinator at (409) 899-8785, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Olympia C-Store Management LLC dba Olympia C Store, Docket No. 2011-0390-PST-E on September 26, 2011 assessing $6,455 in administrative penalties with $1,291 deferred.

Information concerning any aspect of this order may be obtained by contacting Wallace Myers, Enforcement Coordinator at (512) 239-6580, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Bismilla, Inc. dba Exclusive Food Mart, Docket No. 2011-0413-PST-E on September 26, 2011 assessing $3,250 in administrative penalties with $650 deferred.

Information concerning any aspect of this order may be obtained by contacting Allison Fischer, Enforcement Coordinator at (512) 239-2574, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding OMEGA RETAIL, INC. dba Little Buddy 4, Docket No. 2011-0433-PST-E on September 26, 2011 assessing $1,925 in administrative penalties with $385 deferred.

Information concerning any aspect of this order may be obtained by contacting Clinton Sims, Enforcement Coordinator at (512) 239-6933, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding West Wise Special Utility District, Docket No. 2011-0438-WQ-E on September 26, 2011 assessing $4,200 in administrative penalties with $840 deferred.

Information concerning any aspect of this order may be obtained by contacting Michaelle Sherlock, Enforcement Coordinator at (210) 403-4076, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Lake Municipal Utility District, Docket No. 2011-0455-MWD-E on September 26, 2011 assessing $1,200 in administrative penalties with $240 deferred.

Information concerning any aspect of this order may be obtained by contacting Jill Russell, Enforcement Coordinator at (512) 239-4564, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding HOUSTON AIRPORT HOSPITALITY LP dba Holiday Inn, Docket No. 2011-0460-UTL-E on September 26, 2011 assessing $695 in administrative penalties with $139 deferred.

Information concerning any aspect of this order may be obtained by contacting Epifanio Villarreal, Enforcement Coordinator at (361) 825-3425, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Esteban Rey Renteria, Docket No. 2011-0466-PST-E on September 26, 2011 assessing $2,625 in administrative penalties with $525 deferred.

Information concerning any aspect of this order may be obtained by contacting Thomas Greimel, Enforcement Coordinator at (512) 239-5690, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Lefors, Docket No. 2011-0493-MWD-E on September 26, 2011 assessing $3,550 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Harvey Wilson, Enforcement Coordinator at (512) 239-0321, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Fort Bend County Municipal Utility District No. 130, Docket No. 2011-0494-MWD-E on September 26, 2011 assessing $14,840 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Heather Brister, Enforcement Coordinator at (254) 761-3034, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Cracker Barrel, Inc., Docket No. 2011-0518-PWS-E on September 26, 2011 assessing $949 in administrative penalties with $189 deferred.

Information concerning any aspect of this order may be obtained by contacting Katy Schumann, Enforcement Coordinator at (512) 239-2602, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Equistar Chemicals, LP, Docket No. 2011-0530-AIR-E on September 26, 2011 assessing $7,789 in administrative penalties with $1,557 deferred.

Information concerning any aspect of this order may be obtained by contacting Kimberly Morales, Enforcement Coordinator at (713) 422-8938, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Janie Riddle dba Mary's Brazos Caf, Docket No. 2011-0536-PWS-E on September 26, 2011 assessing $3,098 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Andrea Byington, Enforcement Coordinator at (512) 239-2579, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Lexington, Docket No. 2011-0549-MWD-E on September 26, 2011 assessing $6,670 in administrative penalties with $1,334 deferred.

Information concerning any aspect of this order may be obtained by contacting Jorge Ibarra, P.E., Enforcement Coordinator at (817) 588-5890, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding QUARTERS, LLC, Docket No. 2011-0565-MWD-E on September 26, 2011 assessing $1,202 in administrative penalties with $240 deferred.

Information concerning any aspect of this order may be obtained by contacting Jennifer Graves, Enforcement Coordinator at (956) 430-6023, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Bar Constructors, Inc., Docket No. 2011-0577-AIR-E on September 26, 2011 assessing $2,100 in administrative penalties with $420 deferred.

Information concerning any aspect of this order may be obtained by contacting Samuel Short, Enforcement Coordinator at (512) 239-5363, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Upper Leon River Municipal Water District, Docket No. 2011-0601-MWD-E on September 26, 2011 assessing $4,960 in administrative penalties with $992 deferred.

Information concerning any aspect of this order may be obtained by contacting Marty Hott, Enforcement Coordinator at (512) 239-2587, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Total Petrochemicals USA, Inc., Docket No. 2011-0603-AIR-E on September 26, 2011 assessing $10,000 in administrative penalties with $2,000 deferred.

Information concerning any aspect of this order may be obtained by contacting Heather Podlipny, Enforcement Coordinator at (512) 239-2603, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Roaring Springs, Docket No. 2011-0620-PWS-E on September 26, 2011 assessing $275 in administrative penalties with $55 deferred.

Information concerning any aspect of this order may be obtained by contacting Rebecca Clausewitz, Enforcement Coordinator at (210) 403-4012, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Veneerstone, LLC, Docket No. 2011-0623-AIR-E on September 26, 2011 assessing $10,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Miriam Hall, Enforcement Coordinator at (512) 239-1044, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Shanil Oil Company dba Runway Smoke Shop, Docket No. 2011-0639-PST-E on September 26, 2011 assessing $7,033 in administrative penalties with $1,406 deferred.

Information concerning any aspect of this order may be obtained by contacting Keith Frank, Enforcement Coordinator at (512) 239-1203, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Coolidge, Docket No. 2011-0665-MWD-E on September 26, 2011 assessing $1,820 in administrative penalties with $364 deferred.

Information concerning any aspect of this order may be obtained by contacting Merrilee Hupp, Enforcement Coordinator at (512) 239-4490, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Ibrahim Abu-Hamra dba Astrodome Texaco, Docket No. 2011-0671-PST-E on September 26, 2011 assessing $1,755 in administrative penalties with $351 deferred.

Information concerning any aspect of this order may be obtained by contacting Mike Pace, Enforcement Coordinator at (817) 588-5933, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding RYK ENTERPRISES, LLC dba Acres Grocery, Docket No. 2011-0701-PST-E on September 26, 2011 assessing $1,875 in administrative penalties with $375 deferred.

Information concerning any aspect of this order may be obtained by contacting Theresa Hagood, Enforcement Coordinator at (512) 239-2540, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding KHOU-TV, Inc. [Formerly KHOU-TV, L.P.], Docket No. 2011-0729-PST-E on September 26, 2011 assessing $10,693 in administrative penalties with $2,138 deferred.

Information concerning any aspect of this order may be obtained by contacting Philip Aldridge, Enforcement Coordinator at (512) 239-0855, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Borger Energy Associates, L.P., Docket No. 2011-0741-AIR-E on September 26, 2011 assessing $1,060 in administrative penalties with $212 deferred.

Information concerning any aspect of this order may be obtained by contacting Trina Grieco, Enforcement Coordinator at (210) 403-4006, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding EZ ACTION RETAIL, L.P. dba Kwik Stop, Docket No. 2011-0768-PST-E on September 26, 2011 assessing $1,985 in administrative penalties with $397 deferred.

Information concerning any aspect of this order may be obtained by contacting Keith Frank, Enforcement Coordinator at (512) 239-1203, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding SANDFORD OIL COMPANY, INC. dba Circle S 17, Docket No. 2011-0787-PST-E on September 26, 2011 assessing $3,875 in administrative penalties with $775 deferred.

Information concerning any aspect of this order may be obtained by contacting Elvia Maske, Enforcement Coordinator at (512) 239-0789, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Maund Automotive Group, LP, Docket No. 2011-0902-PST-E on September 26, 2011 assessing $2,352 in administrative penalties with $470 deferred.

Information concerning any aspect of this order may be obtained by contacting Elvia Maske, Enforcement Coordinator at (512) 239-0789, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding SPEEDEXX ENTERPRISE INC. dba Speedexx Food Store, Docket No. 2011-0391-PST-E on September 26, 2011 assessing $2,750 in administrative penalties with $550 deferred.

Information concerning any aspect of this order may be obtained by contacting Danielle Porras, Enforcement Coordinator at (713) 767-3682, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

TRD-201104213
Bridget Bohac
Chief Clerk
Texas Commission on Environmental Quality
Filed: October 5, 2011

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Notice of Intent to Perform a Removal Action at the First Quality Cylinders Proposed State Superfund Site in San Antonio, Bexar County, Texas

The executive director of the Texas Commission on Environmental Quality (TCEQ) hereby issues public notice of intent to perform a removal action, as provided by Texas Health and Safety Code (THSC), §361.133, for the First Quality Cylinders proposed State Superfund site (the Site). The Site, including all land, structures, attachments, and other improvements, is approximately one acre located at 931 West Laurel Street, San Antonio, Bexar County, Texas. The Site is located in an industrial/commercial area of San Antonio. Records indicate that a chrome plating shop operated on the Site between 1982 and 1994. The Site is currently inactive. The Site also includes any areas where hazardous substances have come to be located as a result, either directly or indirectly, of releases of hazardous substances from the Site. The Site is proposed for listing under THSC, Chapter 361, Subchapter F.

The Site is located on property jointly owned by the Jana S. Jaffe de Rossell Trust and the Floyd Smith Trust and consists of a warehouse with a sump in the chromium plating process area. The property has been paved with asphalt and fenced. Currently, a shallow groundwater recovery system with a French drain, three recovery wells and a pump system with a 6,000-gallon aboveground storage tank operate at the Site. The Site description may change as additional information is gathered on the sources and extent of contamination.

Chromium was detected in the groundwater above the United States Environmental Protection Agency (EPA) National Primary Drinking Water Regulations Maximum Contaminant Level (MCL) of 100 parts per billion. The shallow groundwater recovery system was installed to prevent the groundwater from migrating off-site. To date, the TCEQ continues to properly dispose of the contaminated groundwater collected by the recovery system. The removal action will consist of demolishing the building and excavating the sump to remove the main source of contamination. Removing the main source of the contamination is an integral strategy to protecting human health as well as being beneficial for the future remediation and restoration of the contaminated groundwater. This removal action can be completed without extensive investigation and planning and will achieve a significant cost reduction for the Site.

A portion of the records for this Site, including documents pertinent to the executive director's determination of eligibility, is available for review at the San Antonio Public Library, 600 Soledad, San Antonio, Texas, (210) 207-2500, during regular business hours. Copies of the complete public record file may be obtained during regular business hours at the TCEQ's Records Management Center, Building E, First Floor, Records Customer Service, 12100 Park 35 Circle, Austin, Texas 78753, (800) 633-9363 or (512) 239-2920. Photocopying of file information is subject to payment of a fee. Parking for persons with disabilities is available on the east side of Building D, convenient to access ramps that are between Buildings D and E.

For further information, please contact Subhash Pal, P.E., TCEQ Project Manager, Remediation Division, at (512) 239-4513, or John Flores, TCEQ Community Relations Coordinator, at (800) 633-9363.

TRD-201104176
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: October 4, 2011

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Notice of Opportunity to Comment on Agreed Orders of Administrative Enforcement Actions

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 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 14, 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 A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the attorney designated for the AO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on November 14, 2011.** Comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The designated attorney is available to discuss the AO and/or the comment procedure at the listed phone number; however, TWC, §7.075 provides that comments on an AO shall be submitted to the commission in **writing.**

(1) COMPANY: Bluff Springs Enterprises Inc. dba Texan Food Mart; DOCKET NUMBER: 2010-0616-PST-E; TCEQ ID NUMBER: RN102351111; LOCATION: 7612 Bluff Springs Road, Austin, Travis County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.10(b), by failing to maintain underground storage tank (UST) records and make them immediately available for inspection upon request by agency personnel; 30 TAC §334.7(d)(3), by failing to notify the agency of any change or additional information regarding the USTs within 30 days from the date of occurrence of the change or addition; 30 TAC §344.49(a), (c)(2)(C) and (4)(C), and TWC, §26.3475(d), by failing to provide proper corrosion protection for the UST system 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 inspect and test the cathodic protection system for operability and adequacy of protection at a frequency of at least once every three years; 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 use as motor fuel; and 30 TAC §334.50(b)(1)(A), (2), (2)(A)(i)(III), (d)(1)(B)(ii) and (iii)(I), and TWC, §26.3475(a) and (c)(1), by failing to monitor the UST system for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring), by failing to provide release detection for the piping associated with the UST system, by failing to test the line leak detectors at least once per year for performance and operational reliability, by failing to conduct reconciliation of detailed inventory control records at least once each month, sufficiently accurate to detect a release as small as the sum of 1.0% of the total substance flow-through for the month plus 130 gallons, and by failing to record the inventory volume measurement for regulated substance inputs, withdrawals, and the amount still remaining in the tank each operating day; PENALTY: $11,897; STAFF ATTORNEY: Rudy Calderon, Litigation Division, MC 175, (512) 239-0205; REGIONAL OFFICE: Austin Regional Office, 2800 South Interstate Highway 35, Suite 100, Austin, Texas 78704-5712, (512) 339-2929.

(2) COMPANY: Highland Park Water Supply Corporation; DOCKET NUMBER: 2010-1944-PWS-E; TCEQ ID NUMBER: RN101254407; LOCATION: County Road (CR) 3590, one half mile northwest of the intersection of CR 3590 and 3570 near Valley Mills, Bosque County; TYPE OF FACILITY: public water system (PWS); RULES VIOLATED: 30 TAC §290.43(e) and §290.46(m), by failing to initiate maintenance and housekeeping practices to ensure the good working condition and general appearance of the facility and its equipment, and by failing to ensure the fence around the facility is intruder-resistant; 30 TAC §290.121(a) and (b), by failing to develop and maintain an up-to-date chemical and microbiological monitoring plan that identifies all sampling locations, describes the sampling frequency, and specifies the analytical procedures and laboratories that the facility will use to comply with the monitoring requirements; 30 TAC §290.46(n)(2), by failing to provide an accurate and up-to-date map of the distribution system so that valves and mains can be easily located during emergencies; 30 TAC §290.46(i), by failing to adopt an adequate plumbing ordinance, regulations, or service agreement with provisions for proper enforcement to ensure that neither cross-connections nor other unacceptable plumbing practices are permitted; and 30 TAC §290.46(n)(3), and TCEQ AO Docket Number 2008-1488-PWS-E, Ordering Provision 2.b.ii., by failing to keep on file copies of well completion data such as well material setting data, geological log, scaling information (pressure cementing and surface protection), disinfection information, microbiological sample results, and a chemical analysis report of a representative sample of water from the well, as long as the well remains in service; PENALTY: $650; STAFF ATTORNEY: Kari Gilbreth, Litigation Division, MC 175, (512) 239-1320; REGIONAL OFFICE: Waco Regional Office, 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(3) COMPANY: Northwest Petroleum LP dba San Marcos Shell; DOCKET NUMBER: 2010-1588-PST-E; TCEQ ID NUMBER: RN101496453; LOCATION: 2201 Interstate Highway 35 South, San Marcos, Hays County; TYPE OF FACILITY: UST system and a convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.10(b), by failing to maintain UST records and make them immediately available for inspection upon request by agency personnel; and 30 TAC §334.50(b)(1)(A) and (2)(A), (d)(1)(B)(ii) and (iii)(I) and TWC, §26.3475(a) and (c)(1), by failing to ensure that the USTs are monitored in a manner which will detect a release at a frequency of at least once a month (not to exceed 35 days between monitoring), by failing to provide release detection for the piping associated with the USTs, by failing to conduct reconciliation of detailed inventory control records at least once each month, sufficiently accurate to detect a release which equals or exceeds the sum of 1.0% of the total substance flow-through for the month plus 130 gallons, and by failing to record inventory volume measurement for regulated substance inputs, withdrawals and the amount still remaining in the tank each operating day; PENALTY: $8,004; STAFF ATTORNEY: Jim Sallans, Litigation Division, MC 175, (512) 239-2053; REGIONAL OFFICE: Austin Regional Office, 2800 South Interstate Highway 35, Suite 100, Austin, Texas 78704-5712, (512) 339-2929.

(4) COMPANY: Roy L. Guillory and C & C Demo, Inc.; DOCKET NUMBER: 2010-1420-MSW-E; TCEQ ID NUMBER: RN105951602; LOCATION: Indian Lake 1, Lots 177 - 180, on CR 4213, approximately 300 feet east of the Entergy Substation, Deweyville, Newton County; TYPE OF FACILITY: unauthorized waste disposal site; RULES VIOLATED: 30 TAC §330.15(c), by failing to prevent the unauthorized disposal of municipal solid waste; PENALTY: $1,050; STAFF ATTORNEY: Stephanie Frazee, Litigation Division, MC 175, (512) 239-3693; REGIONAL OFFICE: Beaumont Regional Office, 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(5) COMPANY: Stone Hedge Utility Co., Inc.; DOCKET NUMBER: 2010-1185-MWD-E; TCEQ ID NUMBER: RN102334992; LOCATION: approximately 6,100 feet northeast of the intersection of State Highway(SH) 105 and SH 336, Montgomery County; TYPE OF FACILITY: wastewater treatment facility; RULES VIOLATED: TWC, §26.121(a), 30 TAC §305.125(1), and Texas Pollutant Discharge Elimination System (TPDES) Permit Number WQ0014709001, Effluent Limitations and Monitoring Requirements Number 1, by failing to comply with permitted effluent limit; 30 TAC §305.125(1) and TPDES Permit Number WQ0014709001 Monitoring and Reporting Requirements Number 7.c., by failing to submit the noncompliance notifications for any effluent violations which deviate from the permitted effluent limitations by more than 40%; 30 TAC §305.125(1) and TPDES Permit Number WQ0014709001 Other Requirements Number 8, by failing to provide a certified operator to inspect the wastewater treatment plant daily; and 30 TAC §305.125(1) and TPDES Permit Number WQ0014709001 Monitoring and Reporting Requirements Number 1, by failing to timely submit effluent monitoring results at the intervals specified in the permit; PENALTY: $13,994; STAFF ATTORNEY: Stephanie Frazee, Litigation Division, MC 175, (512) 239-3693; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(6) COMPANY: T S RANCH & RETREAT, Inc.; DOCKET NUMBER: 2010-1069-PWS-E; TCEQ ID NUMBER: RN104810619; LOCATION: 5950 Farm-to-Market Road 920, Weatherford, Parker County; TYPE OF FACILITY: PWS; RULES VIOLATED: 30 TAC

§290.43(c) and TCEQ AO Docket Number 2007-1360-PWS-E, Ordering Provision Number 2.d.ii, by failing to design, fabricate, and erect all facilities for potable water storage in strict accordance with current American Water Works Association standards; and 30 TAC §290.39(e) and (h)(1), Texas Health and Safety Code (THSC), §341.035(a) and TCEQ AO Docket Number 2007-1360-PWS-E, Ordering Provision Number 2.b.vi., by failing to submit as-built plans and specifications for the facility that have been prepared by a licensed, professional engineer for commission review and approval; PENALTY: $910; STAFF ATTORNEY: Kari Gilbreth, Litigation Division, MC 175, (512) 239-1320; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(7) COMPANY: TLALOC OUTDOORS, INC. dba Del Rio Fisherman's Headquarters; DOCKET NUMBER: 2011-0361-PWS-E; TCEQ ID NUMBER: RN101217800; LOCATION: 4957 West Highway 90, Del Rio, Val Verde County; TYPE OF FACILITY: PWS; RULES VIOLATED: THSC, §341.033(d) and 30 TAC §290.109(c)(2)(A)(i) and §290.122(c)(2)(B), by failing to collect routine distribution water samples for coliform analysis for the months of August and October 2009 and July 2010 and by failing to provide public notice of the failure to sample for the month of October 2009; THSC, §341.031(a) and 30 TAC §290.109(f)(3) and §290.122(b)(2)(A); PENALTY: $1,163; STAFF ATTORNEY: Mike Fishburn, Litigation Division, MC 175, (512) 239-0635; REGIONAL OFFICE: Laredo Regional Office, 707 East Calton Road, Suite 304, Laredo, Texas 78041-3887, (956) 791-6611.

TRD-201104182
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: October 4, 2011

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Notice of Opportunity to Comment on Default Orders of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Default Orders (DOs). The commission staff proposes a DO when the staff has sent an executive director's preliminary report and petition (EDPRP) to an entity outlining the alleged violations; the proposed penalty; the proposed technical requirements necessary to bring the entity back into compliance; and the entity fails to request a hearing on the matter within 20 days of its receipt of the EDPRP or requests a hearing and fails to participate at the hearing. Similar to the procedure followed with respect to Agreed Orders entered into by the executive director of the commission, in accordance with Texas Water Code (TWC), §7.075 this notice of the proposed order and the opportunity to comment is 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 14, 2011.** The commission will consider any written comments received and the commission may withdraw or withhold approval of a DO if a comment discloses facts or considerations that indicate that consent to the proposed DO 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 DO is not required to be published if those changes are made in response to written comments.

A copy of each proposed DO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Written comments about the DO should be sent to the attorney designated for the DO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on November 14, 2011.** Comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The commission's attorneys are available to discuss the DOs and/or the comment procedure at the listed phone numbers; however, §7.075 provides that comments on the DOs shall be submitted to the commission in **writing.**

(1) COMPANY: Anna S. Fuller dba Fuller Oil Co., Tony "Dude" Fuller dba Fuller Oil Co., and Prissy F. Knighten dba Fuller Oil Co.; DOCKET NUMBER: 2011-0394-IHW-E; TCEQ ID NUMBER: RN100532803; LOCATION: 535 East Avenue G, Silsbee, Hardin County; TYPE OF FACILITY: wholesale petroleum bulk storage facility; RULES VIOLATED: TWC, §26.121(a) and 30 TAC §335.4, by failing to prevent the unauthorized discharge of industrial waste into or adjacent to water in the state; PENALTY: $19,650; STAFF ATTORNEY: Tammy Mitchell, Litigation Division, MC 175, (512) 239-0736; REGIONAL OFFICE: Beaumont Regional Office, 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(2) COMPANY: Eduardo Valdez; DOCKET NUMBER: 2011-0315-OSS-E; TCEQ ID NUMBER: RN105800650; LOCATION: 5918 Cottonwood Street, Pearland, Brazoria County; TYPE OF FACILITY: on-site sewage facility (OSSF); RULES VIOLATED: Texas Health and Safety Code (THSC), §366.017(b) and 30 TAC §285.33(d)(2)(D) and §285.70(a)(2), by failing to take adequate measures as soon as practicable to abate an immediate health hazard; 30 TAC §285.32(b)(1)(D) and §285.34(b), by failing to have water tight caps on all septic tank inspection or cleanout ports; and 30 TAC §285.33(d)(2)(G)(v), by failing to properly color code the OSSF; PENALTY: $1,100; STAFF ATTORNEY: Sharesa Y. Alexander, Litigation Division, MC 175, (512) 239-3503; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(3) COMPANY: Gilbert Benavides; DOCKET NUMBER: 2011-0649-LII-E; TCEQ ID NUMBER: RN103654604; LOCATION: 4709 46th Street, Lubbock, Lubbock County; TYPE OF FACILITY: landscaping business; RULES VIOLATED: 30 TAC §334.35(d)(2) and (3), by failing to comply with local requirements to obtain all permits and inspections required to install an irrigation system; PENALTY: $250; STAFF ATTORNEY: Mike Fishburn, Litigation Division, MC 175, (512) 239-0635; REGIONAL OFFICE: Lubbock Regional Office, 5012 50th Street, Suite 100, Lubbock, Texas 79414-3426, (806) 796-7613.

(4) COMPANY: IZ, INC. DBA IZ Food Mart; DOCKET NUMBER: 2011-0653-PST-E; TCEQ ID NUMBER: RN102239035; LOCATION: 699 West Renner Road, Richardson, Collin County; TYPE OF FACILITY: underground storage tanks (UST) system and a convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.8(c)(4)(A)(vii) and (5)(B)(ii), by failing to renew a previously issued UST delivery certificate by submitting a properly completed UST registration and self-certification from at least 30 days before the expiration date; 30 TAC §115.246(7)(A) and THSC, §382.085(b), by failing to maintain Stage II records at the station and make them immediately available for review upon request by agency personnel; 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 USTs; 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; and TCEQ Agreed Order 2006-1825-PST-E, Ordering Provision Number 1, by

failing to pay the administrative penalty and associated late fees for TCEQ Financial Account Number 23703555; PENALTY: $16,780; STAFF ATTORNEY: Jim Sallans, Litigation Division, MC 175, (512) 239-2053; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(5) COMPANY: Jason Class dba Class Ready Mix; DOCKET NUMBER: 2011-0161-IWD-E; TCEQ ID NUMBER: RN105078737; LOCATION: 16733 Fordtran Boulevard, Industry, Austin County; TYPE OF FACILITY: wastewater treatment plant; RULES VIOLATED: TWC, §26.121(a)(1), 30 TAC §305.125(1), and TCEQ General Permit Number TXG110961, Part III Permit Requirements Section A, by failing to comply with permitted effluent limits at Outfall 001 in December 2009, February 2010, July 2010, and September 2010, and at Outfall 002 in February 2010 and July 2010; TWC, §26.121(a)(1), 30 TAC §305.125(1), and TCEQ General Permit Number TXG110961, Part III Permit Requirements Section A, by failing to comply with permitted effluent limits; 30 TAC §305.125(17) and §319.1, and TCEQ General Permit Number TXG110961, Part IV Standard Permit Conditions 7(f), by failing to timely submit effluent monitoring results at the intervals specified in the permit; 30 TAC §305.125(1), and TCEQ General Permit Number TXG110961, Part III Permit Requirements Section D, by failing to conduct whole effluent toxicity testing at the intervals specified in the permit; and TWC, §5.7055 and 30 TAC §70.104(c)(2), by failing to pay general wastewater permit fees and associated late fees for TCEQ Financial Account Number 20502031; PENALTY: $14,501; STAFF ATTORNEY: Tammy Mitchell, Litigation Division, MC 175, (512) 239-0736; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(6) COMPANY: Krebs Utilities, Inc. dba Padok Timbers Subdivision WS; DOCKET NUMBER: 2011-0416-UTL-E; TCEQ ID NUMBER: RN101267177; LOCATION: Harris County Appraisal District KEY MAP 418N, Harris County; TYPE OF FACILITY: public water system (PWS); RULES VIOLATED: TWC, §13.1395(b)(2) and 30 TAC §290.39(o)(1) and §291.162(a) and (j), by failing to adopt and submit to the executive director for approval by March 1, 2010, an emergency preparedness plan that demonstrates the facility's ability to provide emergency operations; PENALTY: $735; STAFF ATTORNEY: Peipey Tang, Litigation Division, MC 175, (512) 239-0654; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(7) COMPANY: Krebs Utilities, Inc. dba K Estates Water System; DOCKET NUMBER: 2011-0417-UTL-E; TCEQ ID NUMBER: RN101257806; LOCATION: Harris County Appraisal District KEY MAP 418T, near 10810 Stephens Lane and 15503 Long Road, Harris County; TYPE OF FACILITY: PWS; RULES VIOLATED: TWC, §13.1395(b)(2) and 30 TAC §290.39(o)(1) and §291.162(a) and (j), by failing to adopt and submit to the executive director for approval by March 1, 2010, an emergency preparedness plan that demonstrates the facility's ability to provide emergency operations; PENALTY: $813; STAFF ATTORNEY: Peipey Tang, Litigation Division, MC 175, (512) 239-0654; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(8) COMPANY: Marcelino Rico dba Ricos Tires, Juan J. Vasquez, and Rosa Vasquez; DOCKET NUMBER: 2011-0700-MSW-E; TCEQ ID NUMBER: RN106098247; LOCATION: 0.25 miles east of the intersection of Mile 11 Road and Mile 6.5 Road and Mile 11 Road, Weslaco, Hidalgo County; TYPE OF FACILITY: tire shredding facility; RULES VIOLATED: 30 TAC §330.15(c), by failing to prevent the unauthorized disposal of municipal solid waste; PENALTY: $10,000; STAFF ATTORNEY: Tammy Mitchell, Litigation Division, MC 175, (512) 239-0736; REGIONAL OFFICE: Harlingen Regional Office, 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

(9) COMPANY: Meadowland Utility Corporation; DOCKET NUMBER: 2010-1767-MWD-E; TCEQ ID NUMBER: RN102815198; LOCATION: approximately 7,600 feet west of the intersection of State Highway 35 and the American Canal, and approximately 1.9 miles north of the intersection of State Highway 6 and McCormick Street, Brazoria County; TYPE OF FACILITY: wastewater treatment facility; RULES VIOLATED: 30 TAC §305.125(1) and (5) and §317.4(d)(2) and (g)(4)(B)(iii), and Texas Pollutant Discharge Elimination System (TPDES) Permit Number WQ0013632001, Operational Requirements Number 1, by failing to ensure that the facility and all of its systems of collection, treatment, and disposal are properly operated and maintained; TWC, §26.121(a), 30 TAC §305.125(1), and TPDES Permit Number WQ0013632001, Effluent Limitations and Monitoring Requirements Number 2, by failing to comply with the permitted effluent limits; 30 TAC §305.125(11)(A) and §319.4, and TPDES Permit Number WQ0013632001, Monitoring and Reporting Requirements Numbers 1 and 3.a., by failing to collect and analyze samples for required parameters at the frequency specified in the permit; 30 TAC §305.125(17) and §319.1, and TPDES Permit Number WQ0013632001, Sludge Provisions, by failing to submit the annual sludge reports for the monitoring periods ending July 31, 2008 and July 31, 2009; and TWC, §5.702 and 30 TAC §21.4, by failing to pay outstanding consolidated water quality fees and associated late fees for TCEQ Financial Account Number 23004116 for Fiscal Years 2009 and 2010; PENALTY: $132,302; STAFF ATTORNEY: Jeff Huhn, Litigation Division, MC R-13, (210) 403-4023; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(10) COMPANY: Richard Billings dba Oak Hills Ranch Water Company; DOCKET NUMBER: 2011-1046-PWS-E; TCEQ ID NUMBER: RN101209914; LOCATION: 234 Sandy Oaks Drive, Seguin, Guadalupe County; TYPE OF FACILITY: PWS; RULES VIOLATED: 30 TAC §290.110(e)(4)(A) and (f)(3), by failing to submit a Disinfectant Level Quarterly Operating Report to the executive director each quarter by the tenth day of the month following each quarter; and 30 TAC §290.271(b) and §290.274(a) and (c) and TCEQ Default Order Docket Number 2008-1651-PWS-E, Ordering Provision Number 2.a.i., by failing to mail or directly deliver one copy of the Consumer Confidence Report (CCR) to each bill paying customer by July 1 of each year and by failing to submit to the executive director by July 1 of each year a copy of the annual CCR and certification that the CCR has been distributed to the customers of the facility and that information in the CCR is correct and consistent with compliance monitoring data; PENALTY: $1,531; STAFF ATTORNEY: Peipey Tang, Litigation Division, MC 175, (512) 239-0654; REGIONAL OFFICE: San Antonio Regional Office, 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(11) COMPANY: SAVS Investments, Inc. dba Friday's General Store; DOCKET NUMBER: 2011-0635-PWS-E; TCEQ ID NUMBER: RN104711163; LOCATION: 7678 East United States Highway 290, Johnson City, Blanco County; TYPE OF FACILITY: PWS; RULES VIOLATED: THSC, §341.0315(c) and 30 TAC §290.46(d)(2)(A) and §290.110(b)(4), by failing to operate the disinfection equipment to continuously maintain a disinfectant residual of 0.2 milligrams per liter (mg/L) of free chlorine throughout the distribution system at all times; THSC, §341.035(a) and 30 TAC §290.39(c), (e)(1) and (h)(1), by failing to submit engineering plans and specifications and obtain commission approval prior to the construction of a new water system; THSC, §341.0315(c) and 30 TAC§290.46(d)(2)(A) and §290.110(b)(4), by failing to operate the disinfection equipment to continuously maintain a disinfectant residual of 0.2 mg/L of free

chlorine throughout the distribution system at all times; 30 TAC §290.110(c)(4)(A), by failing to monitor the disinfectant residual at representative locations throughout the distribution system at least once every seven days; THSC, §341.0315(c) and 30 TAC §290.45(d)(2)(A)(ii), by failing to provide a minimum pressure tank capacity of 220 gallons; 30 TAC §290.41(c)(3)(A), by failing to submit well completion data to the commission for review and approval prior to placing the well into service; and TWC, §5.702 and 30 TAC §290.51(a)(3), by failing to pay annual public health service fees, including associated late fees for TCEQ Financial Administration Account Number 90160028 for Fiscal Year 2011; PENALTY: $2,597; STAFF ATTORNEY: Phillip Goodwin, Litigation Division, MC 175, (512) 239-0675; REGIONAL OFFICE: Austin Regional Office, 2800 South Interstate Highway 35, Suite 100, Austin, Texas 78704-5712, (512) 339-2929.

(12) COMPANY: Thakoor Chatarpal; DOCKET NUMBER: 2011-0165-PST-E; TCEQ ID NUMBER: RN101827533; LOCATION: 14109 South Post Oak Road, Houston, Harris County; TYPE OF FACILITY: UST system and property; RULES VIOLATED: 30 TAC §334.7(d)(3), by failing to notify the agency of any change or additional information regarding a UST system within 30 days from the date of occurrence of the change or addition; and 30 TAC §334.47(a)(2), by failing to permanently remove from service, no later than 60 days after the prescribed upgrade implementation date, a UST system for which any applicable component of the system is not brought into timely compliance with the upgrade requirements; PENALTY: $9,300; STAFF ATTORNEY: Stephanie Frazee, Litigation Division, MC 175, (512) 239-3693; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Avenue, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(13) COMPANY: TIRETEX, INC. and Jerry Waller; DOCKET NUMBER: 2011-0307-MSW-E; TCEQ ID NUMBER: RN103043329; LOCATION: 305 West Simonds Road, Seagoville, Dallas County; TYPE OF FACILITY: used tire wholesale facility; RULES VIOLATED: 30 TAC §328.63(b)(1) and (2), by failing to obtain prior authorization for the storage of scrap tires and scrap tire pieces; 30 TAC §328.52(a), by failing to comply with local codes and ordinances; 30 TAC §328.56(d)(3), by failing to sort, mark, classify and arrange in an organized manner good used tires for sale to consumers; 30 TAC §328.58(b), by failing to record on manifests the end location of whole used tires removed from a delivered load; and 30 TAC §328.63(d)(3), by failing to monitor for vector control and apply vector control measures when needed; PENALTY: $43,260; STAFF ATTORNEY: Jim Sallans, Litigation Division, MC 175, (512) 239-2053; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

TRD-201104183
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: October 4, 2011

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Notice of Water Quality Applications

The following notices were issued on September 23, 2011 through September 30, 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

ISP SYNTHETIC ELASTOMERS LLC which operates a synthetic rubber manufacturing facility, has applied for a major amendment to Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0002487000 to reduce the monitoring frequencies for total organic carbon and oil and grease at Outfall 001 from once per day to once per month; reduce the monitoring frequencies for total copper, total mercury, and total silver at Outfall 001 from once per month to once quarter; increase the daily average flow limitation for Outfall 001 from 200,000 gallons per day to 253,000 gallons per day; and modify the monitoring location description of Outfall 001 to accommodate potential future changes. The current permit authorizes the discharge of fire hydrant water, potable water, steam condensate, and non-process area storm water at a daily average flow not to exceed 200,000 gallons per day via Outfall 001. The facility is located at 1615 Main Street, immediately east of the intersection of Main Street and Avenue G, east of the City of Port Neches, Jefferson County, Texas 77651. The TCEQ Executive Director has reviewed this action for consistency with the Texas Coastal Management Program goals and policies in accordance with the regulations of the Coastal Coordination Council, and has determined that the action is consistent with the applicable CMP goals and policies.

VULCAN CONSTRUCTION MATERIALS LP which operates the Vulcan Construction Materials - Simonton Sand Plant, has applied for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0004952000, to authorize the discharge of process wastewater, mine dewatering, and storm water at a daily average flow not to exceed 3,950,000 gallons per day via Outfall 001. The facility is located at 3551 East FM 1093, on the west side of FM 1093 immediately west and adjacent to the Brazos River, between the towns of Wallis and Simonton, Austin County, Texas 77485.

ARANSAS BAY UTILITIES CO which operates Aransas Bay Utilities Water Treatment Plant, has applied for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0004956000, to authorize the discharge of reverse osmosis brine water and filter backwash water at a daily average flow not to exceed 61,000 gallons per day via Outfall 001. The facility is located at 119 Live Oak Drive, 1400 feet north-northeast of the intersection of Park Road 13 (E. Main Street) and Bois D'Arc Street and approximately 900 feet west-southwest of the Lamar Cemetery, Aransas County, Texas 78382. The TCEQ Executive Director has reviewed this action for consistency with the Texas Coastal Management Program goals and policies in accordance with the regulations of the Coastal Coordination Council, and has determined that the action is consistent with the applicable CMP goals and policies.

LONE STAR NGL MONT BELVIEU LP which proposes to operate Lone Star NGL Mont Belvieu Fractionator Project, a natural gas processing plant, has applied for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0004957000, to authorize the discharge of cooling tower blowdown at a volume not to exceed a daily average flow of 150,000 gallons per day via Outfall 001; and non-contact storm water runoff, potable water filter backwash, and fire protection test water on an intermittent and flow variable basis via Outfall 002. The facility is located at 10030 A Farm-to-Market Road 1942, in Mont Belvieu, Chambers County, Texas 77580.

TOWN OF LAKEWOOD VILLAGE has applied for a renewal of TPDES Permit No. WQ0010903001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 100,000 gallons per day. The facility is located approximately 275

feet East of the intersection of Green Meadow Drive and Shoreline Drive in Denton County, Texas 75068.

TROPHY CLUB MUNICIPAL UTILITY DISTRICT NO 1 has applied for a renewal of TPDES Permit No. WQ0011593001, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 1,750,000 gallons per day. The current permit also authorizes the disposal of treated domestic wastewater via irrigation of 416.9 acres of golf course. The facility is located at 1499 Indian Creek Drive, approximately 0.9 mile north of the intersection of State Highway 114 and Trophy Club Drive, and approximately 2.5 miles east of the intersection of U.S. Highway 377 and State Highway 114 in Denton County, Texas 76262. The disposal site is located adjacent to the facility.

CITY OF BLOOMING GROVE has applied for a renewal of TPDES Permit No. WQ0011606001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 100,000 gallons per day. The facility is located on the west bank of Rush Creek, at a point approximately 4,200 feet southeast of the intersection of State Highway 22 and Farm-to-Market Road 55 in Navaro County, Texas 76626.

TIFCO INDUSTRIES INC has applied for a renewal of TPDES Permit No. WQ0012465001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 35,000 gallons per day. The facility is located at 21400 Hempstead Highway, approximately 3,000 feet northwest of the intersection of U.S. Highway 290 and Huffmeister Road in Harris County, Texas 77429.

City of Star Harbor has applied for a renewal of TPDES Permit No. WQ0014268001, which authorizes the discharge of treated filter backwash effluent from a water treatment plant at a daily average flow not to exceed 38,000 gallons per day. The facility is located approximately 2.5 miles north west of the intersection of State Highway 198 and Farm-to-Market Road 3062, north of the City of Malakoff, and lies on a peninsula of Cedar Creek Reservoir in Henderson County, Texas 75148.

WESTSIDE WATER LLC has applied for a renewal of TPDES Permit No. WQ0014434001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 240,000 gallons per day. The facility is located at 21118 West Farwood Terrace, Cypress (2.1 miles northeast of the intersection of Bauer Road and U.S. 290 and approximately 2,000 feet north of Schiel Road) in Harris County, Texas 77433.

TRAVIS COUNTY MUNICIPAL UTILITY DISTRICT NO 16 AND RC TRAVIS LP has applied for a renewal of TCEQ Permit No. WQ0014664001, which authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 125,500 gallons per day via surface irrigation of 50 acres of public access land. This permit will not authorize a discharge of pollutants into waters in the State. The wastewater treatment facility and disposal site will be located at 9606 Crumley Ranch Road, approximately 5,000 feet south of Hamilton Pool Road (Farm-to-Market Road 3238) and 2,250 feet west of Crumley Ranch Road in Travis County, Texas 78738.

JESSE CARL WOOD has applied for a renewal of TPDES Permit No. WQ0014823001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 25,000 gallons per day. The facility is located on the south side of County Road 306 at its intersection with Dolphin Drive in Calhoun County, Texas 77979.

NEAL AND FM548-1076 (MANN 1100) LLP has applied for a renewal of TPDES Permit No. WQ0014858001, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 1,120,000 gallons per day. The facility is located 2,400 feet southwest of the intersection of County Road 233 and Farm-to-Market Road 548 in Kaufman County, Texas 75032.

If you need more information about these permit applications or the permitting process, please call the TCEQ Public Education Program, Toll Free, at 1-800-687-4040. General information about the TCEQ can be found at our web site at www.TCEQ.state.tx.us. Si desea información en español, puede llamar al 1-800-687-4040.

TRD-201104211
Bridget Bohac
Chief Clerk
Texas Commission on Environmental Quality
Filed: October 5, 2011

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Notice of Water Rights Application

Notices issued September 28, 2011.

APPLICATION NO. 4301C; Greater Texoma Utility Authority (GTUA), 5100 Airport Drive, Denison, Texas 75020-8448, Applicant, seeks an amendment to Water Use Permit No. 4301 (Application No. 2006) to appropriate additional storage within the existing conservation pool of Lake Texoma, located on the Red River, Red River Basin, and to divert and use additional water made available from that storage for municipal, industrial, and agricultural purposes within GTUA's Service Area located in Cooke and Grayson Counties, Red River Basin and that portion of those counties in the Trinity River Basin through an exempt interbasin transfer. GTUA further seeks authorization to reuse the return flows resulting from use of the additional water. The application and partial fees were received on January 21, 2011. Additional information and fees were received on March 21 and April 4, 2011. The application was declared administratively complete and filed with the Office of the Chief Clerk on March 25, 2011. The Executive Director completed the technical review of the application and prepared a draft amendment. The draft amendment, if granted, would include special conditions including, but not limited to, the continued maintenance of a contract with the United States Army Corps of Engineers. The application, technical memoranda, and Executive Director's draft amendment are available for viewing and copying at the Office of the Chief Clerk, 12100 Park 35 Circle, Building F, Austin, Texas 78753. Written public comments and requests for a public meeting should be received in the Office of Chief Clerk, at the address provided in the information section below, within 30 days of the date of newspaper publication of the notice.

INFORMATION SECTION

To view the complete issued notice, view the notice on our web site at www.tceq.state.tx.us/comm_exec/cc/pub_notice.html or call the Office of the Chief Clerk at (512) 239-3300 to obtain a copy of the complete notice. When searching the web site, type in the issued date range shown at the top of this document to obtain search results.

A public meeting is intended for the taking of public comment, and is not a contested case hearing.

The Executive Director can consider approval of an application unless a written request for a contested case hearing is filed. To request a contested case hearing, you must submit the following: (1) your name (or for a group or association, an official representative), mailing address, daytime phone number, and fax number, if any: (2) applicant's name and permit number; (3) the statement "[I/we] request a contested case hearing;" and (4) a brief and specific description of how you would be affected by the application in a way not common to the general public. You may also submit any proposed conditions to the requested application which would satisfy your concerns. Requests for a contested case

hearing must be submitted in writing to the TCEQ Office of the Chief Clerk at the address provided in the information section below.

If a hearing request is filed, the Executive Director will not issue the requested permit and may forward the application and hearing request to the TCEQ Commissioners for their consideration at a scheduled Commission meeting.

Written hearing requests, public comments or requests for a public meeting should be submitted to the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, Texas 78711-3087. For information concerning the hearing process, please contact the Public Interest Counsel, MC 103, at the same address. For additional information, individual members of the general public may contact the Office of Public Assistance at 1-800-687-4040. General information regarding the TCEQ can be found at our web site at www.tceq.state.tx.us. Si desea información en español, puede llamar al 1-800-687-4040.

TRD-201104212
Bridget Bohac
Chief Clerk
Texas Commission on Environmental Quality
Filed: October 5, 2011

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Texas Facilities Commission

Request for Proposals #303-2-20307

The Texas Facilities Commission (TFC), on behalf of the General Land Office, announces the issuance of Request for Proposals (RFP) #303-2-20307. TFC seeks a five or ten year lease of approximately 2,239 square feet of office space and 9,000 square feet of warehouse/secured outside storage in Port Lavaca, Texas.

The deadline for questions is October 21, 2011 and the deadline for proposals is November 2, 2011 at 3:00 p.m. The award date is December 1, 2011. TFC reserves the right to accept or reject any or all proposals submitted. TFC is under no legal or other obligation to execute a lease on the basis of this notice or the distribution of an RFP. Neither this notice nor the RFP commits TFC to pay for any costs incurred prior to the award of a grant.

Parties interested in submitting a proposal may obtain information by contacting the Regional Leasing Assistant, Evelyn Esquivel, at (512) 463-6494. A copy of the RFP may be downloaded from the Electronic State Business Daily at *http://esbd.cpa.state.tx.us/bid_show.cfm?bidid=97041*.

TRD-201104088
Kay Molina
General Counsel
Texas Facilities Commission
Filed: September 29, 2011

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Request for Proposals #303-2-20308

The Texas Facilities Commission (TFC), on behalf of the Department of State Health Services, announces the issuance of Request for Proposals (RFP) #303-2-20308. TFC seeks a five or ten year lease of approximately 2,666 square feet of office space in Rockport, Aransas County, Texas.

The deadline for questions is October 21, 2011 and the deadline for proposals is November 8, 2011 at 3:00 p.m. The award date is December 21, 2011. TFC reserves the right to accept or reject any or all proposals submitted. TFC is under no legal or other obligation to execute a lease on the basis of this notice or the distribution of an RFP. Neither this notice nor the RFP commits TFC to pay for any costs incurred prior to the award of a grant.

Parties interested in submitting a proposal may obtain information by contacting the Regional Leasing Assistant, Evelyn Esquivel at (512) 463-6494. A copy of the RFP may be downloaded from the Electronic State Business Daily at *http://esbd.cpa.state.tx.us/bid_show.cfm?bidid=97067*.

TRD-201104089
Kay Molina
General Counsel
Texas Facilities Commission
Filed: September 29, 2011

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Golden Crescent Workforce Development Board

Public Notice

The Golden Crescent Workforce Development Board (dba Workforce Solutions Golden Crescent) will release its Request for Proposals for Independent Auditing Services on October 10, 2011.

The Board is responsible for administering an integrated workforce development system, including child care services, job training, employment, and employment-related educational programs in the Golden Crescent area.

A complete set of specifications may be obtained on or after October 10, 2011, at 120 South Main #501, Victoria, Texas, phone: (361) 573-5872, fax: (361) 573-0225, or email: susansnow@gcworkforce.org.

Response Deadline: November 7, 2011

Evaluation of Bids: November 8 - 14, 2011

Contract Negotiations: November 21, 2011

Initial Contract: January 1, 2012 - September 30, 2012

GCWDB/WSGC is an equal opportunity employer/program. Auxiliary aids and services are available upon request to individuals with disabilities. Relay Texas-711 (TTY and Voice).

TRD-201104178
Henry Guajardo
Executive Director
Golden Crescent Workforce Development Board
Filed: October 4, 2011

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Public Notice

The Golden Crescent Workforce Development Board (dba Workforce Solutions Golden Crescent) will release its Request for Proposals for Program Monitoring on October 10, 2011.

The Board is responsible for administering an integrated workforce development system, including child care services, job training, employment, and employment-related educational programs in the Golden Crescent area.

A complete set of specifications may be obtained on or after October 10, 2011, at 120 South Main #501, Victoria, Texas, phone: (361) 573-5872, fax: (361) 573-0225, or email: susansnow@gcworkforce.org.

Response Deadline: November 7, 2011

Evaluation of Bids: November 8 - 14, 2011

Contract Negotiations: November 23, 2011

Initial Contract: January 1, 2012 - August 31, 2012

GCWDB/WSGC is an equal opportunity employer/program. Auxiliary aids and services are available upon request to individuals with disabilities. Relay Texas-711 (TTY and Voice).

TRD-201104179
Henry Guarjardo
Executive Director
Golden Crescent Workforce Development Board
Filed: October 4, 2011

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Texas Health and Human Services Commission

Public Notice

The Texas Health and Human Services Commission announces its intent to submit transmittal number 11-053 to the Texas State Plan for Medical Assistance, under Title XIX of the Social Security Act.

The proposed amendment adds categorical determinations to the Preadmission Screening and Resident Review (PASRR) program. Preadmission screening and resident review is required by the Omnibus Budget Reconciliation Act of 1987 (P.L. 100-203). The goals of PASRR are to identify individuals with mental illness (MI) and/or mental retardation (MR), to place such individuals appropriately, and to ensure that they receive the services they need. The Code of Federal Regulations allows states to make advance group determinations by category. These group determinations enable states to identify certain situations where individuals who meet certain criteria are likely to need nursing facility services. This state plan amendment identifies the categories that Texas plans to utilize. The requested effective date for the proposed amendment is February 1, 2013. There is no anticipated fiscal impact with the implementation of this amendment.

To obtain copies of the proposed amendment, interested parties may contact Ashley Fox by mail at the Health and Human Services Commission, P.O. Box 13247, Mail Code H-100, Austin, Texas 78711; by telephone at (512) 491-1165; by facsimile at (512) 491-1953; or by e-mail at ashley.fox@hhsc.state.tx.us. Copies of the proposal will also be made available for public review at the local offices of the Texas Department of Aging and Disability Services.

TRD-201104139
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Filed: October 3, 2011

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Public Notice

The Texas Health and Human Services Commission announces its intent to submit transmittal number 11-054 to the Texas State Plan for Medical Assistance, under Title XIX of the Social Security Act.

The proposed amendment defines the preadmission screening and resident review (PASRR) Level II evaluation and identifies specialized services available only to individuals who are PASRR-eligible. Texas also provides other specialized services and nursing facility add-on services that are otherwise described in the state plan. PASRR is required by the Omnibus Budget Reconciliation Act of 1987. The goals of PASRR are to identify individuals with mental illness (MI) and/or mental retardation (MR), to place such individuals appropriately, and to ensure that they receive the services they need. The requested effective date for the proposed amendment is February 1, 2013.

The proposed amendment is estimated to result in an additional annual aggregate expenditure of $5,821,793 for federal fiscal year (FFY) 2013 consisting of $3,477,985 in federal funds and $2,343,808 in state general revenue. For FFY 2014, the estimated additional annual expenditure is $8,823,795 consisting of $5,285,258 in federal funds and $3,538,537 in state general revenue. For FFY 2015, the estimated additional annual expenditure is $8,823,795 consisting of $5,285,258 in federal funds and $3,538,537 in state general revenue.

To obtain copies of the proposed amendment, interested parties may contact Ashley Fox by mail at the Health and Human Services Commission, P.O. Box 13247, Mail Code H-100, Austin, Texas 78711; by telephone at (512) 491-1165; by facsimile at (512) 491-1953; or by e-mail at ashley.fox@hhsc.state.tx.us. Copies of the proposal will also be made available for public review at the local offices of the Texas Department of Aging and Disability Services.

TRD-201104140
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Filed: October 3, 2011

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Public Notice

The Texas Health and Human Services Commission intends to submit to the Centers for Medicare and Medicaid Services a request for a renewal to the Texas Home Living (TxHmL) waiver program, under the authority of §1915(c) of the Social Security Act. The Texas Home Living waiver program is currently approved for the five-year period beginning March 1, 2007, and ending February 29, 2012. It is expected that the Centers for Medicare and Medicaid Services will approve a previous amendment submitted in September 2011, which increased the capacity of the waiver to allow for more individuals to enroll in the Texas Home Living waiver program. Upon approval of that amendment, this renewal will be submitted to the Centers for Medicare and Medicaid Services. The proposed effective date for the renewal is March 1, 2012.

The Texas Home Living program provides community-based services and supports to individuals with an intellectual disability or an IQ of 75 or below and a related condition in order to assist them in continuing to live in the community instead of an institution. Services include assistance with activities of daily living, day habilitation, respite, supported employment, prescription medications, adaptive aids, behavioral support, community support, dental, employment assistance, minor home modifications, nursing, audiology, dietary assistance, physical therapy, occupational therapy, and speech and language pathology.

The Health and Human Services Commission is requesting that the waiver renewal be approved for the period beginning March 1, 2012, through February 28, 2017. This renewal maintains cost neutrality for waiver years 2012 through 2017.

To obtain copies of the proposed waiver renewal, interested parties may contact Christine Longoria by mail at Texas Health and Human Services Commission, P.O. Box 85200, mail code H-370, Austin, Texas 78708-5200; by phone at (512) 491-1152; by fax at (512) 491-1957; or by email at Christine.Longoria@hhsc.state.tx.us.

TRD-201104181

Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Filed: October 4, 2011

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Department of State Health Services

Revised Maximum Fees Allowed for Providing Health Care Information Effective September 9, 2011

This notice supersedes the publication in the September 9, 2011, issue of the *Texas Register* (36 TexReg 6047). The fee listed in Health and Safety Code, §241.154(c)(2), is corrected to read "written responses to a written set of questions, not to exceed $10.00 for a set." No additional revisions are contained in this revised notice and the relevant information contained in the original notice is reflected for reference.

The Department of State Health Services licenses general and special hospitals in accordance with Health and Safety Code, Chapter 241. In 1995, the Texas Legislature amended the law to address the release and confidentiality of health care information. In 2009, the Texas Legislature amended the law to change the definition of health care information and to add a category of fees for records provided on and delivered in a digital or other electronic media.

In accordance with Health and Safety Code, §241.154(e), the fee effective as of September 9, 2011, for providing a patient's health care information has been adjusted by increasing by 4.1% the 2010 rate to reflect the most recent changes to the consumer price index that measures the average changes in prices of goods and services purchased by urban wage earners and clerical workers as published by the Bureau of Labor Statistics of the United States Department of Labor.

Health and Safety Code, §241.154(b) - (d) Provisions:

(b) Except as provided by subsection (d), the hospital or its agent may charge a reasonable fee for providing the health care information except payment information and is not required to permit the examination, copying, or release of the information requested until the fee is paid unless there is a medical emergency. The fee may not exceed the sum of:

(1) a basic retrieval or processing fee, which must include the fee for providing the first 10 pages of copies and which may not exceed $43.78; and

(A) a charge for each page of:

(i) $1.47 for the 11th through the 60th page of provided copies;

(ii) $.73 for the 61st through the 400th page of provided copies;

(iii) $.38 for any remaining pages of the provided copies; and

(B) the actual cost of mailing, shipping, or otherwise delivering the provided copies;

(2) if the requested records are stored on microform, a retrieval or processing fee, which must include the fee for providing the first 10 pages of the copies and which may not exceed $66.70; and

(A) $1.47 per page thereafter; and

(B) the actual cost of mailing, shipping, or otherwise delivering the provided copies; or

(3) if the requested records are provided on a digital or other electronic medium and the requesting party requests delivery in a digital or electronic medium, including electronic mail:

(A) a retrieval or processing fee, which may not exceed $79.32; and

(B) the actual cost of mailing, shipping, or otherwise delivering the provided copies.

(c) In addition, the hospital or its agent may charge a reasonable fee for:

(1) execution of an affidavit or certification of a document, not to exceed the charge authorized by Civil Practice and Remedies Code, §22.004; and

(2) written responses to a written set of questions, not to exceed $10.00 for a set.

(d) A hospital may not charge a fee for:

(1) providing health care information under subsection (b) to the extent the fee is prohibited under Health and Safety Code, Chapter 161, Subchapter M;

(2) a patient to examine the patient's own health care information;

(3) providing an itemized statement of billed services to a patient or third-party payer, except as provided under §311.002(f); or

(4) health care information relating to treatment or hospitalization for which workers' compensation benefits are being sought, except to the extent permitted under Labor Code, Chapter 408.

This information is provided only as a courtesy to licensed hospitals. Hospitals are responsible for verifying that fees for health care information are charged in accordance with Health and Safety Code, Chapters 241, 311, and 324.

The statutes referenced in this notice may be found on the Internet at:

Health and Safety Code, http://www.statutes.legis.state.tx.us?link=HS

Labor Code, http://www.statutes.legis.state.tx.us?link=LA

Civil Practice and Remedies Code, http://www.statutes.legis.state.tx.us?link=CP

Should you have questions, you may contact the Department of State Health Services, Facility Licensing Group, Mail Code 2835, P.O. Box 149347, Austin, Texas 78714-9347, telephone (512) 834-6648.

TRD-201104180
Lisa Hernandez
General Counsel
Department of State Health Services
Filed: October 4, 2011

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Texas Department of Housing and Community Affairs

Announcement of the Revision to the Public Comment Period for the One Year Action Plan

The Texas Department of Housing and Community Affairs (TDHCA) announces a revision to the public comment period of the *2012 State of Texas Consolidated Plan One Year Action Plan (Plan).* The Plan was originally released for comment on September 30, 2011 with an end date of October 19, 2011. The revised public comment period will end on October 29, 2011 at 5:00 p.m.

The Plan is required as part of the overall requirements governing the State's consolidated planning process and the public comment period on the Plan is required by the U.S. Department of Housing and Urban Development (HUD). The Plan is submitted in compliance with 24 CFR §91.520, Consolidated Plan Submissions for Community Planning and Development Programs. TDHCA coordinates the preparation of the Plan with the Office of Rural Affairs within the Texas De-

partment of Agriculture (formerly Texas Department of Rural Affairs) and the Department of State Health Services (DSHS). The Plan covers the State's administration of the Community Development Block Grant Program by the Office of Rural Affairs, the Housing Opportunities for Persons with AIDS Program by DSHS, and the Emergency Shelter Grants Program and the HOME Investment Partnerships Program by TDHCA.

The Plan is currently available on the Department's website at www.tdhca.state.tx.us. A hard copy of the Plan can be requested by contacting the Housing Resource Center via mail at TDHCA, Housing Resource Center, P.O. Box 13941, Austin, Texas 78711-3941, or phone at (512) 475-3800, or email at info@tdhca.state.tx.us.

Public comment on the Plan may be provided in writing via mail to Elizabeth Yevich, TDHCA, P.O. Box 13941, Austin, Texas 78711-3941, or fax at (512) 475-1672 or email at elizabeth.yevich@tdhca.state.tx.us.

TRD-201104197
Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
Filed: October 5, 2011

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Texas Department of Insurance

Notice of Application by a Small Employer Health Benefit Plan Issuer to be a Risk-Assuming Health Benefit Plan Issuer

Notice is given to the public of the application of the listed small employer health benefit plan issuer to be a risk-assuming health benefit plan issuer under Insurance Code §1501.312. A small employer health benefit plan issuer is defined by Insurance Code §1501.002(16) as a health benefit plan issuer offering, delivering, issuing for delivery, or renewing health benefit plans subject to the Insurance Code, Chapter 1501, Subchapters C - H. A risk-assuming health benefit plan issuer is defined by Insurance Code §1501.301(4) as a small employer health benefit plan issuer that does not participate in the Texas Health Reinsurance System. The following small employer health benefit plan issuer has applied to be a risk-assuming health benefit plan issuer:

Aetna Health Inc.

The application is subject to public inspection at the offices of the Texas Department of Insurance, Legal & Compliance Division - Nick Hoelscher, 333 Guadalupe, Tower I, Room 920, Austin, Texas.

If you wish to comment on the application of Aetna Health Inc. to be a risk-assuming health benefit plan issuer, you must submit your written comments within 60 days after publication of this notice in the *Texas Register* to Sara Waitt, Acting General Counsel, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. Upon consideration of the application and comments, if the Commissioner is satisfied that all requirements of law have been met, the Commissioner or his designee may take action to approve the applicant to be a risk-assuming health benefit plan issuer.

TRD-201104119
Sara Waitt
Acting General Counsel
Texas Department of Insurance
Filed: September 30, 2011

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Texas Lottery Commission

Instant Game Number 1380 "Groovy Cash"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1380 is "GROOVY CASH". The play style is "other".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1380 shall be $5.00 per ticket.

1.2 Definitions in Instant Game No. 1380.

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, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55 and 56.

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. 1380 - 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
41	FTO
42	FFT
43	FTE
44	FRF
45	FRV
46	FRS

47	FSN
48	FRE
49	FNI
50	FTY
51	FFN
52	FTT
53	FTR
54	FTF
55	FTV
56	FTX

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 $5.00, $6.00, $9.00, $10.00 or $15.00.

G. Mid-Tier Prize - A prize of $40.00, $50.00, $100, $250 or $500.

H. High-Tier Prize - A prize of $750, $1,000 or $50,000.

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 (1380), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 075 within each pack. The format will be: 1380-0000001-001.

K. Pack - A pack of "GROOVY CASH" Instant Game tickets contains 075 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 075 while the other fold will show the back of ticket 001 and front of 075.

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 "GROOVY CASH" Instant Game No. 1380 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 "GROOVY CASH" Instant Game is determined once the latex on the ticket is scratched off to expose 80 (eighty) play symbols. Scratch the FAR OUT NUMBERS, and then scratch ONLY the matching numbers on the GROOVY GRID. If the player matches all of the numbers to complete a row or column in the GROOVY GRID, the player wins the prize in the corresponding arrow. 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 80 (eighty) 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 80 (eighty) 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 80 (eighty) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the 80 (eighty) 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. Players can win up to five (5) times on a ticket in accordance with the approved prize structure.

B. Adjacent non-winning tickets within a pack will not have identical play symbol patterns. Two (2) tickets have identical play symbol patterns if they have the same play symbols in the same positions.

C. Each ticket will have 24 unique play symbols.

D. All twenty-four (24) Far-Out Numbers will match a number in the Groovy Grid.

E. On non-winning tickets, there will be at least three rows or columns matching all numbers, less one.

2.3 Procedure for Claiming Prizes.

A. To claim a "GROOVY CASH" Instant Game prize of $5.00, $6.00, $9.00, $10.00, $15.00, $40.00, $50.00, $100, $250 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 $40.00, 50.00, $100, $250 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 Section 2.3.B and 2.3.C of these Game Procedures.

B. To claim a "GROOVY CASH" Instant Game prize of $750, $1,000 or $50,000, 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 "GROOVY CASH" 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 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 "GROOVY CASH" 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 "GROOVY CASH" 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 6,000,000 tickets in the Instant Game No. 1380. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 1380 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$5	160,000	37.50
$6	920,000	6.52
$9	320,000	18.75
$10	160,000	37.50
$15	160,000	37.50
$40	80,000	75.00
$50	25,000	240.00
$100	20,000	300.00
$250	600	10,000.00
$500	250	24,000.00
$750	100	60,000.00
$1,000	50	120,000.00
$50,000	7	857,142.86

*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 3.25. 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. 1380 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. 1380, 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-201104172

Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: October 4, 2011

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Instant Game Number 1381 "Money Multiplier"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1381 is "MONEY MULTIPLIER". The play style is "key number match with doubler".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1381 shall be $5.00 per ticket.

1.2 Definitions in Instant Game No. 1381.

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: $5.00, $10.00, $15.00, $20.00, $40.00, $50.00, $100, $500, $2,000, $50,000, 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, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60 and MONEY BAG SYMBOL.

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. 1381 - 1.2D

PLAY SYMBOL	CAPTION
$5.00	FIVE$
$10.00	TEN$
$15.00	FIFTN
$20.00	TWENTY
$40.00	FORTY
$50.00	FIFTY
$100	ONE HUND
$500	FIV HUND
$2,000	TWO THOU
$50,000	50 THOU
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
41	FTO
42	FFT
43	FTE
44	FRF
45	FRV
46	FRS
47	FSN
48	FRE
49	FNI
50	FTY
51	FFN
52	FTT
53	FTR
54	FTF
55	FTV
56	FTX
57	FSV
58	FEG
59	FNN
60	SXY
MONEY BAG SYMBOL	BAG

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 $5.00, $10.00 or $20.00.

G. Mid-Tier Prize - A prize of $50.00, $100 or $500.

H. High-Tier Prize - A prize of $2,000 or $50,000.

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 (1381), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 075 within each pack. The format will be: 1381-0000001-001.

K. Pack - A pack of "MONEY MULTIPLIER" Instant Game tickets contains 75 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 075 while the other fold will show the back of ticket 001 and front of 075.

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 "MONEY MULTIPLIER" Instant Game No. 1381 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 "MONEY MULTIPLIER" Instant Game is determined once the latex on the ticket is scratched off to expose 45 (forty-five) play symbols. Each time YOUR LUCKY NUMBER is revealed within a GAME, the player wins the PRIZE for that GAME. If the player reveals a "MONEY BAG" play symbol, the player wins DOUBLE the prize for that game! 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 45 (forty-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 45 (forty-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 45 (forty-five) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the 45 (forty-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. Players can win up to thirty-six (36) times on a ticket in accordance with the approved prize structure.

B. Adjacent non-winning tickets within a pack will not have identical play or prize symbol patterns. Two (2) tickets have identical play or prize symbol patterns if they have the same play or prize symbols in the same positions.

C. Each ticket will contain one (1) "YOUR LUCKY NUMBER" play symbol.

D. The "MONEY BAG" play symbol will never appear in the "YOUR LUCKY NUMBER" play symbol spot.

E. The "MONEY BAG" play symbol will only appear as dictated by the prize structure.

F. Non-winning tickets will contain thirty-six (36) different play symbol spots within the eight (8) games.

G. On winning tickets, non-winning play symbols within the eight (8) games will all be different.

H. No ticket will ever contain more than two (2) identical non-winning prize symbols.

I. Non-winning prize symbols will never be the same as the winning prize symbol(s).

J. The top prize symbol will appear on every ticket unless otherwise restricted.

K. No prize symbol in a non-winning spot will correspond with the "YOUR LUCKY NUMBER" play symbol (i.e., 5 and $5).

L. A winning play symbol will not appear in any individual game that contains a "MONEY BAG" symbol.

2.3 Procedure for Claiming Prizes.

A. To claim a "MONEY MULTIPLIER" Instant Game prize of $5.00, 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 Section 2.3.B and 2.3.C of these Game Procedures.

B. To claim a "MONEY MULTIPLIER" Instant Game prize of $2,000 or $50,000, 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 "MONEY MULTIPLIER" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Com-

mission, 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 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 under $600 from the "MONEY MULTIPLIER" 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 "MONEY MULTIPLIER" 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 6,000,000 tickets in the Instant Game No. 1381. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 1381 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$5	720,000	8.33
$10	640,000	9.38
$20	240,000	25.00
$50	70,350	85.29
$100	12,500	480.00
$500	800	7,500.00
$2,000	66	90,909.09
$50,000	6	1,000,000.00

*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 3.56. 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. 1381 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 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. 1381, 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-201104205

Kimberly L. Kiplin

General Counsel

Texas Lottery Commission

Filed: October 5, 2011

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Instant Game Number 1385 "Chocolate"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1385 is "CHOCOLATE." The play style is "key number match."

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1385 shall be $5.00 per ticket.

1.2 Definitions in Instant Game No. 1385.

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, HEART SYMBOL, $5.00, $10.00, $15.00, $20.00, $40.00, $50.00, $100, $500, $1,000, and $50,000.

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.1385 - 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
HEART SYMBOL	WIN5X
$5.00	FIVE$
$10.00	TEN$
$15.00	FIFTN
$20.00	TWENTY
$40.00	FORTY

$50.00	FIFTY
$100	ONE HUND
$500	FIV HUND
$1,000	ONE THOU
$50,000	50 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 $5.00, $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 or $50,000.

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 (1385), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 075 within each pack. The format will be: 1385-0000001-001.

K. Pack - A pack of "CHOCOLATE" Instant Game tickets contains 075 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 075 while the other fold will show the back of ticket 001 and front of 075.

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 "CHOCOLATE" Instant Game No. 1385 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 "CHOCOLATE" Instant Game is determined once the latex on the ticket is scratched off to expose 44 (forty-four) play symbols. The player must scratch the entire play area. 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 "HEART" play symbol, the player wins 5 TIMES 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 44 (forty-four) 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 44 (forty-four) 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 44 (forty-four) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the 44 (forty-four) 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. Players can win up to twenty (20) times on a ticket in accordance with the approved prize structure.

B. Adjacent non-winning tickets within a pack will not have identical play or prize symbol patterns. Two (2) tickets have identical play or prize symbol patterns if they have the same play or prize symbols in the same positions.

C. Each ticket will have four (4) different "WINNING NUMBERS" play symbols.

D. Non-winning tickets will contain all different "YOUR NUMBERS" play symbols.

E. On winning tickets, non-winning play symbols will all be different.

F. Non-winning tickets will never contain more than three (3) identical prize symbols.

G. On winning tickets, non-winning prize symbols will never appear more than three (3) times.

H. The "HEART" play symbol will never appear in the "WINNING NUMBERS" play symbol spots.

I. The "HEART" play symbol will only appear as dictated by the prize structure.

J. Non-winning prize symbols will never be the same as the winning prize symbol(s).

K. The top prize symbol ($50,000) will appear on every ticket unless otherwise restricted by the prize structure and/or other constraints.

L. No prize amount in a non-winning spot will correspond with the "YOUR NUMBERS" play symbol (i.e., 5 and $5).

2.3 Procedure for Claiming Prizes.

A. To claim a "CHOCOLATE" Instant Game prize of $5.00, $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 "CHOCOLATE" Instant Game prize of $1,000 or $50,000, 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 "CHOCOLATE" 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 "CHOCOLATE" 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 "CHOCOLATE" 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 6,000,000 tickets in the Instant Game No. 1385. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 1385 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$5	640,000	9.38
$10	840,000	7.14
$20	160,000	37.50
$50	72,800	82.42
$100	10,000	600.00
$500	700	8,571.43
$1,000	160	37,500.00
$50,000	9	666,666.67

*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 3.48. 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. 1385 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. 1385, 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-201104173
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: October 4, 2011

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Instant Game Number 1391 "Platinum Card"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1391 is "PLATINUM CARD." The play style is "key number match with doubler."

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1391 shall be $2.00 per ticket.

1.2 Definitions in Instant Game No. 1391.

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: $2.00, $4.00, $5.00, $10.00, $20.00, $50.00, $100, $1,000, $20,000, 1, 2, 3, 4, 5, 6, 7, 8, 9,

10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20 and DOLLAR BILL SYMBOL.

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. 1391 - 1.2D

PLAY SYMBOL	CAPTION
$2.00	TWO$
$4.00	FOUR$
$5.00	FIVE$
$10.00	TEN$
$20.00	TWENTY
$50.00	FIFTY
$100	ONE HUND
$1,000	ONE THOU
$20,000	20 THOU
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
DOLLAR BILL SYMBOL	BILL

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 $2.00, $4.00, $5.00, $10.00 or $20.00.

G. Mid-Tier Prize - A prize of $50.00 or $100.

H. High-Tier Prize - A prize of $1,000 or $20,000.

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 (1391), 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: 1391-0000001-001.

K. Pack - A pack of "PLATINUM CARD" Instant Game tickets contains 125 tickets, packed in plastic shrink-wrapping and fanfolded in pages of two (2). One ticket will be folded over to expose a front and back of one ticket on each pack. Please note the books will be in an A, B, C and D configuration.

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 "PLATINUM CARD" Instant Game No. 1391 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 "PLATINUM CARD" Instant Game is determined once the latex on the ticket is scratched off to expose 22 (twenty-two) play symbols. If a player matches any of YOUR NUMBERS to either WINNING NUMBER, the player wins the PRIZE for that number. If a player reveals a "BILL" 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 22 (twenty-two) 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 22 (twenty-two) 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 22 (twenty-two) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the 22 (twenty-two) 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. Players can win up to ten (10) times on a ticket in accordance with the approved prize structure.

B. Adjacent non-winning tickets within a pack will not have identical play and prize symbol patterns. Two (2) tickets have identical play and prize symbol patterns if they have the same play/prize symbols in the same positions.

C. Each ticket will contain two (2) different "WINNING NUMBERS" play symbols.

D. The "BILL" play symbol will never appear in the "WINNING NUMBERS" play symbol spots.

E. The "BILL" play symbol will only appear as dictated by the prize structure.

F. Non-winning tickets will contain ten (10) different "YOUR NUMBERS" play symbols.

G. On winning tickets, non-winning "YOUR NUMBERS" play symbols will all be different.

H. No ticket will ever contain more than two (2) identical non-winning prize symbols.

I. Non-winning prize symbols will never be the same as the winning prize symbol(s).

J. The top prize symbol will appear on every ticket unless otherwise restricted.

K. No prize amount in a non-winning spot will correspond with the "YOUR NUMBERS" play symbol (i.e., 5 and $5).

2.3 Procedure for Claiming Prizes.

A. To claim a "PLATINUM CARD" Instant Game prize of $2.00, $4.00, $5.00, $10.00, $20.00, $50.00 or $100, 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 or $100 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 "PLATINUM CARD" Instant Game prize of $1,000 or $20,000, 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 "PLATINUM CARD" 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 "PLATINUM CARD" 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 "PLATINUM CARD" 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 6,000,000 tickets in the Instant Game No. 1391. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 1391 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$2	576,000	10.42
$4	624,000	9.62
$5	96,000	62.50
$10	72,000	83.33
$20	48,000	125.00
$50	29,350	204.43
$100	2,500	2,400.00
$1,000	75	80,000.00
$20,000	10	600,000.00

*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 4.14. 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. 1391 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. 1391, 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-201104174
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: October 4, 2011

♦ ♦ ♦

Instant Game Number 1393 "Spades"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1393 is "SPADES." The play style is "beat score with tripler."

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1393 shall be $1.00 per ticket.

1.2 Definitions in Instant Game No. 1393.

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: $1.00, $2.00, $3.00, $5.00, $10.00, $15.00, $20.00, $30.00, $100, $1,000, 2 CARD SYMBOL, 3 CARD SYMBOL, 4 CARD SYMBOL, 5 CARD SYMBOL, 6 CARD SYMBOL, 7 CARD SYMBOL, 8 CARD SYMBOL, 9 CARD SYMBOL, 10 CARD SYMBOL, J CARD SYMBOL, Q CARD SYMBOL, K CARD SYMBOL, A CARD SYMBOL or JOKER SYMBOL.

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. 1393 - 1.2D

PLAY SYMBOL	CAPTION
$1.00	ONE$
$2.00	TWO$
$3.00	THREE$
$5.00	FIVE$
$10.00	TEN$
$15.00	FIFTN
$20.00	TWENTY
$30.00	THIRTY
$100	ONE HUND
$1,000	ONE THOU
2 CARD SYMBOL	TWO
3 CARD SYMBOL	THR
4 CARD SYMBOL	FOR
5 CARD SYMBOL	FIV
6 CARD SYMBOL	SIX
7 CARD SYMBOL	SVN
8 CARD SYMBOL	EGT
9 CARD SYMBOL	NIN
10 CARD SYMBOL	TEN
J CARD SYMBOL	JCK
Q CARD SYMBOL	QUE
K CARD SYMBOL	KNG
A CARD SYMBOL	ACE
JOKER SYMBOL	JKR

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 $1.00, $2.00, $3.00, $5.00, $10.00 or $15.00.

G. Mid-Tier Prize - A prize of $30.00, $45.00 or $100.

H. High-Tier Prize - A prize of $1,000.

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 (1393), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 150 within each pack. The format will be: 1393-0000001-001.

K. Pack - A pack of "SPADES" Instant Game tickets contains 150 tickets, packed in plastic shrink-wrapping and fanfolded in pages of five (5). Tickets 001 to 005 will be on the top page; tickets 006 to 010 on the next page; etc.; and tickets 146 to 150 will be on the last page with backs exposed. Ticket 001 will be folded over so the front of ticket 001 and 010 will be exposed.

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 "SPADES" Instant Game No. 1393 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 "SPADES" Instant Game is determined once the latex on the ticket is scratched off to expose 12 (twelve) play symbols. If a player's YOUR CARD play symbol beats the DEALER'S CARD play symbol in the same HAND, the player wins prize shown for that HAND. If a player reveals a "JOKER" play symbol in any hand, the player wins 3 times the prize for that HAND. 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 12 (twelve) 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 12 (twelve) 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 12 (twelve) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the 12 (twelve) 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. Players can win up to four (4) times on a ticket in accordance with the approved prize structure.

B. Adjacent non-winning tickets within a pack will not have identical play or prize symbol patterns. Two (2) tickets have identical play or prize symbol patterns if they have the same play or prize symbols in the same positions.

C. The "YOUR CARD" play symbol will never match the "DEALER'S CARD" play symbol in the same HAND across.

D. There will be no duplicate HANDS in any order on a ticket.

E. On winning tickets, non-winning HANDS will never contain more than two (2) identical prize symbols.

F. Non-winning tickets will never contain more than two (2) identical prize symbols.

G. The "2" play symbol will never appear as "YOUR CARD" and the "A" play symbol will never appear as the "DEALER'S CARD."

H. The JOKER "JKR" play symbol will only appear as dictated in the prize structure.

I. The JOKER "JKR" play symbol will never appear as the "DEALER'S CARD."

J. Non-winning prize symbols will never be the same as the winning prize symbol(s).

K. The top prize symbol will appear on every ticket unless otherwise restricted.

2.3 Procedure for Claiming Prizes.

A. To claim a "SPADES" Instant Game prize of $1.00, $2.00, $3.00, $5.00, $10.00, $15.00, $30.00, $45.00 or $100, 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, $45.00 or $100 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 "SPADES" Instant Game prize of $1,000 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 "SPADES" 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 "SPADES" 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 "SPADES" 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 10,080,000 tickets in the Instant Game No. 1393. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 1393 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$1	1,209,600	8.33
$2	336,000	30.00
$3	336,000	30.00
$5	134,400	75.00
$10	50,400	200.00
$15	33,600	300.00
$30	33,600	300.00
$45	4,200	2,400.00
$100	714	14,117.65
$1,000	210	48,000.00

*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 4.71. 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. 1393 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. 1393, 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-201104175
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: October 4, 2011

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Texas Department of Motor Vehicles

Notice of Opportunity to Participate in Discussion

The Texas Department of Motor Vehicles (department) announces the Senate Bill 529 Advisory Committee's intent to hold an informal discussion forum of Senate Bill 529 (Texas SB 529, 82nd Legislature, Regular Session (2011)) requirements and implementation.

The Senate Bill 529 Advisory Committee meeting is open to public participation of any interested person. The meeting will be held on November 2, 2011, at 10:00 a.m. in the department's Board Room located at 200 Riverside Drive, Building 150, First Floor, Room 1B.1. Additional questions regarding this discussion forum may be directed to MVD_Exchange@TxDMV.gov or Grace Moody at (512) 416-4910.

Any individual who plans to attend this meeting requiring auxiliary aids or services should notify Grace Moody as far in advance as possible so that appropriate arrangements may be made.

TRD-201104198
Brett Bray
General Counsel
Texas Department of Motor Vehicles
Filed: October 5, 2011

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Texas Parks and Wildlife Department

Notice of Hearing and Opportunity for Public Comment

This is a notice of an opportunity for public comment and a public hearing on a Vulcan Construction Materials LP application to renew a Texas Parks and Wildlife Department (TPWD) permit to dredge state-owned sand and gravel from the Brazos River bed: approximately 7 river miles downstream from IH-10 and approximately 23 river miles upstream from US 59 in Austin and Fort Bend Counties.

The hearing will be held on November 4, 2011 at 2:00 p.m. at TPWD Headquarters, 4200 Smith School Road, Austin, Texas 78744. The hearing is not a contested case hearing under the Administrative Procedure Act.

Written comments must be submitted within 30 days of the publication of this notice in the *Texas Register* or the newspaper, whichever is later, or at the public hearing. Submit written comments, questions, or requests to review the application to: Tom Heger, TPWD, by mail to the above address; e-mail tom.heger@tpwd.state.tx.us; phone (512) 389-4583.

TRD-201104184

Ann Bright
General Counsel
Texas Parks and Wildlife Department
Filed: October 4, 2011

♦ ♦ ♦

Public Utility Commission of Texas

Notice of Application for Amendment to Service Provider Certificate of Operating Authority

On October 3, 2011, Ohio First Communications, LLC filed an application with the Public Utility Commission of Texas (commission) to amend its service provider certificate of operating authority (SPCOA) Certificate Number 60772. Applicant seeks to reflect a change in ownership/control whereby Gores AC Holdings, LLC would acquire indirect control of Applicant.

The Application: Application of Ohio First Communications, LLC for an Amendment to its Service Provider Certificate of Operating Authority, Docket Number 39813.

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 21, 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 39813.

TRD-201104216
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: October 5, 2011

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Notice of Application for Amendment to Service Provider Certificate of Operating Authority

On October 3, 2011, Alpheus Communications, LP filed an application with the Public Utility Commission of Texas (commission) to amend its service provider certificate of operating authority (SPCOA) Certificate Number 60112. Applicant seeks to reflect a change in (1) name to Alpheus Communications, LLC resulting from a conversion from a limited partnership to a limited liability company; (2) in ownership/control whereby Gores AC Holdings, LLC would acquire indirect control of Applicant; and (3) type of provider to include data services.

The Application: Application of Alpheus Communications, LP for an Amendment to its Service Provider Certificate of Operating Authority, Docket Number 39814.

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 1-888-782-8477 no later than October 21, 2011. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll-free at 1-800-735-2989. All comments should reference Docket Number 39814.

TRD-201104217
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: October 5, 2011

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Notice of Application to Relinquish a Service Provider Certificate of Operating Authority

On October 3, 2011, Adirondack Area Network filed an application with the Public Utility Commission of Texas (commission) to amend its service provider certificate of operating authority (SPCOA) Number 60534. Applicant intends to relinquish the certificate.

The Application: Application of Adirondack Area Network to Relinquish its Service Provider Certificate of Operating Authority, Docket Number 39820.

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 1-888-782-8477 no later than October 21, 2011. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll-free at 1-800-735-2989. All comments should reference Docket Number 39820.

TRD-201104196
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: October 4, 2011

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Public Notice of Workshop and Request for Comments

The staff of the Public Utility Commission of Texas (commission) will hold a workshop regarding amending commission substantive rules relating to telecommunications service to conform to 2011 legislation, which includes S.B. 773, S.B. 980, S.B. 983, H.B. 2295, and H.B. 2680. The workshop will be held on Wednesday, November 2, 2011, at 9:30 a.m. in the Commissioners' Hearing Room, located on the 7th floor of the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701. Project Number 39585, *Rulemaking Proceeding to Amend Substantive Rules Relating to Telecommunications Service to Conform to 2011 Legislation*, has been established for this proceeding. Prior to the workshop, the commission requests interested persons file comments to the draft rule and the following questions:

1. S.B. 773, Section 5 amended PURA §58.259, Tariff Rate for Certain IntaLATA Service, which changed the percentage from 105% to 110% percent of the service's statewide average long run incremental cost, including installation. Although this section does not reference customer specific contracts (CSC), do commenters believe S.B. 773, Section 5 is applicable to CSCs as well as tariffs?

2. Is there a benefit to add definitions for Package Service and Promotional Service and if so, what would those definitions be?

On October 13, 2011, the commission shall make a copy of the draft rule available in Central Records under Project No. 39585.

Responses may be filed by submitting 16 copies to the commission's Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326 no later than October 28, 2011. All responses should reference Project Number 39585. This notice is not a formal notice of proposed rulemaking, however, the parties' responses to the questions and comments at the workshop will assist the commission in developing a commission policy or determining the necessity for a related rulemaking.

Questions concerning the workshop or this notice should be referred to Liz Kayser, Market Economist, Competitive Markets Division, (512)

936-7390. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136.

TRD-201104204
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: October 5, 2011

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Public Notice of Workshop on Proposed ERCOT Budget for 2012 and Request for Comments

The staff of the Public Utility Commission of Texas (commission) will hold a workshop regarding the proposed budget for 2012 for the Electric Reliability Council of Texas (ERCOT) on Thursday, November 17, 2011, at 10:00 a.m. in the commissioners' hearing room, located on the 7th floor of the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701. Project Number 38533, *PUC Review of ERCOT Budget*, has been established for this proceeding. Pursuant to P.U.C. Substantive Rule §25.363(d) (relating to ERCOT Budget and Fees), ERCOT is required on an annual basis to submit for commission review its board-approved budget, budget strategies and staffing needs, with a justification for all expenses, capital outlays, additional debt, and staffing requirements. The commission may approve, modify or reject ERCOT's proposed budget and budget strategies. On September 29, 2011, ERCOT filed in Project No. 38533 its proposed budget for 2012. ERCOT's proposed budget does not contemplate any change in the ERCOT System Administrative Fee, which is currently set at $0.4171 per megawatt hour (MWh). Prior to the workshop, the commission requests interested persons to file comments on the following question:

Is ERCOT's proposed budget for 2012 reasonable?

Responses may be filed by submitting 16 copies to the commission's Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326 no later than Monday, November 14, 2011. All responses should reference Project Number 38533.

Questions concerning the workshop or this notice should be referred to Thomas S. Hunter, Special Counsel, (512) 936-7280. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136.

TRD-201104171
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: October 3, 2011

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Public Notice of Workshop on TDU Curtailment Procedures and Service Restoration Priorities Plans

The staff of the Public Utility Commission of Texas (commission) will hold a workshop entitled **TDU Curtailment Procedures and Service Restoration Priorities** on Thursday, November 3, 2011, from 9:00 a.m. until 5:00 p.m. in the Commissioners' Hearing Room (Room 7-100), located on the 7th floor of the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701. Project Number 39140 has been established for this proceeding.

The purpose of this workshop is to address electric power outage issues and comments related to transmission and/or distribution utility curtailment procedures and service restoration priority plans including priorities for power restoration to certain medical facilities. This workshop is a follow-up to the commission's **Request for Information, Review of TDU Curtailment Procedures and Service Restoration Priorities Plans,** issued March 1, 2011. Funding for this workshop was obtained from an American Reinvestment and Recovery Act (ARRA) grant received by the State Energy Conservation Office from the DOE.

This notice is not a notice of proposed rulemaking; however, the information discussed during the workshop may assist the commission in developing policy or determining the necessity for a related rulemaking.

Questions concerning the workshop or this notice should be referred to Brian Davison, Infrastructure & Reliability Division at (512) 936-7173 for the curtailment issues or Regina Chapline, Infrastructure & Reliability Division at (512) 936-7392 for service restoration issues. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136.

TRD-201104202
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: October 5, 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: CHANGES were made to specifications.

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 PUCT staff, the contractor will evaluate the costs and benefits of ETI joining a regional transmission organization and make findings and recommendations, as specified below:

- Analyze and evaluate the cost-benefit studies and related addendum 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 Entergy's allocation of costs and benefits to the OpCos in accordance with the Entergy System Agreement (ESA).

- Analyze and evaluate Entergy's recommendation to join MISO, including its supporting analysis of the costs and benefits of joining SPP or MISO.

- Analyze and evaluate relevant documents such as the MISO-SPP Joint Operating Agreement and the MISO tariff waiver request for Entergy to join MISO.

- 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 state 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.

The contractor will provide hearing services under the direction of PUCT staff who will review the contractor's analysis, review any proposed testimony, conduct direct and re-direct examination of the contractor's witness, if any, and generally manage the staff case before, during, and after a hearing.

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-201104084
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: September 29, 2011

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Office of Public Utility Counsel

Notice of Annual Public Hearing

Pursuant to the Public Utility Regulatory Act, Texas Utilities Code Annotated §13.064 (Vernon 2007 & Supp. 2010) (PURA), the Office of Public Utility Counsel (Office) will conduct its annual public hearing.

The public hearing will be held on the date and time and at the location indicated below.

Wednesday, November 9, 2011, from 11:30 a.m. - 1:30 p.m.

South Meeting Room - City Council Chambers

500 Rio Concho Drive

San Angelo, Texas 76903

All interested persons are invited to attend and provide input.

The Office represents the interest of residential and small commercial consumers in electric and telecommunications proceedings before the Public Utility Commission of Texas, Electric Reliability Council of Texas, state and federal courts, and federal regulatory bodies. The Office seeks public input to assist the Office in developing a plan of priorities, and seeks comments on the Office's functions and effectiveness.

Contact Michele Gregg, P.O. Box 12397, Austin, Texas 78711-2397 or (512) 936-7500 or (877) 839-0363 for further information.

TRD-201104050
Sheri Givens
Public Counsel
Office of Public Utility Counsel
Filed: September 28, 2011

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Texas Department of Transportation

Aviation Division - Request for Proposal for Professional Engineering Services

The City of Port Aransas, through its agent, the Texas Department of Transportation (TxDOT), intends to engage an aviation professional engineering firm for services pursuant to Government Code, Chapter 2254, Subchapter A. TxDOT Aviation Division will solicit and receive proposals for professional aviation engineering design services described below.

The following is a listing of proposed projects at Mustang Beach Airport during the course of the next five years through multiple grants.

Current Project: The City of Port Aransas. TxDOT CSJ No.: 1216PARAN. Scope: Provide engineering/design services for environmental assessment, runway, taxiway, and runway safety area improvements, rehabilitate and mark Runway 12-30 and partial parallel taxiway and stubs, rehabilitate terminal apron, replace medium intensity runway lighting Runway 12-30, and install security fencing, terminal area lighting, and video surveillance at the Mustang Beach Airport.

The HUB goal for the current project is 8%. TxDOT Project Manager is Stephanie Kleiber, P.E.

Future scope work items for engineering/design services within the next five years may include the following:

1. Extend taxiway to Runway 12 end
2. Extend Runway 30
3. Extend taxiway to Runway 30
4. Expand apron
5. Improve Runway 30 RSA to include ditch relocation
6. Extend medium intensity lighting
7. Rehabilitate and mark paved areas
8. Install additional fencing

The City of Port Aransas reserves the right to determine which of the above scope of services may or may not be awarded to the successful

firm and to initiate additional procurement action for any of the services above.

To assist in your proposal preparation the criteria, 5010 drawing, project diagram, and most recent Airport Layout Plan are available online at www.txdot.gov/avn/avninfo/notice/consult/index.htm by selecting "Port Aransas." The proposal should address a technical approach for the current scope only.

Firms shall use page 4, Recent Airport Experience, to list relevant past projects for both current and future scope.

Interested firms shall utilize the latest version of Form AVN-550, titled "Aviation Engineering Services Proposal." The form may be requested from TxDOT Aviation Division, 125 East 11th Street, Austin, Texas 78701-2483, phone number, 1-800-68-PILOT (74568). The form may be emailed by request or downloaded from the TxDOT web site at http://www.txdot.gov/business/projects/aviation.htm. The form may not be altered in any way. All printing must be in black on white paper, except for the optional illustration page. Firms must carefully follow the instructions provided on each page of the form. Proposals may not exceed the number of pages in the proposal format. The proposal format consists of seven pages of data plus two optional pages consisting of an illustration page and a proposal summary page. A prime provider may only submit one proposal. If a prime provider submits more than one proposal, that provider will be disqualified. Proposals shall be stapled but not bound in any other fashion. PROPOSALS WILL NOT BE ACCEPTED IN ANY OTHER FORMAT.

ATTENTION: To ensure utilization of the latest version of Form AVN-550, firms are encouraged to download Form AVN-550 from the TxDOT website as addressed above. Utilization of Form AVN-550 from a previous download may not be the exact same format. Form AVN-550 is a PDF Template.

Please note:

Five completed, unfolded copies of Form AVN-550 **must be received** by TxDOT Aviation Division at 150 East Riverside Drive, 5th Floor, South Tower, Austin, Texas 78704 no later than November 8, 2011 at 4:00 p.m. Electronic facsimiles or forms sent by email will not be accepted. Please mark the envelope of the forms to the attention of Sheri Quinlan.

The consultant selection committee will be composed of Aviation Division staff members and one local government member. The final selection by the committee will generally be made following the completion of review of proposals. The committee will review all proposals and rate and rank each. The criteria for evaluation of engineering proposals can be found at http://www.txdot.gov/business/projects/aviation.htm. All firms will be notified and the top rated firm will be contacted to begin fee negotiations. The selection committee does, however, reserve the right to conduct interviews for the top rated firms if the committee deems it necessary. If interviews are conducted, selection will be made following interviews.

Please contact TxDOT Aviation for any technical or procedural questions at 1-800-68-PILOT (74568). For procedural questions, please contact Sheri Quinlan, Grant Manager. For technical questions, please contact Stephanie Kleiber, P.E., Project Manager.

TRD-201104200
Bob Jackson
General Counsel
Texas Department of Transportation
Filed: October 5, 2011

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Aviation Division - Request for Proposal for Professional Services

The Aviation Division of the Texas Department of Transportation (TxDOT) intends to enter into contracts with prime providers pursuant to Texas Government Code, Chapter 2254, Subchapter A, for professional surveying services including fee acquisition and avigation easement for a five year contract period.

TxDOT CSJ No. 12AVSURVY

Project Description and Work to be Performed:

The Aviation Division of TxDOT intends to enter into one or two contracts with prime providers to perform professional surveying services. The work to be performed consists of surveying airport runway protection zones, threshold sighting surfaces, preparation of airport property maps, field notes, parcel plats, property descriptions, avigation easement surveys, and plan profile plats of approach surfaces with elevations.

Work will be performed at various locations within the 254 counties of the state of Texas.

Contracted firms will be required to provide on-demand surveying services throughout the state with up to five days advance notification.

Services to be Provided by the Surveyor-Fee Acquisition:

1. Surveyor will obtain Right of Entry from the property owner prior to entering the property.

2. Applicable Texas Board of Professional Land Surveying (TBPLS), Texas Society of Professional Surveyors (TSPS), and TxDOT standards shall be followed for the type of survey being preformed.

3. Acquisition areas will be monumented with materials that will remain relatively permanent and stable for the area. The property description will reference monuments set or found per current TBPLS regulations. Taking lines will be marked with a stake and lathe every 100 linear feet (LF).

4. Property descriptions and parcel plats shall include the size of any remainder tract created when surveying a partial acquisition. This area may be calculated using deed information. An additional sketch will depict the physical relationship of the partial acquisition to the parent tract.

5. Scale selected should allow presentation on 8 and 1/2 x 11 inch paper, unless another size is required for legibility. Only the scales from an engineer's scale (10, 20, 30, 40, 50, 60 and multiples of 10) may be used.

6. Project units should be US Survey Feet, Horizontal; North American Datum (NAD) 1983 (1993 Adjustment), Vertical; and North American Vertical Datum (NAVD) 1988, unless the project site dictates another system for data compatibility.

7. Each Parcel Plat should note owner's name and area of the whole property. On partial acquisitions, the area to be acquired and remaining acreage should also be noted.

8. Furnish five original signed/sealed property descriptions and plats for each parcel.

Services to be Provided by the Surveyor-Avigation Easement:

1. Surveyor will obtain right of entry from the property owner prior to entering the property.

2. Applicable TBPLS, TSPS and TxDOT standards shall be followed for the type of survey being preformed.

3. Acquisition areas will be monumented with materials that will remain relatively permanent and stable for the area. The property description will reference monuments set or found per current TBPLS regulations.

4. Elevations of approach surface will be determined and shown on plat and plan profile view for each parcel. Elevations will be shown for the runway end (threshold) point where the approach surface comes into contact with the subject property at the nearest point to the threshold and the point the approach surface departs the subject property at the furthest point from the threshold.

5. Determine elevations of all improvements and vegetation penetrations in part taken. Show height of all improvements and vegetation penetrations on profile. Show ground contour along extended runway centerline every 100 feet.

6. Determine elevations on all property corners.

7. Property descriptions and parcel plats shall include the size of any remainder tract created when surveying a partial acquisition. This area may be calculated using deed information. An additional sketch will depict the physical relationship of the partial acquisition to the parent tract.

8. Scale selected should allow presentation on 8 and 1/2 x 11 inch paper, unless another size is required for legibility. Only the scales from an engineer's scale (10, 20, 30, 40, 50, 60 and multiples of 10) may be used.

9. Project units should be US Survey Feet, Horizontal; North American Datum (NAD) 1983 (1993 Adjustment), Vertical; and North American Vertical Datum (NAVD) 1988, unless the project site dictates another system for data compatibility.

10. Each Parcel Plat should note owner's name and area of the whole property. On partial acquisitions, the area to be acquired and remaining acreage should also be noted.

11. Furnish five original certified property descriptions and plats for each parcel.

Selection Requirements:

The proposed team must demonstrate that a professional land surveyor registered or licensed in Texas will sign and/or seal the work performed on the contract. For purposes of executing a contract and doing work with TxDOT, the prime provider must be registered with the Texas Board of Professional Land Surveying for surveying contracts. The proposing firm must demonstrate a familiarity with the Texas Department of Transportation Surveying Manual, Chapter 6. The selected firm must perform 30 percent of the actual contract work.

Historically Underutilized Business (HUB) Goal/Disadvantaged Business Enterprise (DBE):

The assigned HUB/DBE goal for participation in the work to be performed under this contract will be race neutral. Services for HUB or DBE will be reported dependent upon the funding utilized for each project.

Selection Criteria:

TxDOT will evaluate proposals using the following criteria:

1. Working knowledge of TxDOT's Surveying Manual, Chapter 6. (20 points)

2. The project manager's experience with airports, airport property maps and aviation related surveying. (30 points)

3. The project manager's experience with approach surfaces for avigation easements. (30 points)

4. Ability to perform on-demand services and ability to adhere to schedules and deadlines. (20 points)

Proposal Procedure:

The successful firms will be selected on the basis of a proposal of no more than five (5) typed, 8 and 1/2 x 11 inch single sided pages, using no smaller than a 12 pitch font size. In addition to the five (5) aforementioned pages, please include one (1) sketch of previous work showing a plat sketch depicting fee simple interest and one (1) plat sketch of previous work showing the plan profile of an avigation easement. The proposal will systematically address the four criteria listed above and data provided below, and will be scored accordingly.

At a minimum, the proposal must include:

1. The Request for Proposal number, name of firm, address, email address, telephone number and contact information for key personnel.

2. Information showing the team's project understanding and approach, the project manager's experience with similar projects, similar project-related experience of the task leaders responsible for the major work categories and other pertinent information addressed in this notice. For each similar project referenced, identify either the project manager's or the task leader's specific role(s) and work contributed.

3. List of ten recent relevant projects within the last five years.

4. Name and contact information (mailing address, email address, telephone number) for at least three prime provider client references for similar related projects. Members of the consultant selection committee consisting of Scott Bryan, Darryl Zercher, and Bob Harwood may not be used as references.

5. Insert two illustration pages no larger than 8 and 1/2 x 11 inches in size of a plat sketch depicting a fee simple interest and a plat sketch depicting the plan profile of an avigation easement.

Contract Terms:

For each individual project, the selected firm will submit a proposed schedule and price for surveying based on the scope provided by the TxDOT Aviation Project Manager for approval. The TxDOT Project Manager may add or delete specific requirements based on the complexity and/or budget constraints of each individual project. Compensation for individual projects shall be based on costs for required surveys that are commensurate with industry standards, plus travel expenses, and per diem when appropriate. On occasion, if mutually beneficial, a lump sum fee for a project may be allowed.

Deadline:

Five unfolded copies of the proposal **must be received** by TxDOT Aviation Division at 150 East Riverside Drive, 5th Floor, South Tower, Austin, Texas 78704 no later than **November 8, 2011, 4:00 p.m.** Electronic facsimiles or forms sent by email will not be accepted. Please mark the envelope of the forms to the attention of Beverly Longfellow.

The consultant selection committee will be composed of TxDOT staff members. The final selection by the committee will generally be made following the completion of review of proposals. The committee will review all proposals and rate and rank each. All firms will be notified and the top rated firms will be contacted to begin fee negotiations. The selection committee does, however, reserve the right to conduct interviews for the top rated firms if the committee deems it necessary. If interviews are conducted, selection will be made following interviews.

If there are any procedural questions, please contact Beverly Longfellow, Grant Manager at 1-800-68-PILOT (74568). Please contact Scott Bryan, Project Manager for technical questions at 1-800-68-PILOT (74568).

TRD-201104169
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Filed: October 3, 2011

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Notice of Intent - North Houston Highway Improvement Project, Harris County, Texas

Pursuant to 43 TAC §2.5(e)(2), the Texas Department of Transportation (department), in cooperation with the Federal Highway Administration, is issuing this notice to advise the public that an Environmental Impact Statement (EIS) will be prepared for a proposed transportation project. The limits of the proposed North Houston Highway Improvement Project begin at the interchange of United States Highway (US) 59 and State Highway (SH) 288 and follow northward along IH 45 to the interchange of IH 45 and Beltway 8 North, a distance of approximately 16 miles. The proposed project area also includes portions of IH 10, IH 610, US 59, SH 288 near the downtown Houston area, and the Hardy Toll Road located north of downtown Houston. Projected increases in population and employment in the Houston metropolitan area will contribute to additional IH 45 congestion, which is already serious to severe. The proposed North Houston Highway Improvement Project is needed to add roadway capacity to accommodate existing and anticipated future traffic, and to bring the roadway up to current design standards, which would improve safety and provide for more efficient movement of people and goods. Additional capacity is also needed to aid in evacuation events. The purpose of the proposed North Houston Highway Improvement Project is to create additional roadway capacity to manage congestion, enhance safety, and to improve mobility and operational efficiency.

The EIS will evaluate potential impacts from construction and operation of the project, including, but not limited to, the following: impacts or potential displacements to residents and businesses; detours; air and noise impacts from construction equipment, and operation of the project; water quality impacts from the construction area and from roadway storm water runoff; impacts to waters of the United States; impacts to historic and archeological resources; impacts to floodplains; impacts to hazardous materials; impacts to socio-economic resources (including environmental justice and limited English proficiency populations); indirect impacts; cumulative impacts; impacts to land use; impacts to vegetation; impacts to wildlife; and impacts to aesthetic and visual resources.

North-Hardy Planning Studies: Alternative Analysis Report (Highway Component) prepared for the Metropolitan Transit Authority of Harris County, the department, and the Houston-Galveston Area Council was completed in November 2005. The report evaluated alternatives for transportation improvements within the project corridor. The report determined that even with parallel high-capacity transit and the extension of the Hardy Toll Road to downtown Houston, additional capacity would be needed in the corridor. For the North Houston Highway Improvement Project EIS, the department will consider a reasonable range of alternatives intended to satisfy the identified need and purpose. The alternatives will include the no-build alternative as well as managed lane/tolling alternatives. Managed lanes takes advantage of limited entry and exit opportunities, and may include the possible collection of tolls as means of value pricing. Value pricing means that tolls would change based on peak-hour trips or vehicle occupancy.

The project may require the following approvals by the federal government: Department of the Army permit, and U.S. Coast Guard bridge permit. The actual approvals required may change after the department completes field surveys and selects the alignment for the project.

A scoping meeting is an opportunity for participating agencies, cooperating agencies and the public to be involved in defining the need and purpose for the proposed project, to assist in determining the range of alternatives for consideration in the draft EIS, and to comment on methodologies to evaluate alternatives. The department will publish notice that scoping meetings will be held. The notice will be published in newspapers of general circulation in the project area at least 30 days prior to the meetings, and again approximately 10 days prior to the meetings.

The department will complete the procedures for public participation and coordination with other agencies as described in one or both the National Environmental Policy Act and state law. In addition to scoping meetings, the department will hold a series of meetings to solicit public comment during the environmental review process. They will be held during appropriate phases of the project development process. Public notices will be given stating the date, time, and location of the meeting or hearing and will be published in English as well as Spanish. Provisions will be made for those with special communication needs, including translation if requested. The department will also send correspondence to federal, state, and local agencies, and to organizations and individuals that have previously expressed or are known to have an interest in the project, that will describe the proposed project and solicit comments. The department invites comments and suggestions from all interested parties to ensure that the full range of issues related to the proposed project are identified and addressed. Comments or questions should be directed to the department at the address set forth below.

The department currently anticipates that the draft EIS will be completed in 2013, and the EIS will be approved in 2016.

Agency Contact: Comments or questions concerning this proposed action and the EIS should be sent to Mark A. Marek, P.E., Interim Director, Environmental Affairs Division, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701, (512) 416-2734.

TRD-201104201
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Filed: October 5, 2011

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Public Hearing Notice - Statewide Transportation Improvement Program

The Texas Department of Transportation will hold a public hearing on Wednesday, November 9, 2011 at 10:00 a.m. at the Texas Department of Transportation, 200 East Riverside Drive, Room 1A-2, in Austin, Texas to receive public comments on the October 2011 Out of Cycle Revisions to the Statewide Transportation Improvement Program (STIP) for FY 2011-2014. The STIP reflects the federally funded transportation projects in the FY 2011-2014 Transportation Improvement Programs (TIPs) for each Metropolitan Planning Organization (MPO) in the state. The STIP includes both state and federally funded projects for the nonattainment areas of Beaumont, Dallas-Fort Worth, El Paso, and Houston. The STIP also contains information on federally funded projects in rural areas that are not included in any MPO area, and other statewide programs as listed.

Title 23, United States Code, §134 and §135 require each designated MPO and the state, respectively, to develop a TIP and STIP as a condition to securing federal funds for transportation projects under Title 23 or the Federal Transit Act (49 USC §5301, et seq.).

Section 134(j) requires an MPO to develop its TIP in cooperation with the state and affected public transit operators and to provide an opportunity for interested parties to participate in the development of the program. Section 135(g) requires the state to develop a STIP for all areas of the state in cooperation with the designated MPOs and, with respect to non-metropolitan areas, in consultation with affected local officials, and further requires an opportunity for participation by interested parties as well as approval by the Governor or the Governor's designee.

A copy of the proposed October 2011 Out of Cycle Revisions to the FY 2011-2014 STIP will be available for review, at the time the notice of hearing is published, at each of the department's district offices, at the department's Transportation Planning and Programming Division offices located in Building 118, Second Floor, 118 East Riverside Drive, Austin, Texas, and on the department's website at:

www.txdot.gov

Persons wishing to review the October 2011 Out of Cycle Revisions to the FY 2011-2014 STIP may do so online or contact the Transportation Planning and Programming Division at (512) 486-5033.

Persons wishing to speak at the hearing may register in advance by notifying Lori Morel, Transportation Planning and Programming Division, at (512) 486-5033 not later than Tuesday, November 8, 2011, or they may register at the hearing location beginning at 9:00 a.m. on the day of the hearing. Speakers will be taken in the order registered. Any interested person may appear and offer comments or testimony, either orally or in writing; however, questioning of witnesses will be reserved exclusively to the presiding authority as may be necessary to ensure a complete record. While any persons with pertinent comments or testimony will be granted an opportunity to present them during the course of the hearing, the presiding authority reserves the right to restrict testimony in terms of time or repetitive content. Groups, organizations, or associations should be represented by only one speaker. Speakers are requested to refrain from repeating previously presented testimony. Persons with disabilities who have special communication or accommodation needs or who plan to attend the hearing may contact the Government and Public Affairs Division, at 125 East 11th Street, Austin, Texas 78701-2483, (512) 463-9957. Requests should be made no later than three days prior to the hearing. Every reasonable effort will be made to accommodate the needs.

Further information on the FY 2011-2014 STIP may be obtained from Lori Morel, Transportation Planning and Programming Division, 118 East Riverside Drive, Austin, Texas 78704, (512) 486-5033. Interested parties who are unable to attend the hearing may submit comments to James L. Randall, P.E., Director, Transportation Planning and Programming Division, 118 East Riverside Drive, Austin, Texas, 78704. In order to be considered, all written comments must be received at the Transportation Planning and Programming office by Monday, November 14, 2011 at 4:00 p.m.

TRD-201104170
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Filed: October 3, 2011

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Texas A&M University System Board of Regents

Announcement of Finalist for the Position of Director of the Texas Engineering Experiment Station

Pursuant to §552.123, Texas Government Code, the following candidate is the finalist for the position of Director of the Texas Engineering Experiment Station of The Texas A&M University System:

Dr. Margaret Katherine Banks

Upon the expiration of 21 days, final action is to be taken by the Board of Regents of The Texas A&M University System.

TRD-201104120
Vickie Spillers
Executive Secretary to the Board
Texas A&M University System Board of Regents
Filed: September 30, 2011

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Workforce Solutions Capital Area

Request for Quotation - Financial Monitoring Services

Workforce Solutions Capital Area Workforce Board is soliciting proposals for Financial Monitoring Services.

Request for Quotation (RFQ) packages may be obtained from Workforce Solutions Capital Area, 6505 Airport Blvd., Suite 101E, Austin, Texas 78752 beginning Wednesday, October 5, 2011, at 1:00 p.m., and thereafter, weekdays from 8:00 a.m. to 5:00 p.m. RFQ packages may be downloaded from the Board's website at www.wfscapitalarea.com or requests for RFQ packages may also be emailed to niki.sanders@wfscapitalarea.com.

Requests for all RFQ packages include a Statement of Receipt that should be signed, dated, and faxed or emailed back to Workforce Solutions Capital Area at (512) 719-4710 or niki.sanders@wfscapitalarea.com. The Statement of Receipt is the last page of the RFQ packet.

All responses to the RFQ must be received by Workforce Solutions Capital Area by 12:00 p.m. (noon) CST on October 21, 2011. The official time is determined by Workforce Solutions Capital Area. ABSOLUTELY NO EXCEPTIONS WILL BE MADE.

All inquiries regarding this solicitation should be directed to Jerry W. Neef at (512) 597-7105.

TRD-201104208
Alan D. Miller
Executive Director
Workforce Solutions Capital Area
Filed: October 5, 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)*