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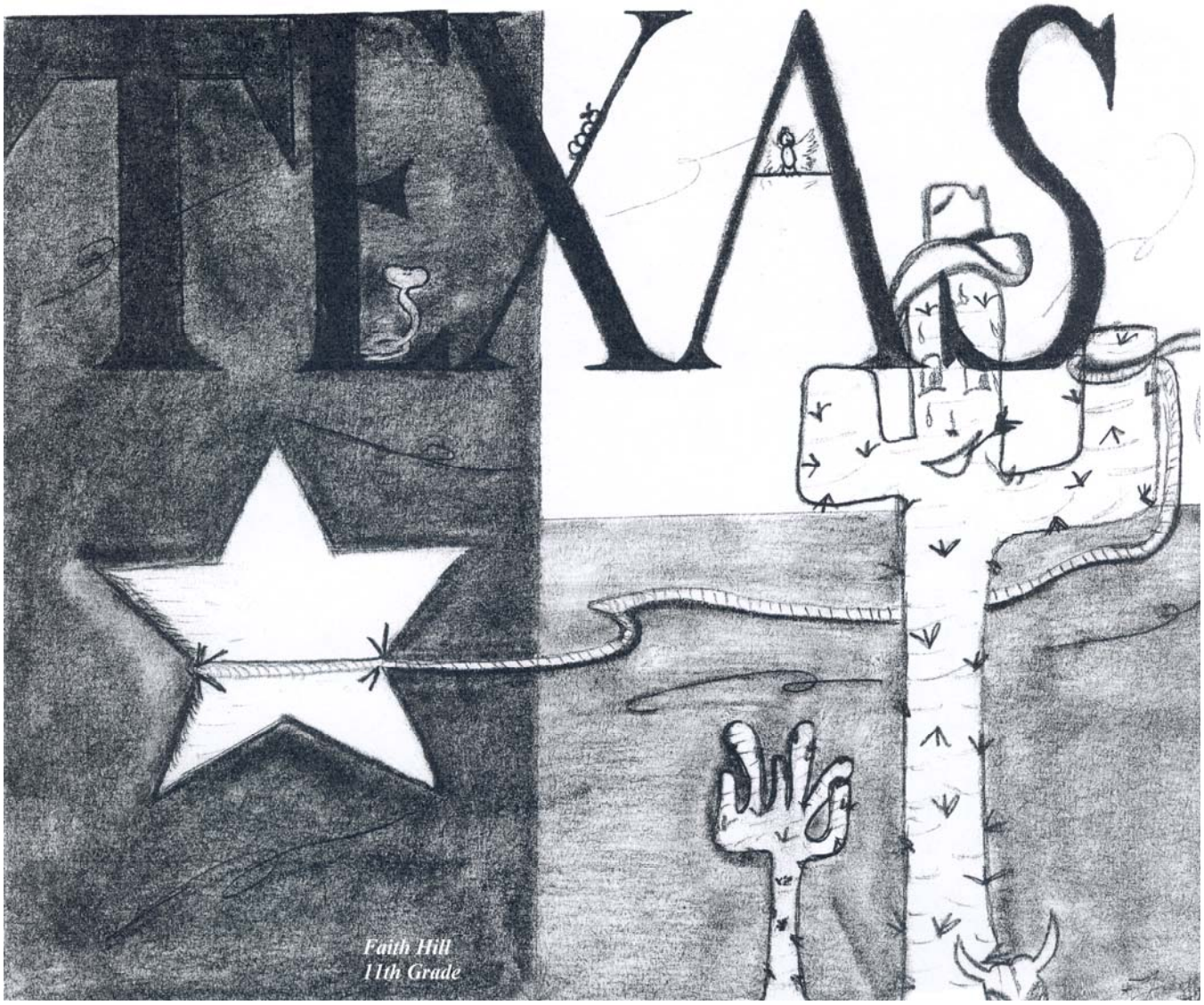

School children's artwork is used to decorate the front cover and blank filler pages of the *Texas Register*. Teachers throughout the state submit the drawings for students in grades K-12. The drawings dress up the otherwise gray pages of the *Texas Register* and introduce students to this obscure but 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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Office of the Secretary of State
P.O. Box 13824
Austin, TX 78711-3824
(512) 463-5561
FAX (512) 463-5569

http://www.sos.state.tx.us
register@sos.state.tx.us

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IN THIS ISSUE

ADOPTED RULES

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-1024-GA

Requestor:

The Honorable Jeff Wentworth, Chair

Select Committee Open Government

Texas State Senate

Post Office Box 12068

Austin, Texas 78711-2068

Re: Authority of a constable with regard to payment of outstanding warrants issued by a justice court (RQ-1024-GA)

Briefs requested by January 7, 2012

RQ-1025-GA

Requestor:

Mr. David U. Flores

Williamson County Auditor

701 South Main St., Ste. 301

Georgetown, Texas 78626

Re: Calculation of a county's rollback tax rate (RQ-1025-GA)

Briefs requested by January 12, 2012

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

TRD-201105545
Jay Dyer
Deputy Attorney General
Office of the Attorney General
Filed: December 13, 2011

♦ ♦ ♦

Opinions

Opinion No. GA-0894

Mr. Andrew C. Hughey

General Counsel

Texas Southern University

3100 Cleburne Avenue

Houston, Texas 77004

Re: Whether Texas Southern University may exchange or grant outright a portion of its real property that contains or is adjacent to a historical cemetery (RQ-0975-GA)

S U M M A R Y

Article III, sections 51 and 52 of the Texas Constitution would not prohibit Texas Southern University from conveying real property to a private entity in exchange for historical papers or a right of access to property, provided such papers or access rights constitute adequate consideration for the real property. Whether the papers or rights constitute adequate consideration is a matter for the University's governing board to determine in the first instance.

Texas Southern University may not grant real property by gift to a private corporation except to serve an authorized purpose of the University.

Opinion No. GA-0895

The Honorable Joel D. Littlefield

Hunt County Attorney

Post Office Box 1097

Greenville, Texas 75403-1097

Re: Authority of a county bail bond board to enact a rule that restricts a bail bond licensee from employing a person who is currently on probation or parole, or who is the defendant in a pending criminal case (RQ-0976-GA)

S U M M A R Y

A rule of the Hunt County Bail Bond Board that restricts a bail bond licensee from employing an individual who is currently on probation or parole, or is the defendant in a pending criminal case, impermissibly imposes burdens on those employees that are additional to and in conflict with section 1704.302 of the Texas Occupations Code. The rule thus exceeds the authority of the Board.

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

TRD-201105532
Jay Dyer
Deputy Attorney General
Office of the Attorney General
Filed: December 13, 2011

♦ ♦ ♦

PROPOSED RULES

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

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

TITLE 1. ADMINISTRATION

PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 353. MEDICAID MANAGED CARE

The Texas Health and Human Services Commission (HHSC) proposes to amend Chapter 353, governing Medicaid managed care, Subchapter A, §§353.1 - 353.5, concerning general provisions; Subchapter B, §§353.101, 353.102, 353.104, and 353.105, concerning provider and member education programs; Subchapter C, §§353.201 - 353.203, concerning member bill of rights and responsibilities; Subchapter E, §§353.403, 353.405, 353.407, 353.409, 353.411, 353.413, 353.415, 353.417, 353.419, and 353.421, concerning standards for Medicaid managed care; and Subchapter G, §§353.601, 353.603, 353.605, and 353.607, concerning the STAR+PLUS program.

HHSC proposes the repeal of Subchapter H, consisting of §§353.701 - 353.703, concerning the Integrated Care Management program.

HHSC proposes new Subchapter H, consisting of §353.701 and §353.702, concerning the STAR Health program; and new Subchapter I, consisting of §353.801 and §353.802, concerning the STAR program.

Background and Justification

The amendments, new rules, and repeals are proposed to comply with certain provisions of Senate Bill (S.B. 7), 82nd Legislature, First Called Session, 2011, and to comply with the cost-saving initiatives in the 2012-13 General Appropriations Act (Article II, Health and Human Services Commission, House Bill 1, 82nd Legislature, Regular Session, 2011).

Section 1.02 of S.B. 7, in part, required HHSC to determine the most cost-effective alignment of Medicaid managed care service delivery areas in Texas and removed the prohibition against health maintenance organization (HMO) service delivery in the South Texas counties of Cameron, Hidalgo, and Maverick. To comply with the Legislature's direction regarding the statewide expansion of the Medicaid managed care program, HHSC is seeking a waiver under Section 1115 of the federal Social Security Act (42 U.S.C. §1315) (1115 waiver). An 1115 waiver must be approved by the Centers for Medicare and Medicaid Services (CMS).

HHSC has submitted a proposal for a 1115 waiver to CMS that is designed to build on existing Texas health care reforms and to redesign health care delivery in Texas consistent with CMS goals to improve the experience of care, improve the health of populations, and reduce the cost of health care without compromising quality. The amendments, new rules, and repeals are proposed to implement state mandates consistent with the provisions of the 1115 waiver, which in part will expand managed care statewide and add dental and pharmacy services to the array of services provided under Medicaid managed care. The addition of pharmacy services into managed care is covered in a separate rulemaking preamble and set of proposed rules being published concurrently but separately in this issue of the *Texas Register.*

A summary of the rule changes attributable to legislative direction, cost-saving initiatives, and implementation of the 1115 waiver follows:

Expansion of the Medicaid Managed Care Program. The expansion of managed care is addressed in Section 1.02 of S.B. 7 and is assumed as a cost savings in the 2012-13 General Appropriations Act. With the statewide expansion of managed care, Primary Care Case Management (PCCM) will no longer be an option for health care delivery in Texas. Clients currently receiving services under PCCM will receive services through STAR beginning March 1, 2012. The proposal deletes references to PCCM throughout Chapter 353. Proposed amendments in Subchapter G update the service areas for STAR+PLUS, including new Jefferson, El Paso, Lubbock, and Hidalgo service areas. New subchapters H and I are added to govern the STAR and STAR Health programs, respectively.

Dental Services. Dental services will be added as a benefit under the Medicaid managed care program. The proposal: (1) adds definitions related to the addition of dental services, including dental MCO, dental contractor and dental home; (2) adds requirements for dental MCOs to participate in Medicaid managed care; (3) identifies which requirements are applicable to dental MCOs, as opposed to health care MCOs; (4) describes standards for access to dental services; and (5) includes requirements relating to dental services and records as part of an MCO's waste, abuse, and fraud prevention and reduction efforts.

The amendments and repeals are also proposed to delete references to the Integrated Care Management (ICM) program. ICM was a Texas Medicaid managed care program designed to address the care needs of people with disabilities or age 65 or older who lived in the Dallas and Tarrant service areas. The program was discontinued in February 2011 when the STAR+PLUS program expanded to those service areas, which made the ICM program obsolete. Therefore, HHSC is proposing to delete references to ICM.

Further, the rules are proposed to update and revise terminology for clarity and consistency; revise Texas Administrative Code (TAC) references as appropriate; update the provisions to match current policy and contract language; clarify language through the use of plain language principles and consistency with the Code Construction Act (Government Code, Chapter 311); and

revise language in accordance with H.B. 1481, 82nd Texas Legislature, Regular Session, 2011, regarding person-first respectful language.

Section-by-Section Summary

Subchapter A, General Provisions

The proposed amendment to §353.1 adds a TAC reference to exclusive provider benefit plans in subsection (b) and adds new subsection (d) to clarify that the rules in Chapter 354 do not apply to managed care, unless indicated in this chapter or in an agreement with an MCO.

The proposed amendment to §353.2 adds new definitions for: capitated services, dual eligible, enrollment, FPL, health care managed care organization (health care MCO), non-capitated services, STAR, STAR Health, STAR+PLUS, and state plan; and adds definitions for dental contractor, dental home, dental managed care organization (dental MCO), dental services, main dental home provider, and main dentist, as dental services are now included in managed care. The definition for medically necessary behavioral health services is now included in the medically necessary health care services definition, which was previously called medically necessary health services. This definition is revised to clarify the medical necessity requirements for Texas Health Steps (THSteps) health and dental services and other Medicaid services. The term 1915(c) nursing facility waiver is replaced with STAR+PLUS Home and Community-Based Waiver Services and the definition is updated. The definitions for action, behavioral health services, covered services, CMS, default enrollment, EPDST-CCP, experience rebate, long term services and supports, and managed care organization (MCO) are clarified. The definitions of adverse determination, managed care, marketing materials, member education program, and provider education program are updated to include dental references. The term value-added service is revised to clarify that these services are not "medical assistance," as defined by §32.003 of the Human Resources Code, and to move substantive provisions to §353.409 (regarding Scope of Services). References to behavioral health are deleted as the term health care services includes behavioral health. Obsolete definitions for and references to core service area, Integrated Care Management (ICM) Program, ICM contractor, managed care plan, and Primary Care Case Management (PCCM) are deleted. The following acronyms and short references are deleted: Commission, QAFI, and TDI.

The proposed amendment to §353.3 makes technical corrections for consistency with the rest of the chapter.

The proposed amendment to §353.4 clarifies which requirements apply only to health care MCOs, and which requirements apply to all MCOs (both health care MCOs and dental MCOs) and deletes subsection (h) as obsolete. A new subsection (h) explains that the section does not apply to pharmacy providers. Provisions regarding out-of-network pharmacy providers are included under a separate set of proposed rules for Chapter 353, Subchapter J, regarding Outpatient Pharmacy Services.

The proposed amendment to §353.5 adds a reference to dental services and adds the terms remedy and monetary remedies to align with MCO contract language.

Subchapter B, Provider and Member Education Programs

The proposed amendment to §353.101 makes technical corrections for consistency with the rest of the chapter.

The proposed amendment to §353.102 adds references to dental services.

The proposed amendments to §353.104 and §353.105 add references to dental services and remove references to behavioral health, as the term health care services includes behavioral health.

Subchapter C, Member Bill of Rights and Responsibilities

The proposed amendment to §353.201 updates a Government Code citation.

The proposed amendments to §353.202 and §353.203 delete the imbedded figures containing the Member Bill of Rights and the Member Bill of Responsibilities, respectively, and incorporate updated requirements for the members' rights and responsibilities into the body of the rules.

Subchapter E, Standards for Medicaid Managed Care

The proposed amendment to §353.403 revises the title of the section to reflect that provisions governing disenrollment have been added. The amendment:

Adds a requirement for beneficiaries to choose an MCO within 15 days from the time notification is mailed or HHSC will default the beneficiary into an MCO.

Updates the methodology used to assign a default MCO or primary care provider (PCP) to a member.

States that beneficiaries who regain Medicaid eligibility within six months after losing eligibility will automatically be re-enrolled in the same MCO.

Deletes subsections (e)(12), (f), (g), and (h), as their provisions are no longer applicable or apply only to PCCM.

Adds new subsection (f) to govern disenrollment procedures if disenrollment is requested by a member or at an MCO's request, and states that members will be notified of disenrollment opportunities no less than annually.

The proposed amendment to §353.405 makes technical corrections for consistency with the rest of the chapter.

The proposed amendment to §353.407 removes an obsolete reference to PCCM and updates TAC references.

The proposed amendment to §353.409 requires an MCO to provide covered services to members, and clarifies that MCOs are not responsible for providing or paying for non-capitated services or member cost-sharing, if any. The proposed amendment to §353.409 also describes the criteria HHSC will use when approving proposed value-added services, and adds that value-added services may be unique to an MCO and limited to members who meet the MCO's qualifications for the services.

The proposed amendment to §353.411 reorganizes the subsections to include the health care MCO accessibility of services information in subsection (a) and new dental MCO accessibility of services information in new subsection (b). Newly renumbered subsections (c) - (i) apply existing requirements to dental MCOs.

The proposed amendment to §353.413 clarifies that the EPSDT requirements listed will be included in all contracts as applicable to each managed care program.

The proposed amendment to §353.415 makes technical corrections for consistency with the rest of the chapter.

The proposed amendment to §353.417 removes obsolete language and requires that the periodic assessment of an MCO's cost-effectiveness, member access, and quality of care under each waiver be conducted according to the terms of the approved federal waiver. The proposed amendment to §353.417 also clarifies that HHSC will determine the need for additional evaluations after completing the evaluations and assessments referenced in subsection (d)(1) - (2).

The proposed amendment to §353.419 requires an MCO to comply with its contract requirements requiring a fiscally sound operation, in addition to the Texas Insurance Code and Texas Department of Insurance rules.

The proposed amendment to §353.421 adds language to clarify that the section applies only to health care MCOs.

Subchapter G, STAR+PLUS

The proposed amendment to §353.601 deletes obsolete information; updates references to the purchasing methods used to select STAR+PLUS MCOs; and updates the list of counties in which the program is available, including counties comprising the new Hidalgo, Lubbock, El Paso, and Jefferson service areas.

The proposed amendment to §353.603 replaces references to 1915(c) nursing facility waiver services with STAR+PLUS Home and Community-Based Waiver Services; and clarifies that dual eligibles receive most of their acute care services through their Medicare provider and their STAR+PLUS Home and Community-Based Waiver Services through the STAR+PLUS MCO.

The proposed amendment to §353.605 specifies that providers of acute and long-term services and supports who traditionally have served Medicaid clients can participate in STAR+PLUS MCOs.

The amendment to §353.607 replaces references to 1915(b) and 1915(c) waiver services with STAR+PLUS program services.

Subchapter H, Integrated Care Management Program

Subchapter H is repealed in its entirety.

Subchapter H, STAR Health

New Subchapter H adds STAR Health program policy.

Proposed new §353.701 states that HHSC administers STAR Health, indicates that rules governing the program will be in accordance with Subchapter E (Standards for Medicaid Managed Care), specifies that HHSC selects STAR Health MCOs using the purchasing methods described in Chapter 391, and notes that the STAR Health program serves members in all areas of the state.

Proposed new §353.702 defines eligibility for participation in the STAR Health program, including the categories of children and young adults who are eligible to participate, and clarifies that, although participants in the Former Foster Care Children in Higher Education program are not Medicaid beneficiaries, they receive the same covered services and benefits as other eligible participants in the STAR Health program.

Subchapter I, STAR

New Subchapter I adds STAR program policy.

Proposed new §353.801 states that HHSC administers STAR, indicates that rules governing the program will be in accordance with Subchapter E (Standards for Medicaid Managed Care), specifies that HHSC selects STAR MCOs using the purchasing methods described in Chapter 391, and notes that the STAR program serves members in all areas of the state.

Proposed new §353.802 requires Medicaid recipients who meet the criteria in the eligibility categories listed to enroll in STAR. Medicaid-eligible children who receive Supplemental Security Income, are not enrolled in Medicare, and reside in a service area where STAR+PLUS is not available may voluntarily enroll in STAR.

Throughout the proposal, the amendments update terminology for clarity and consistency throughout the chapter; revise TAC references as appropriate; clarify language through the use of plain language principles and consistency with the Code Construction Act; and revise language in accordance with H.B. 1481, regarding person-first respectful language.

Fiscal Note

Greta Rymal, Deputy Executive Commissioner for Financial Services, has determined that, for the first five years the proposed amendments, repeals, and new rules are in effect, there are foreseeable implications relating to costs or revenues of state government. There are no foreseeable implications relating to costs or revenues of local governments. There are no anticipated economic costs to persons who are required to comply with the proposed rules. There is no anticipated effect on employment in a local economy.

The estimated fiscal impact calculated for this rulemaking takes into account the expansion of managed care overall resulting from the 2011 legislative session, including the contiguous counties expansion in STAR and STAR+PLUS that occurred in September 2011 and the statewide expansion of managed care to occur in March 2012. The effect on state government for the first five years the proposed amendments, repeals, and new rules are in effect is an estimated general revenue cost savings of $133,905,606 in FY 2012; $252,935,235 in FY 2013; $244,308,503 in FY 2014; $242,471,440 in FY 2015; and $240,071,070 in FY 2016; and an estimated increase in revenue of $4,106,098 in FY 2012; $155,087,517 in FY 2013; $119,557,751 in FY 2014; $113,777,819 in FY 2015; and $122,437,129 in FY 2016.

Small Business and Micro-business Impact Analysis

Under §2006.002 of the Government Code, a state agency proposing an administrative rule that may have an adverse economic effect on small businesses must prepare an economic impact statement and a regulatory flexibility analysis. The economic impact statement estimates the number of small businesses subject to the rule and projects the economic impact of the rule on small businesses. The regulatory flexibility analysis describes the alternative methods the agency considered to achieve the purpose of the proposed rule while minimizing adverse effects on small businesses.

Ms. Rymal has determined that the proposed amendments, repeals, and new rules related to expansion of managed care statewide and the inclusion of dental services into Medicaid managed care program may have an adverse economic effect on small and micro-businesses. The adverse economic effects may reach many types of healthcare providers across the state, some of which are small or micro-businesses as defined by Texas Government Code §2006.001.

It is estimated that approximately 88,000 healthcare providers will be affected by the proposed rules. HHSC does not regu-

late the affected healthcare providers in terms of licensure or business operations, and thus the data necessary to determine whether or how many of those providers are small or micro-businesses is not known. The estimated economic impact to each provider type is as follows:

Figure: 1 TAC Chapter 353--Preamble

As stated in the background and justification section above, HHSC is required to comply with the cost-saving initiatives outlined in the 2012-13 General Appropriations Act, and will achieve those savings through the expansion of managed care. In conducting the regulatory flexibility analysis required by Government Code §2006.002, HHSC determined that there are no feasible alternative methods by which to achieve the goals of the proposed rules and allow HHSC to achieve the required savings. Alternatives include: (1) not to expand managed care; or (2) to expand managed care for most services but carve-out inpatient hospital services in order to comply with other requirements in the General Appropriations Act related to preserving hospital supplemental funding. Neither of those alternatives would allow HHSC to achieve the required savings.

Public Benefit

Billy Millwee, Deputy Executive Commissioner for Health Services, has determined that for each year of the first five years the proposed amendments, new rules, and repeals are in effect, the anticipated public benefit expected as a result of enforcing the rules will be the transformation of the current delivery of care and payment systems in Texas to a system that is more transparent and accountable. Further, the public will benefit from rules that are clearer and reflect current requirements.

Regulatory Analysis

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

Takings Impact Assessment

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

Public Comment

Written comments on the proposed amendments, new rules, and repeals may be submitted to Gary Young, Medicaid/CHIP Division, Texas Health and Human Services Commission, Mail Code H320, 11209 Metric Blvd., Bldg. H, Austin, TX 78758; by fax to (512) 491-1972; or by e-mail to gary.young@hhsc.state.tx.us within 30 days of publication of this proposal in the *Texas Register.*

Public Hearing

A public hearing is scheduled for January 17, 2012 from 9:00 a.m. to 11:00 a.m. in the John H. Winters Building, Public Hearing Room 125, located at 701 W. 51st Street, Austin, Texas 78751. Persons requiring further information, special assistance, or accommodations should contact Leigh A. Van Kirk at (512) 491-2813.

SUBCHAPTER A. GENERAL PROVISIONS

1 TAC §§353.1 - 353.5

Statutory Authority

The amendments are proposed under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; and Human Resources Code §32.021 and Texas Government Code §531.021, which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas and to adopt rules and standards for program administration.

The amendments affect Texas Human Resources Code, Chapter 32, and Texas Government Code, Chapters 531 and 533. No other statutes, articles, or codes are affected by this proposal.

§353.1. Purpose.

(a) The purpose of this chapter is to define the requirements for the Medicaid Managed Care program.

(b) The rules in this chapter [~~Chapter 353~~] must be read in conjunction with:

(1) federal and state statutes; [~~,~~]

(2) rules relating to Medicaid in Chapter 354 [~~254~~] of this title (relating to Medicaid Health Services); [~~,~~] and

(3) except where otherwise indicated, [~~the~~] Texas Department of Insurance rules regarding:

(A) regulation of health maintenance organizations [~~HMOs~~] at 28 TAC Chapter 11; and

(B) exclusive provider benefit plans at 28 TAC Chapter 3, Subchapter KK[~~, except where otherwise indicated~~].

(c) A managed care organization (MCO) must comply with all terms of its contract with the Health and Human Services Commission (HHSC).

(d) Unless otherwise provided in this chapter or incorporated by reference into an agreement with an MCO, HHSC's rules regarding Medicaid Health Services in Chapter 354 of this title do not apply to the Medicaid managed care program.

§353.2. Definitions.

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

~~[(1) 1915(c) Nursing Facility Waiver--The Medicaid waiver program that provides home and community based services to aged, blind and disabled clients as cost-effective alternatives to institutional care in nursing homes.]~~

(1) [~~(2)~~] Action--

(A) An action [~~Action~~] is defined as:

(i) [~~(A)~~] the [~~The~~] denial or limited authorization of a requested Medicaid service, including the type or level of service;

(ii) [~~(B)~~] the reduction, suspension, or termination of a previously authorized service;

(iii) [~~(C)~~] the failure to provide services in a timely manner;

(iv) [~~(D)~~] the denial in whole or in part of payment for a service;

(v) [~~(E)~~] the failure of a managed care organization (MCO) [~~an MCO or the ICM Contractor~~] to act within the timeframes set forth by the Health and Human Services Commission (HHSC) and state and federal law; or

(vi) [~~(F)~~] for a resident of a rural area with only one MCO, the denial of a [~~Medicaid~~] member's request to obtain services outside the network.

(B) "Action" does not include expiration of a time-limited service.

(2) [~~(3)~~] Acute care [~~Care~~]--Preventive care, primary care, and other medical or behavioral health care provided for a condition having a relatively short duration. [~~In the ICM Program, acute care services do not include behavioral health services in the Dallas service area.~~]

(3) [~~(4)~~] Acute care hospital [~~Care Hospital~~]--A hospital that provides acute care services.

(4) [~~(5)~~] Adverse determination [~~Determination~~]--A determination by an MCO [~~or the ICM Contractor~~] that the health care services or dental [~~and behavioral health~~] services furnished, or proposed to be furnished, to a patient are not medically necessary or appropriate.

(5) [~~(6)~~] Agreement or Contract--The formal, written, and legally enforceable contract and amendments thereto between HHSC [~~the Commission~~] and an MCO [~~or the ICM Contractor~~].

(6) [~~(7)~~] Allowable revenue [~~Revenue~~]--All managed care revenue received by the MCO pursuant to the contract during the contract period, including retroactive adjustments made by HHSC. This would include any revenue earned on Medicaid managed care funds such as investment income, earned interest, or third party administrator earnings from services to delegated networks.

(7) [~~(8)~~] Appeal--The formal process by which a member or his or her representative requests a review of the MCO's action [~~or the ICM Contractor's action~~].

(8) [~~(9)~~] Behavioral health service [~~Health Services~~]--A covered service [~~Covered services~~] for the treatment of mental, emotional, [~~health~~] or chemical dependency disorders.

(9) Capitated service--A benefit available to members under the Texas Medicaid program for which an MCO is responsible for payment.

(10) Capitation rate [~~Rate~~]--A fixed predetermined fee paid by HHSC to the MCO each month, in accordance with the contract, for each enrolled member in exchange for which the MCO arranges for or provides a defined set of covered services to the member, regardless of the amount of covered services used by the enrolled member.

(11) Client--Any Medicaid-eligible recipient.

(12) CMS--The Centers for Medicare and Medicaid Services, which is the federal agency responsible for administering Medicare and overseeing state administration of Medicaid [~~and the Children's Health Insurance Program (CHIP)~~].

[~~(13) Commission--The Texas Health and Human Services Commission.~~]

(13) [~~(14)~~] Complainant--A member, or a treating provider or other individual designated to act on behalf of the member, who files a complaint.

(14) [~~(15)~~] Complaint--Any dissatisfaction expressed by a complainant, orally or in writing, to the MCO [~~or the ICM Contractor~~] about any matter related to the MCO [~~or the ICM Contractor~~] other than an action. Subjects for complaints may include[~~, but are not limited to~~]:

(A) the quality of care of services provided;

(B) aspects of interpersonal relationships such as rudeness of a provider or employee; and

(C) failure to respect the [~~Medicaid~~] member's rights.

[~~(16) Core Service Area--The core set of service area counties defined by HHSC for the Medicaid managed care programs in which Medicaid eligibles will be required to enroll in the MCO.~~]

(15) [~~(17)~~] Covered services [~~Services~~]--Unless a service or item is specifically excluded under the terms of the state plan, a federal waiver, a managed care services contract, or an amendment to any of these, the phrase "covered services" means all health care or dental services or items that the MCO must arrange to provide and pay for on a member's behalf under the terms of the contract executed between the MCO and HHSC, including: [~~Health care services the MCO must arrange to provide to member, including all services required by the Commission, state and federal law, and all value-added services negotiated by the Commission and an MCO. Covered services include behavioral health services.~~]

(A) all services or items comprising "medical assistance" as defined in §32.003 of the Human Resources Code; and

(B) all value-added services under such contract.

(16) [~~(18)~~] Cultural competency [~~Competency~~]--The ability of individuals and systems to provide services effectively to people of various cultures, races, ethnic backgrounds, and religions in a manner that recognizes, values, affirms, and respects the worth of the individuals and protects and preserves their dignity.

(17) [~~(19)~~] Day--A calendar day, unless specified otherwise.

(18) [~~(20)~~] Default enrollment [~~Enrollment~~]--The process established by HHSC to assign a [~~mandatory~~] Medicaid managed care [~~Managed Care~~] enrollee to an MCO when the enrollee has not selected an MCO [~~has not been selected by the client~~].

(19) Dental managed care organization (dental MCO)--A dental indemnity insurance provider or dental health maintenance organization licensed or approved by the Texas Department of Insurance.

(20) Dental contractor--A dental MCO that is under contract with HHSC for the delivery of dental services.

(21) Dental home--A provider who has contracted with a dental MCO to serve as a dental home to a member and who is responsible for providing routine preventive, diagnostic, urgent, therapeutic, initial, and primary care to patients, maintaining the continuity of patient care, and initiating referral for care. Provider types that can serve as dental homes are general dentists and pediatric dentists.

(22) Dental service--The routine preventive, diagnostic, urgent, therapeutic, initial, and primary care provided to a member and included within the scope of HHSC's agreement with a dental contractor. For purposes of this chapter, "dental service" does not include a device for a craniofacial anomaly or an emergency service provided in a hospital, urgent care center, or ambulatory surgical center setting involving dental trauma. These types of services are treated as health care services in this chapter.

(23) [~~(21)~~] Disproportionate Share Hospital (DSH)--A hospital that serves a higher than average number of Medicaid and

other low-income patients and receives additional reimbursement from the State.

(24) [~~(22)~~] Disability--A physical or mental impairment that substantially limits one or more of an individual's major life activities, such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, socializing, or [~~and/or~~] working.

(25) Dual eligible--A Medicaid recipient who is also eligible for Medicare.

(26) [~~(23)~~] Elective enrollment [~~Enrollment~~]--Selection of a primary care provider (PCP) and MCO by a client during the enrollment period established by HHSC [~~the Commission~~].

(27) [~~(24)~~] Emergency behavioral health condition [~~Behavioral Health Condition~~]--Any condition, without regard to the nature or cause of the condition, that in the opinion of a prudent layperson possessing an average knowledge of health and medicine:

(A) requires immediate intervention and/or medical attention without which the client would present an immediate danger to themselves or others;[~~,~~] or

(B) renders the client incapable of controlling, knowing, or understanding the consequences of his or her actions.

(28) [~~(25)~~] Emergency service [~~Services~~]--A covered [~~Covered~~] inpatient and outpatient service, [~~services~~] furnished by a network provider or out-of-network provider that is qualified to furnish such service, [~~services~~] that is [~~are~~] needed to evaluate or stabilize an emergency medical condition and/or an emergency behavioral health condition. For health care MCOs, the term "emergency service" includes post-stabilization care services [~~, including Post-Stabilization Care Services~~].

(29) [~~(26)~~] Emergency medical condition [~~Medical Condition~~]--A medical condition manifesting itself by acute symptoms of recent onset and sufficient severity (including severe pain), such that a prudent layperson, who possesses an average knowledge of health and medicine, could reasonably expect the absence of immediate medical care could result in:

(A) placing the patient's health in serious jeopardy;

(B) serious impairment to bodily functions;

(C) serious dysfunction of any bodily organ or part;

(D) serious disfigurement; or

(E) serious jeopardy to the health of a pregnant woman or her unborn child.

(30) [~~(27)~~] Encounter--A covered service or group of covered services delivered by a provider to a member during a visit between the member and provider. This also includes value-added services.

(31) Enrollment--The process by which an individual determined to be eligible for Medicaid is enrolled in a Medicaid MCO serving the service area in which the individual resides.

(32) [~~(28)~~] EPSDT--The federally mandated Early and Periodic Screening, Diagnosis and Treatment program defined in 25 TAC Chapter 33 [~~of Title 25 of the Texas Administrative Code~~]. The State of Texas has adopted the name Texas Health Steps (THSteps) for its EPSDT program.

(33) [~~(29)~~] EPSDT-CCP--The Early and Periodic Screening, Diagnosis and Treatment-Comprehensive Care Program described in Chapter 363 of this title (relating to Texas Health Steps Comprehensive Care Program) [~~, includes medically necessary benefits for children under 21 years of age in addition to benefits available to the general Medicaid population~~].

(34) [~~(30)~~] Exclusive provider benefit plan [~~Provider Benefit Plan~~] (EPBP)--An MCO [~~A Managed Care Plan~~] that complies with 28 TAC §§3.9201 - 3.9212, relating to the Texas Department of Insurance's requirements for EPBPs [~~exclusive provider benefit plans~~], and contracts with HHSC [~~the Commission~~] to provide [~~CHIP or~~] Medicaid coverage.

(35) [~~(31)~~] Experience rebate [~~Rebate~~]--The portion of the MCO's net income before taxes that is returned to the State in accordance with the MCO's contract with HHSC [~~28 TAC Chapter 11, Subchapter S, relating to solvency standards for Medicaid MCOs~~].

(36) [~~(32)~~] Fair hearing [~~Hearing~~]--The process adopted and implemented by HHSC in Chapter 357, Subchapter A of this title (relating to Uniform Fair Hearing Rules) [~~Title, relating to Medical fair hearing rules,~~] in compliance with federal regulations and state rules relating to Medicaid fair hearings.

(37) FPL--Federal Poverty Level Income Guidelines.

(38) [~~(33)~~] Federally Qualified Health Center (FQHC)--An entity certified by CMS to meet the requirements of §1861(aa)(3) of the Social Security Act (42 U.S.C. §1395x(aa)(3)) as a Federally Qualified Health Center that is enrolled as a provider in the Texas Medicaid program.

(39) [~~(34)~~] Federal waiver [~~Waiver~~]--Any waiver permitted under federal law and approved by CMS that allows states to implement Medicaid managed care.

(40) Health care managed care organization (health care MCO)--An entity that is licensed or approved by the Texas Department of Insurance to operate as a health maintenance organization or to issue an EPBP.

(41) [~~(35)~~] Health care services [~~Care Services~~]--The acute care, behavioral health care, and health-related services that an enrolled population might reasonably require in order to be maintained in good health, including, at a minimum, emergency services and inpatient and outpatient services.

(42) [~~(36)~~] Health and Human Services Commission (HHSC)--The single state agency charged with administration and oversight of the Texas [~~state~~] Medicaid program. HHSC's [~~The Commission's~~] authority is established in Chapter 531 of the Texas Government Code.

(43) [~~(37)~~] Health maintenance organization [~~Maintenance Organization~~] (HMO)--An organization that holds a certificate of authority from the Texas Department of Insurance to operate as an HMO under Chapter 843 of the Texas Insurance Code, or a certified Approved Non-Profit Health Corporation formed in compliance with Chapter 844 of the Texas Insurance Code.

(44) [~~(38)~~] Hospital--A licensed public or private institution as defined in the Texas Health and Safety Code at Chapter 241, relating to hospitals, or Chapter 261, relating to municipal hospitals.

~~[(39) Integrated Care Management (ICM) Program--A Medicaid managed care plan where an ICM Contractor manages and coordinates acute care services and LTSS for eligible SSI clients and other eligible Medicaid clients.]~~

~~[(40) ICM Contractor--An entity under contract with HHSC and responsible for managing and coordinating acute care services and long term services and supports (LTSS) for the ICM Program. The ICM Contractor does not pay medical claims.]~~

(45) [~~(41)~~] Long term service and support [~~Term Services and Supports~~] (LTSS)--A service [~~Services~~] provided to a qualified member in his or her [~~members in their~~] home or other community-based settings necessary to provide assistance with activities of daily living to allow the member to remain in the most integrated setting possible. [~~These LTSS services include services provided to all SSI recipients under the Texas State Plan as well as those services available only to persons who qualify for 1915(c) nursing facility waiver services.~~]

(46) Main dental home provider--See definition of "dental home" in this section.

(47) Main dentist--See definition of "dental home" in this section.

(48) [~~(42)~~] Managed care [~~Care~~]--A health care delivery system or dental services delivery system in which the overall care of a patient is coordinated by or through a single provider or organization.

(49) [~~(43)~~] Managed care organization [~~Care Organization~~] (MCO)--A dental MCO or a health care MCO. [~~An entity that has a valid Texas Department of Insurance certificate of authority to operate as an HMO under Chapter 843 of the Texas Insurance Code, an Approved Nonprofit Health Corporation under Chapter 844 of the Texas Insurance Code, an Exclusive Provider Benefit Plan issued by an insurer licensed by the Texas Department of Insurance, as described at 28 TAC Chapter 3, Subchapter KK, relating to Exclusive Provider Benefit Plans.~~]

~~[(44) Managed Care Plan--includes PCCM, HMO, Exclusive Provider Benefit Plans (EPBP), and the ICM Contractor.]~~

(50) [~~(45)~~] Marketing--Any communication from an MCO to a client who is not enrolled with the MCO that can reasonably be interpreted as intended to influence the client's decision to enroll, not to enroll, or to disenroll from a particular MCO.

(51) [~~(46)~~] Marketing materials [~~Materials~~]--Materials that are produced in any medium by or on behalf of the MCO [~~or the ICM Contractor~~] that can reasonably be interpreted as intending to market to potential members. Materials relating to the prevention, diagnosis or treatment of a medical or dental condition are not marketing materials.

(52) [~~(47)~~] Medicaid--The medical assistance program authorized and funded pursuant to Title XIX of the Social Security Act (42 U.S.C. §1396 et seq) and administered by HHSC.

(53) [~~(48)~~] Medical Assistance Only (MAO)--A person who qualifies financially for Medicaid but does not receive Supplemental Security Income (SSI) payments.

(54) [~~(49)~~] Medical home [~~Home~~]--A PCP or specialty care provider who has accepted the responsibility for providing accessible, continuous, comprehensive, and coordinated care to members participating in an [~~HHSC~~] MCO contracted with HHSC [~~or to non-Medicare members participating in the ICM Program~~].

(55) Medically necessary--Means:

(A) For Medicaid members birth through age 20, the following Texas Health Steps services:

(i) screening, vision, and hearing services; and

(ii) other health care services or dental services that are necessary to correct or ameliorate a defect or physical or mental illness or condition. A determination of whether a service is necessary to correct or ameliorate a defect or physical or mental illness or condition:

(I) must comply with the requirements of a final court order that applies to the Texas Medicaid program or the Texas Medicaid managed care program as a whole; and

(II) may include consideration of other relevant factors, such as the criteria described in subparagraphs (B)(ii) - (vii) and (C)(ii) - (vii) of this paragraph.

(B) For Medicaid members over age 20, non-behavioral health services that are:

(i) reasonable and necessary to prevent illnesses or medical conditions, or provide early screening, interventions, or treatments for conditions that cause suffering or pain, cause physical deformity or limitations in function, threaten to cause or worsen a handicap, cause illness or infirmity of a member, or endanger life;

(ii) provided at appropriate facilities and at the appropriate levels of care for the treatment of a member's health conditions;

(iii) consistent with health care practice guidelines and standards that are endorsed by professionally recognized health care organizations or governmental agencies;

(iv) consistent with the member's diagnoses;

(v) no more intrusive or restrictive than necessary to provide a proper balance of safety, effectiveness, and efficiency;

(vi) not experimental or investigative; and

(vii) not primarily for the convenience of the member or provider.

(C) For Medicaid members over age 20, behavioral health services that:

(i) are reasonable and necessary for the diagnosis or treatment of a mental health or chemical dependency disorder, or to improve, maintain, or prevent deterioration of functioning resulting from such a disorder;

(ii) are in accordance with professionally accepted clinical guidelines and standards of practice in behavioral health care;

(iii) are furnished in the most appropriate and least restrictive setting in which services can be safely provided;

(iv) are the most appropriate level or supply of service that can safely be provided;

(v) could not be omitted without adversely affecting the member's mental and/or physical health or the quality of care rendered;

(vi) are not experimental or investigative; and

(vii) are not primarily for the convenience of the member or provider.

~~[(50) Medically Necessary Behavioral Health Services--Those behavioral health services that are documented and:]~~

~~[(A) are reasonable and necessary for the diagnosis or treatment of a mental health or chemical dependency disorder or to improve, maintain or prevent deterioration of functioning resulting from such a disorder;]~~

~~[(B) are in accordance with professionally accepted clinical guidelines and standards of practice in behavioral health care;]~~

~~[(C) are furnished in the most appropriate and least restrictive setting in which services can be safely provided;]~~

~~[(D) are the most appropriate level or supply of service that can be safely provided;]~~

[(E) could not have been omitted without adversely affecting the member's mental and/or physical health or the quality of care rendered;]

[(F) are not experimental or investigational; and]

[(G) are not primarily for the convenience of the member or provider.]

[(51) Medically Necessary Health Services--Health services other than behavioral health services that are documented and:]

[(A) reasonable and necessary to prevent illness or medical conditions or provide early screening, interventions, and/or treatments for conditions that cause suffering or pain, cause physical deformity or limitations in function, threaten to cause or worsen a handicap, cause illness or infirmity of a member, or endanger life;]

[(B) provided at appropriate facilities and at the appropriate levels of care for the treatment of the member's medical condition;]

[(C) consistent with health care practice guidelines and standards that are issued by professionally recognized health care organizations or governmental agencies;]

[(D) consistent with the diagnoses of the condition;]

[(E) no more intrusive or restrictive than necessary to provide a proper balance of safety, effectiveness, and efficiency;]

[(F) are not experimental or investigative; and]

[(G) are not primarily for the convenience of the member or provider.]

(56) [(52)] Member--A person who is eligible for benefits under Title XIX of the Social Security Act and Medicaid, is in a Medicaid eligibility category included in the Medicaid managed care program, and is enrolled in a Medicaid MCO [managed care plan].

(57) [(53)] Member education program [Education Program]--A planned program of education:

(A) concerning access to health care services or dental services through the MCO [or the ICM Contractor] and about specific health or dental topics;

(B) that is approved by HHSC; and

(C) that is provided to members through a variety of mechanisms that must include, at a minimum, written materials and face-to-face or audiovisual communications.

(58) [(54)] Member materials [Materials]--All written materials produced or authorized by the MCO [or ICM Contractor] and distributed to members or potential members containing information concerning the managed care program [MCO or ICM Program]. Member materials include[, but are not limited to,] member ID cards, member handbooks, provider directories, and marketing materials.

(59) Non-capitated service--A benefit available to members under the Texas Medicaid program for which an MCO is not responsible for payment.

(60) [(55)] Outside regular business hours [Regular Business Hours]--As applied to FQHCs and rural health clinics (RHCs), means before 8 a.m. and after 5 p.m. Monday through Friday, weekends, and federal holidays.

(61) [(56)] Participating MCO [MCOs]--An MCO that has [Those MCOs that have] a contract with HHSC [the Commission] to provide services to [Medicaid managed care] members.

[(57) PCCM or Primary Care Case Management--PCCM is a managed care model allowed under federal regulations in which the Commission contracts with providers to form a managed care provider network.]

(62) [(58)] Post-stabilization care service [Care Services]--A covered service, [Covered services,] related to an emergency medical condition, that is [are] provided after a Medicaid member is stabilized in order to maintain the stabilized condition, or, under the circumstances described in 42 C.F.R. [§]§438.114(b) and (e) and 42 C.F.R. §422.113(c)(iii) to improve or resolve the Medicaid member's condition.

(63) [(59)] Primary care provider [Care Provider] (PCP)--A physician or other provider who has agreed with the MCO[, or the ICM Contractor] to provide a medical home to members and who is responsible for providing initial and primary care to patients, maintaining the continuity of patient care, and initiating referral for care.

(64) [(60)] Provider--A credentialed and licensed individual, facility, agency, institution, organization, or other entity, and its employees and subcontractors, that have a contract [Contract] with the MCO [or the ICM Contractor] for the delivery of covered services to the MCO's [or the ICM Program's] members.

(65) [(61)] Provider education program [Education Program]--Program of education about the Medicaid managed care program and about specific health or dental care issues presented by the MCO [or ICM Contractor] to its providers through written materials and training events.

(66) [(62)] Provider network [Network] or Network--All providers that have contracted with the MCO [or ICM Contractor] for the applicable managed care program.

[(63) QAPI--Quality Assessment Performance Improvements.]

(67) [(64)] Quality improvement [Improvement]--A system to continuously examine, monitor, and revise processes and systems that support and improve administrative and clinical functions.

(68) [(65)] Risk--The potential for loss as a result of expenses and costs of the MCO [or ICM Contractor] exceeding payments made by HHSC under the contract.

(69) [(66)] Rural Health Clinic (RHC)--An entity that meets all of the requirements for designation as a rural health clinic under §1861(aa)(1) of the Social Security Act (42 U.S.C. §1395x(aa)(1)) and is approved for participation in the Texas Medicaid program.

(70) [(67)] Service area [Area]--The counties included in any HHSC-defined [core] service area as applicable to each MCO [or the ICM Contractor].

(71) [(68)] Significant traditional provider [Traditional Provider] (STP)--A provider [Providers] identified by HHSC as having provided a significant level of care to the target population, including a DSH. [DSH are also Medicaid STPs.]

(72) STAR--The State of Texas Access Reform (STAR) program that operates under a federal waiver.

(73) STAR Health--The STAR Health program that operates under the Medicaid state plan.

(74) STAR+PLUS--The STAR+PLUS program that operates under one or more federal waivers.

(75) STAR+PLUS Home and Community-Based Waiver Services--The program that provides home and community-based services, as authorized through a federal waiver under §1915(c) or §1115

of the Social Security Act, to qualified clients who are 65 years of age or older, are blind, or have a disability as cost-effective alternatives to institutional care in nursing facilities.

(76) State plan--The agreement between the CMS and HHSC regarding the operation of the Texas Medicaid program, in accordance with the requirements of Title XIX of the Social Security Act.

(77) [~~(69)~~] Supplemental Security Income (SSI)--The federal cash assistance program of direct financial payments to people who are 65 years of age or older, are blind, or have a disability [~~the aged, blind, and disabled~~] administered by the Social Security Administration (SSA) under Title XVI of the Social Security Act. All persons who are certified as eligible for SSI in Texas are eligible for Medicaid. Local SSA claims representatives make SSI eligibility determinations. The transactions are forwarded to the SSA in Baltimore, which then notifies the states through the State Data Exchange (SDX).

~~[(70) TDI--Texas Department of Insurance.]~~

(78) [~~(71)~~] Texas Health Steps (THSteps)--The name adopted by the State of Texas for the federally mandated Early and Periodic Screening, Diagnosis and Treatment (EPSDT) program, described at 42 U.S.C. §1905d(r) and 42 CFR [~~§~~]§440.40 and §§441.40 - 441.62.

(79) [~~(72)~~] Value-added service [~~Value-Added Services~~]--A service provided by an MCO that is not "medical assistance," as defined by §32.003 of the Human Resources Code. [~~Additional services for coverage beyond those specified in the Request For Proposal. Value-Added Services may be actual health care services, benefits, or positive incentives that the Commission determines will promote healthy lifestyles and improve health outcomes. These may include participating in certain health-related programs or engaging in certain health-conscious behaviors. Best practice approaches to delivering covered services are not considered Value-Added Services. For foster children in a statewide Medicaid managed care program, value-added services may include non-health care services and benefits that support the physical, mental and/or developmental well being of the child.~~]

§353.3. Experience Rebate in the Managed Care Program.

Each managed care organization [~~Managed Care Organization~~] (MCO) participating in Medicaid managed care must pay to the state an experience rebate calculated according to the graduated rebate method described in the MCO's contract with the Health and Human Services Commission [~~HHSC~~].

§353.4. Managed Care Organization Requirements Concerning Out-of-Network Providers.

(a) Network adequacy. The Health and Human Services Commission (HHSC) is the state agency responsible for overseeing and monitoring the Medicaid managed care program. The managed care organizations (MCOs) participating in the Medicaid managed care program must offer a network of providers that is sufficient to meet the needs of the Medicaid population who are MCO members. HHSC will monitor MCO members' access to an adequate provider network through reports from the MCOs and complaints received from providers and members. The reporting requirements are discussed in subsection (d) of this section.

(b) MCO requirements concerning treatment of members by out-of-network providers.

(1) The MCO must [~~shall~~] allow referral of its member(s) to an out-of-network provider, must [~~shall~~] timely issue the proper authorization for such referral, and must [~~shall~~] timely reimburse the out-of-network provider for authorized services provided when:

(A) Medicaid covered services are medically necessary and these services are not available through an in-network provider;

(B) a [~~A~~] provider currently providing authorized services to the member requests authorization for such services to be provided to the member by an out-of-network provider; and

(C) the [~~The~~] authorized services are provided within the time period specified in the MCO's authorization. If the services are not provided within the required time period, a new request for referral from the requesting provider must be submitted to the MCO prior to the provision of services.

(2) An MCO may not refuse to reimburse an out-of-network provider for emergency services. Health care MCOs may not refuse to reimburse an out-of-network provider for [~~or~~] post-stabilization care services provided as a result of the MCO's failure to arrange for and authorize a timely transfer of a member.

(3) Health care MCO requirements concerning emergency services.

(A) A health care [~~The~~] MCO must [~~shall~~] allow its members to be treated by any emergency services provider for emergency services, and [~~and/or for~~] services to determine if an emergency condition exists. The health care MCO must pay for such services.

(B) A health care [~~The~~] MCO is prohibited from requiring an authorization for emergency services or for services to determine if an emergency condition exists.

(4) Dental MCO requirements concerning emergency services.

(A) A dental MCO must allow its members to be treated for covered emergency services that are provided outside of a hospital or ambulatory surgical center setting, and for covered services provided outside of such settings to determine if an emergency condition exists. The dental MCO must pay for such services.

(B) A dental MCO is prohibited from requiring an authorization for the services described in subparagraph (A) of this paragraph.

(C) A dental MCO is not responsible for payment of non-capitated emergency services and post-stabilization care provided in a hospital or ambulatory surgical center setting, or devices for craniofacial anomalies. A dental MCO is not responsible for hospital and physician services, anesthesia, drugs related to treatment, and post-stabilization care for:

(i) a dislocated jaw, traumatic damage to a tooth, and removal of a cyst;

(ii) an oral abscess of tooth or gum origin; and

(iii) craniofacial anomalies.

(D) The services and benefits described in subparagraph (C) of this paragraph are reimbursed:

(i) by a health care MCO, if the member is enrolled in a managed care program; or

(ii) by HHSC's claims administrator, if the member is not enrolled in a managed care program.

(5) [~~(4)~~] An MCO [~~MCOs~~] may be required by contract with HHSC to allow members to obtain services from out-of-network providers in circumstances other than those described in paragraphs (1) - (4) [~~(3)~~] of this subsection.

(c) Reasonable reimbursement methodology [~~Reimbursement Methodology~~].

(1) Except as provided in paragraph (3) of this subsection and §353.913 of this chapter (relating to Managed Care Organization Requirements Concerning Out-of-network Outpatient Pharmacy Services), the MCO must [~~shall~~] reimburse an out-of-network, in-area [~~in area~~] service provider the Medicaid fee-for-service [~~Fee-For-Service~~] (FFS) rate in effect on the date of service less five percent [~~(5%)~~], unless the parties agree to a different reimbursement amount. For purposes of this subsection, the Medicaid FFS [~~Fee-For-Service~~] rates are defined as those rates for providers of services in the Texas Medicaid program [~~Program~~] for which reimbursement methodologies are specified in [~~the Texas Administrative Code (TAC) at Title 1, Part 15,~~] Chapter 355 of this title (relating to Reimbursement Rates), exclusive of the rates and payment structures in Medicaid managed care [~~Managed Care~~].

(2) Except as provided in §353.913 of this chapter, an MCO must [~~The MCO shall~~] reimburse an out-of-network, out-of-area service provider at 100 percent of the Medicaid FFS [~~Fee-For-Service~~] rate in effect on the date of service, unless the parties agree to a different reimbursement amount.

(3) In accordance with §533.005(a)(12) and (b) of the Government Code, all post-stabilization care services provided to a member by an out-of-network provider must be reimbursed by a health care [~~the~~] MCO at 100 percent of the Medicaid FFS [~~Fee-For-Service~~] rate in effect on the date of service until the health care MCO arranges for the timely transfer of the member, as determined by the member's attending physician, to a provider in the health care MCO's network.

(d) Reporting requirements.

(1) Each MCO that contracts with HHSC to provide health care services or dental services to members in a service area [~~health care service region~~] must submit quarterly information in its Out-of-Network quarterly report to HHSC.

(2) Each report submitted by an MCO must contain information about members enrolled in each HHSC Medicaid managed care program provided by the MCO. The report must [~~shall~~] include the following information:

(A) The types of services provided by out-of-network providers for the MCO's members [~~of the MCO's Medicaid managed care plan~~].

(B) The scope of services provided by out-of-network providers to the MCO's members [~~of the MCO's Medicaid managed care plan~~].

(C) For a health care MCO, the total [~~Total~~] number of hospital admissions, as well as the number of admissions that occur at each out-of-network hospital. Each out-of-network hospital must be identified.

(D) For a health care MCO, the total [~~Total~~] number of emergency room visits, as well as the total number of emergency room visits that occur at each out-of-network hospital. Each out-of-network hospital must be identified.

(E) Total dollars billed for [~~other outpatient~~] services other than those described in subparagraphs (C) and (D) of this paragraph, as well as total dollars billed by out-of-network providers for other [~~outpatient~~] services.

(F) Any additional information required by HHSC.

(3) HHSC will determine the specific form of the report described in this subsection [~~above~~] and will include the report form as part of the Medicaid managed care contract between HHSC and the MCOs.

(e) Utilization.

(1) Upon review of the reports described in subsection (d) of this section that are submitted to HHSC by the MCOs, HHSC may determine that an MCO exceeded maximum out-of-network [~~Out-of-Network~~] usage standards set by HHSC for out-of-network access to health care services and dental services during the reporting period.

(2) Out-of-network usage standards [~~Out-of-Network Usage Standards~~].

(A) Inpatient admissions [~~Admissions~~]: No more than 15 percent of a health care [~~an~~] MCO's total hospital admissions, by service [~~delivery~~] area, may occur in out-of-network facilities.

(B) Emergency room visits [~~Room Visits~~]: No more than 20 percent of a health care [~~an~~] MCO's total emergency room visits, by service [~~delivery~~] area, may occur in out-of-network facilities.

(C) Other services [~~Outpatient Services~~]: For services that are not included in subparagraph (A) or (B) of this paragraph, no [~~No~~] more than 20 percent of total dollars billed to an MCO [~~for "other outpatient services"~~] may be billed by out-of-network providers.

(3) Special considerations in calculating a health care MCO's out-of-network usage of inpatient admissions and emergency room visits. [~~Considerations in Calculating MCO Out-of-Network Usage of Inpatient Admissions and Emergency Room Visits.~~]

(A) In the event that a health care [~~an~~] MCO exceeds the maximum out-of-network [~~Out-of-Network~~] usage standard set by HHSC for inpatient admissions or emergency room visits [~~Inpatient Admissions or Emergency Room Visits~~], HHSC may modify the calculation of that health care MCO's out-of-network [~~Out-of-Network~~] usage for that standard if:

(i) the [~~The~~] admissions or visits to a single out-of-network facility account for 25 percent [~~%~~] or more of the health care MCO's admissions or visits in a reporting period; and

(ii) HHSC determines that the health care MCO has made all reasonable efforts to contract with that out-of-network facility as a network provider without success.

(B) In determining whether the health care MCO has made all reasonable efforts to contract with the single out-of-network facility described in subparagraph (A) of this paragraph, HHSC will consider at least the following information:

(i) How long the health care MCO has been trying to negotiate a contract with the out-of-network facility;

(ii) The in-network payment rates the health care MCO has offered to the out-of-network facility;

(iii) The other, non-financial contractual terms the health care MCO has offered to the out-of-network facility, particularly those relating to prior authorization and other utilization management policies and procedures;

(iv) The health care MCO's history with respect to claims payment timeliness, overturned claims denials, and provider complaints;

(v) The health care MCO's solvency status; and

(vi) The out-of-network facility's reasons for not contracting with the health care MCO.

(C) If the conditions described in subparagraph (A) of this paragraph are met, HHSC may modify the calculation of the health care MCO's out-of-network [~~Out-of-Network~~] usage for the relevant reporting period and standard by excluding from the calculation the inpatient admissions or emergency room visits [~~Inpatient Admissions or Emergency Room Visits~~] to that single out-of-network facility.

(f) Provider complaints [~~Complaints~~].

(1) HHSC will accept provider complaints regarding reimbursement for or overuse of out-of-network providers and will conduct investigations into any such complaints.

(2) When a provider files a complaint regarding out-of-network payment, HHSC will require the relevant MCO to submit data to support its position on the adequacy of the payment to the provider. The data will include at a minimum a copy of the claim for services rendered and an explanation of the amount paid and of any amounts denied.

(3) Not later than the 60th day after HHSC receives a provider complaint, HHSC will [~~shall~~] notify the provider who initiated the complaint of the conclusions of HHSC's investigation regarding the complaint. The notification to the complaining provider will include:

(A) a [~~A~~] description of the corrective actions, if any, required of the MCO in order to resolve the complaint; and

(B) if [~~If~~] applicable, a conclusion regarding the amount of reimbursement owed to an out-of-network provider.

(4) If HHSC determines through investigation that an MCO did not reimburse an out-of-network provider based on a reasonable reimbursement methodology as described within subsection (c) of this section, HHSC will [~~shall~~] initiate a corrective action plan. Refer to subsection (g) of this section for information about the contents of the corrective action plan.

(5) If, after an investigation, HHSC determines that additional reimbursement is owed to an out-of-network provider, the MCO must:

(A) Pay the additional reimbursement owed to the out-of-network provider within 90 days from the date the complaint was received by HHSC or 30 days from the date the clean claim, or information required that makes the claim clean, is received by the MCO, whichever comes first; or

(B) Submit a reimbursement payment plan to the out-of-network provider within 90 days from the date the complaint was received by HHSC. The reimbursement payment plan provided by the MCO must provide for the entire amount of the additional reimbursement to be paid within 120 days from the date the complaint was received by HHSC.

(6) If the MCO does not pay the entire amount of the additional reimbursement within 90 days from the date the complaint was received by HHSC, HHSC may require the MCO to pay interest on the unpaid amount. If required by HHSC, interest accrues at a rate of 18 percent simple interest per year on the unpaid amount from the 90th day after the date the complaint was received by HHSC, until the date the entire amount of the additional reimbursement is paid.

(7) HHSC will pursue any appropriate remedy authorized in the contract between the MCO and HHSC if the MCO fails to comply with a corrective action plan under subsection (g) of this section.

(g) Corrective action plan [~~Action Plan~~].

(1) A corrective action plan is required by HHSC in the following situations:

(A) The MCO exceeds a maximum standard established by HHSC for out-of-network access to health care services and dental services described in subsection (e) of this section; or

(B) The MCO does not reimburse an out-of-network provider based on a reasonable reimbursement methodology as described within subsection (c) of this section.

(2) A corrective action plan imposed by HHSC will require one of the following:

(A) Reimbursements by the MCO to out-of-network providers at rates that equal the allowable rates for the health care services as determined under [~~Sections~~] §32.028 and §32.0281, Human Resources Code, for all health care services provided during the period:

(i) the MCO is not in compliance with a utilization standard established by HHSC; or

(ii) the MCO is not reimbursing out-of-network providers based on a reasonable reimbursement methodology, as described in subsection (c) of this section;[~~.~~]

(B) Initiation of an immediate freeze by HHSC on the enrollment of additional recipients in the MCO's managed care plan until HHSC determines that the provider network under the managed care plan can adequately meet the needs of the additional recipients;

(C) Education by the MCO of recipients enrolled in the MCO [~~managed care plan~~] regarding the proper use of the MCO's provider network [~~under the health care plan~~]; or

(D) Any other actions HHSC determines are necessary to ensure that Medicaid recipients enrolled in managed care plans provided by the MCO have access to appropriate health care services or dental services, and that providers are properly reimbursed by the MCO for providing medically necessary health care services or dental services to those recipients.

(h) Application to Pharmacy Providers. The requirements of this section do not apply to providers of outpatient pharmacy benefits. [~~The requirements of this rule apply to an MCO contract with HHSC that is in effect on or after September 1, 2006.~~]

§353.5. Internet Posting of Sanctions Imposed for Contractual Violations.

(a) This section pertains to a managed care organization [~~Managed Care Organization~~] (MCO) which the Health and Human Services Commission (HHSC) determines has failed to comply with the terms of a contract to provide health care services or dental services to members enrolled in the MCO [~~clients through a managed care plan issued by the MCO~~].

(b) HHSC is responsible for identifying and investigating contract deficiencies and violations, and taking corrective action to remedy contract deficiencies and violations of an MCO. Corrective actions may include assessment of liquidated damages, contract termination, and/or any other sanction or remedy available under the terms and conditions of the contract or state and federal law and regulations.

(c) If HHSC finds that performance issues, problems, or deficiencies exist with an MCO, as those issues pertain or relate to certain deliverable services, HHSC may investigate a claim of contract violation and determine whether a contract violation has occurred or currently exists.

(d) If HHSC determines that a contract violation has occurred or currently exists, HHSC will decide on the appropriate contract sanction or remedy to be imposed.

(e) If required by contract, HHSC will give written notice to the MCO, describing the contract violation, the contract sanction or remedy to be imposed, the method by which reimbursement (if applicable) to HHSC will be made, and the time frame for resolution of the issue.

(f) When a contract violation has been determined and a sanction or remedy imposed, HHSC will post the following information on HHSC's Internet website:

(1) the [~~The~~] name and address of the MCO;

(2) a [~~A~~] description of the contractual obligation the MCO failed to meet;

(3) the [~~The~~] date of determination of noncompliance;

(4) the [~~The~~] date the sanction or remedy was imposed;

(5) the [~~The~~] maximum sanction or remedy that may be imposed under the contract for the violation; and

(6) the [~~The~~] actual sanction or remedy imposed against the MCO.

(g) HHSC will [~~shall~~] post and maintain the records required by this section on HHSC's Internet website in English and Spanish. HHSC will [~~shall~~] update the list of records on the website at least quarterly.

(h) The information posted on the website will be displayed for twelve months (12) from the date of posting, or for twelve months after completion of the contract sanction or remedy, whichever is later.

(i) HHSC will not post information on HHSC's Internet website that relates to a sanction or remedy while the sanction or remedy is the subject of an administrative appeal or judicial review. Nothing in this subsection creates or enlarges a right to an administrative appeal or judicial review of a contract sanction or remedy.

(j) For purposes of this section, a contract sanction or remedy includes assessment or imposition of one or more of the following [~~contract remedies~~]:

(1) assessment of a penalty;

(2) assessment of liquidated damages or other monetary remedies;

[~~(3) assessment of consequential damages;~~]

(3) [~~(4)~~] imposition of a corrective action plan;

(4) [~~(5)~~] debarment;

(5) [~~(6)~~] involuntary suspension of a contract or portion of a contract; and/or

(6) [~~(7)~~] involuntary termination of a contract or portion of a contract.

(k) For purposes of this section, a sanction is not considered to include:

(1) a vendor hold or similar temporary delay in payment; or

(2) an agreed temporary remedial measure intended to facilitate contract compliance.

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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Steve Aragon
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Texas Health and Human Services Commission
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For further information, please call: (512) 424-6576

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SUBCHAPTER B. PROVIDER AND MEMBER EDUCATION PROGRAMS

1 TAC §§353.101, 353.102, 353.104, 353.105

Statutory Authority

The amendments are proposed under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; and Human Resources Code §32.021 and Texas Government Code §531.021, which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas and to adopt rules and standards for program administration.

The amendments affect Texas Human Resources Code, Chapter 32, and Texas Government Code, Chapters 531 and 533. No other statutes, articles, or codes are affected by this proposal.

§353.101. Purpose.
This subchapter implements the Health and Human Services Commission's authority to establish provider and member education requirements for managed care organizations participating in the Texas Medicaid program [~~state Medicaid Program~~]. This authority is granted in Government Code §531.0211 [~~(Relating to Medicaid Managed Care Program: Rules; Education Programs)~~].

§353.102. Provider and Member Education Programs Generally.
A managed care organization (MCO) that contracts [~~The managed care organizations that contract~~] with the Health and Human Services Commission (HHSC) to provide health care services or dental services through the Medicaid program must provide education programs for providers and members using a variety of techniques and media as described in this chapter and in the contract between HHSC [~~the Health and Human Services Commission~~] and the MCO [~~managed care organization~~].

§353.104. Member Education Program.
A member education program must present information in a manner that is easy to understand. In addition to any requirements specified in the contract between the managed care organization (MCO) and the Health and Human Services Commission, a program must include, at minimum, information on:

(1) a member's rights and responsibilities under the Bill of Rights and the Bill of Responsibilities prescribed in Subchapter C of this chapter (relating to Member Bill of Rights and Responsibilities);

(2) how to access dental services or health care services [~~including how to access behavioral health services~~];

(3) how to access complaint and appeal procedures, the member's right to request a fair hearing, and the process for requesting a fair hearing;

(4) Medicaid policies, procedures, eligibility standards, and benefits;

(5) the policies and procedures of the MCO [~~managed care organization~~]; and

(6) the importance of prevention, early intervention, and appropriate use of services.

§353.105. Provider Education Program.

In addition to any requirements specified in the contract between the managed care organization and the Health and Human Services Commission, a provider education program must include, at minimum, information on:

(1) Medicaid policies, procedures, eligibility standards, and benefits;

(2) the specific problems and needs of Medicaid clients;

(3) screening, identification, and referral processes for coordinating dental services or [~~behavioral health and other~~] health care services; and

(4) members' rights and responsibilities set out in Subchapter [~~subchapter~~] C of this chapter[~~,~~] (relating to [~~Medicaid~~] Member [~~Members'~~] Bill of Rights and Responsibilities).

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 C. MEMBER BILL OF RIGHTS AND RESPONSIBILITIES

1 TAC §§353.201 - 353.203

Statutory Authority

The amendments are proposed under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; and Human Resources Code §32.021 and Texas Government Code §531.021, which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas and to adopt rules and standards for program administration.

The amendments affect Texas Human Resources Code, Chapter 32, and Texas Government Code, Chapters 531 and 533. No other statutes, articles, or codes are affected by this proposal.

§353.201. Purpose.

This subchapter implements the Health and Human Services Commission's authority to adopt a member bill of rights and responsibilities. This authority is granted in Government Code §531.0212 [~~§531.0211 (relating to Medicaid Bill of Rights and Bill of Responsibilities)~~].

§353.202. Member Bill of Rights.

Each managed care organization (MCO) participating in the Texas [~~state's~~] Medicaid program must [~~shall~~] provide to each member [~~Member~~] an easy-to-read, written document describing the member's [~~Member's~~] rights, which must include the following:
[~~Figure: 1 TAC §353.202~~]

(1) Member rights for members of health care MCOs:

(A) You have the right to respect, dignity, privacy, confidentiality and nondiscrimination. That includes the right to:

(i) Be treated fairly and with respect.

(ii) Know that your medical records and discussions with your providers will be kept private and confidential.

(B) You have the right to a reasonable opportunity to choose a managed care organization (MCO) and primary care provider. This is the doctor or health care provider you will see most of the time and who will coordinate your care. You have the right to change to another MCO or provider in a reasonably easy manner. That includes the right to:

(i) Be told how to choose and change your MCO and your primary care provider.

(ii) Choose any MCO you want that is available in your area and choose your primary care provider from that plan.

(iii) Change your primary care provider.

(iv) Change your MCO without penalty.

(v) Be told how to change your MCO or your primary care provider.

(C) You have the right to ask questions and get answers about anything you do not understand. That includes the right to:

(i) Have your provider explain your health care needs to you and talk to you about the different ways your health care problems can be treated.

(ii) Be told why care or services were denied and not given.

(D) You have the right to agree to or refuse treatment and actively participate in treatment decisions. That includes the right to:

(i) Work as part of a team with your provider in deciding what health care is best for you.

(ii) Say yes or no to the care recommended by your provider.

(E) You have the right to use each complaint and appeal process available through the MCO and through Medicaid, and get a timely response to complaints, appeals and fair hearings. That includes the right to:

(i) Make a complaint to your MCO or to the Texas Medicaid program about your health care, your provider or your MCO.

(ii) Get a timely answer to your complaint.

(iii) Use the MCO's appeal process and be told how to use it.

(iv) Ask for a fair hearing from the Texas Medicaid program and get information about how that process works.

(F) You have the right to timely access to care that does not have any communication or physical access barriers. That includes the right to:

(i) Have telephone access to a medical professional 24 hours a day, 7 days a week to get any emergency or urgent care you need.

(ii) Get medical care in a timely manner.

(iii) Be able to get in and out of a health care provider's office. This includes barrier free access for people with disabilities or other conditions that limit mobility, in accordance with the Americans with Disabilities Act.

(iv) Have interpreters, if needed, during appointments with your providers and when talking to your MCO. Interpreters include people who can speak in your native language, help someone with a disability, or help you understand the information.

(v) Be given information you can understand about your MCO's rules, including the health care services you can get and how to get them.

(G) You have the right to not be restrained or secluded when it is for someone else's convenience, or is meant to force you to do something you do not want to do, or is to punish you.

(H) You have a right to know that doctors, hospitals, and others who care for you can advise you about your health status, medical care, and treatment. Your MCO cannot prevent them from giving you this information, even if the care or treatment is not a covered service.

(I) You have a right to know that you are not responsible for paying for covered services. Doctors, hospitals, and others cannot require you to pay copayments or any other amounts for covered services.

(2) Member rights for members of dental MCOs:

(A) You have the right to get accurate, easy-to-understand information to help you make good choices about you or your child's dentists and other providers.

(B) You have the right to know how your child's dentists are paid. You have a right to know about what those payments are and how they work.

(C) You have the right to know how your managed care organization (MCO) decides about whether a service is covered and/or medically necessary. You have the right to know about the people in the MCO's office who decide those things.

(D) You have the right to know the names of the dentists and other providers enrolled with your MCO and their addresses.

(E) You have the right to pick from a list of dentists that is large enough so that your child can get the right kind of care when your child needs it.

(F) You have the right to take part in all the choices about your child's dental care.

(G) You have the right to speak for your child in all treatment choices.

(H) You have the right to get a second opinion from another dentist enrolled in your MCO about what kind of treatment your child needs.

(I) You have the right to be treated fairly by your MCO, dentists and other providers.

(J) You have the right to talk to your child's dentists and other providers in private, and to have your child's dental records kept private. You have the right to look over and copy your child's dental records and to ask for changes to those records.

(K) You have a right to know that dentists, hospitals, and others who care for your child can advise you about your child's health status, medical care, and treatment. Your child's MCO cannot prevent them from giving you this information, even if the care or treatment is not a covered service.

(L) You have a right to know that you are not responsible for paying for covered services for your child. Dentists, hospitals, and others cannot require you to pay any other amounts for covered services.

§353.203. Member Bill of Responsibilities.

Each managed care organization (MCO) participating in the Texas [~~state's~~] Medicaid program must [~~shall~~] provide to each member [~~Member~~] an easy-to-read, written document, which must include the following [~~stating~~]:
[~~Figure: 1 TAC §353.203~~]

(1) Member responsibilities for members of health care MCOs:

(A) You must learn and understand each right you have under the Medicaid program. That includes the responsibility to:

(i) Learn and understand your rights under the Medicaid program.

(ii) Ask questions if you do not understand your rights.

(iii) Learn what choices of managed care organizations (MCOs) are available in your area.

(B) You must abide by the MCO's and Medicaid's policies and procedures. That includes the responsibility to:

(i) Learn and follow your MCO's rules and Medicaid rules.

(ii) Choose your MCO and a primary care provider (PCP) quickly.

(iii) Make any changes in your MCO and PCP in the ways established by Medicaid and by the MCO.

(iv) Keep your scheduled appointments.

(v) Cancel appointments in advance when you cannot keep them.

(vi) Always contact your PCP first for your non-emergency medical needs.

(vii) Be sure you have approval from your PCP before going to a specialist.

(viii) Understand when you should and should not go to the emergency room.

(C) You must share information about your health with your PCP and learn about service and treatment options. That includes the responsibility to:

(i) Tell your PCP about your health.

(ii) Talk to your providers about your health care needs and ask questions about the different ways your health care problems can be treated.

(iii) Help your providers get your medical records.

(D) You must be involved in decisions relating to service and treatment options, make personal choices, and take action to keep yourself healthy. That includes the responsibility to:

(i) Work as a team with your provider in deciding what health care is best for you.

(ii) Understand how the things you do can affect your health.

(iii) Do the best you can to stay healthy.

(iv) Treat providers and staff with respect.

(v) Talk to your provider about all of your medications.

(E) If you think you have been treated unfairly or discriminated against, call the U.S. Department of Health and Human Services (HHS) toll-free at 1-800-368-1019. You also can view information concerning the HHS Office of Civil Rights online at www.hhs.gov/ocr.

(2) Member responsibilities for members of dental MCOs:

(A) You and the MCO both have an interest in seeing your child's dental health improve. You can help by assuming these responsibilities.

(i) You and your child must try to follow healthy habits, such as encouraging your child to exercise, to stay away from tobacco, and to eat a healthy diet.

(ii) You must become involved in the dentist's decisions about you and your child's treatments.

(iii) You must work together with the MCO's dentists and other providers to pick treatments for your child that you have all agreed upon.

(iv) If you have a disagreement with the MCO, you must try first to resolve it using the MCO's complaint process.

(v) You must learn about what the MCO does and does not cover. You must read your Member Handbook to understand how the rules work.

(vi) If you make an appointment for your child, you must try to get to the dentist's office on time. If you cannot keep the appointment, be sure to call and cancel it.

(vii) You must report misuse by dental and health care providers, other members, the MCO, or other dental or medical plans.

(B) If you think you have been treated unfairly or discriminated against, call the U.S. Department of Health and Human Services (HHS) toll-free at 1-800-368-1019. You also can view information concerning the HHS Office of Civil Rights online at www.hhs.gov/ocr.

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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Texas Health and Human Services Commission
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SUBCHAPTER E. STANDARDS FOR MEDICAID MANAGED CARE

1 TAC §§353.403, 353.405, 353.407, 353.409, 353.411, 353.413, 353.415, 353.417, 353.419, 353.421

Statutory Authority

The amendments are proposed under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; and Human Resources Code §32.021 and Texas Government Code §531.021, which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas and to adopt rules and standards for program administration.

The amendments affect Texas Human Resources Code, Chapter 32, and Texas Government Code, Chapters 531 and 533. No other statutes, articles, or codes are affected by this proposal.

§353.403. Enrollment and Disenrollment.

[~~(a) For purposes of this section, managed care plan includes Primary Care Case Management (PCCM), health maintenance organizations (HMO) and Exclusive Provider Benefit Plans (EPBP).~~]

[~~(b) The Commission will determine which Medicaid eligible clients residing in a Medicaid Managed Care service area will be mandatory or voluntary members and which Medicaid eligible clients may be excluded from participation in managed care.~~]

(a) [~~(c)~~] Enrollment by the Health and Human Services Commission (HHSC). HHSC [~~The Commission~~] or its designee will conduct enrollment and disenrollment activities. HHSC [~~The Commission~~] may not contract with a participating managed care organization (MCO) to serve as the administrator for enrollment or disenrollment activities in any area of the state.

(b) [~~(d)~~] Procedures for enrollment. HHSC [~~The Commission~~] will establish procedures for enrollment into participating MCOs [~~managed care plans~~] and with primary care providers (PCPs), including enrollment periods and time limits within which enrollment must occur. Beneficiaries will have 15 calendar days from the date notification is mailed to choose an MCO. If the beneficiary does not choose an MCO within this time period, HHSC will default the beneficiary into an MCO. [~~Members who are mandatory members must select a managed care plan and PCP within the time period allowed by the department or be defaulted to a managed care plan and PCP.~~]

(c) [~~(e)~~] Default assignment. Beneficiaries [~~Mandatory members~~] who fail to select an MCO [~~a managed care plan~~] or PCP during the period established by HHSC [~~the Commission~~] will have an MCO [~~a managed care plan~~] or PCP selected for them by HHSC [~~the Commission~~] or its designee using criteria determined by HHSC [~~the Commission. The Commission shall establish a detailed default methodology that incorporates the following requirements~~].

(d) Default assignment methodology. When possible, the default assignment methodology will take into consideration the beneficiary's history with a PCP or main dental home provider. If this is not possible, HHSC will equitably distribute beneficiaries among qualified

MCOs. HHSC will establish an automated default methodology that includes, to the maximum extent possible, the following criteria:

(1) PCP assignment.

(A) [~~(1)~~] A beneficiary [~~member~~] who does not select a PCP and health care MCO [~~managed care plan~~] will be assigned a PCP and health care MCO [~~managed care plan~~] through the default process established by HHSC [~~the Commission~~].

(B) A beneficiary [~~member~~] who selects a health care MCO [~~managed care plan~~] but not a PCP[~~,~~] will be assigned to the selected health care MCO [~~managed care plan~~] and the beneficiary [~~member~~] will be assigned to a PCP through the default process.

(C) A beneficiary [~~member~~] who selects a PCP but not a health care MCO [~~managed care plan~~] will be assigned to the PCP chosen by the member, subject to PCP restrictions on client age, gender, and capacity, and the beneficiary [~~member~~] will be assigned to a health care MCO [~~managed care plan~~] through a [~~manual~~] default process that is established by HHSC [~~the Commission~~].

(D) Each beneficiary who has not selected a PCP may be defaulted to the PCP with whom there is the most recent Medicaid managed care encounter history. The number of encounters between the beneficiary and the PCP may also be considered.

(E) If there is no Medicaid managed care encounter history, each beneficiary may be defaulted to the PCP with whom there is the most recent traditional Medicaid claims history. The number of prior encounters between the beneficiary and the PCP may also be considered.

(F) If a member does not have history with a PCP, the beneficiary may be defaulted to a PCP on the basis of geographic proximity to the PCP.

(G) HHSC may identify other criteria to be used along with the criteria based on geographic proximity such as, but not limited to, capacity of the PCP, PCP performance, and greatest variance between the percentage of elective and default enrollments (with the percentage of default enrollments subtracted from the percentage of elective enrollments).

(H) PCP restrictions on member age, gender, and capacity will be considered as limitations to default assignments to PCPs.

[~~(2) Each member, who has not selected a PCP, will be defaulted to the PCP with whom there is the most recent Medicaid managed care encounter history. The number of encounters between the member and the PCP may also be considered.~~]

[~~(3) If there is no Medicaid managed care encounter history, each member will be defaulted to the PCP with whom there is the most recent traditional Medicaid claims history. The number of prior encounters between the member and the PCP may also be considered.~~]

[~~(4) If a member does not have history with a PCP, the member will be defaulted to a PCP on the basis of geographic proximity to the PCP.~~]

[~~(5) The Commission may identify other criteria to be used along with the criteria based on geographic proximity such as, but not limited to, capacity of the PCP, PCP performance, and greatest variance between the percentage of elective and default enrollments (with the percentage of default enrollments subtracted from the percentage of elective enrollments).~~]

(2) MCO assignment.

(A) [~~(6)~~] HHSC [~~The Commission~~] will develop a methodology for assignment of defaults to each health care MCO and dental MCO participating in the same Medicaid managed care program and [~~managed care plan in the~~] service area.

(B) Such methodology may be based on MCO [~~managed care plan~~] performance, the greatest variance between the percentage of elective and default enrollments (with the percentage of default enrollments subtracted from the percentage of elective enrollments), capitation rates, market share, or other factors determined by HHSC [~~the Commission~~].

(C) A beneficiary who has not selected a PCP or MCO, and is defaulted to a PCP who is contracted with only one health care MCO will be assigned to that health care MCO.

(D) HHSC will automatically re-enroll a beneficiary in the same MCO if there is a loss of Medicaid eligibility of six months or less.

(3) [~~(7)~~] Use of manual default processes. Members who cannot be assigned to a PCP, health care MCO, or dental MCO [~~and managed care plan~~] on the basis of an automated default process may be assigned through a manual default process determined by HHSC [~~the Commission~~].

(4) [~~(8)~~] Beneficiaries [~~Members~~] with special medical needs may be defaulted on the basis of a manual default methodology if such beneficiaries [~~members~~] can be identified and if the automated default process cannot be administered for such beneficiaries [~~members~~].

[~~(9) A member who is defaulted to a PCP who is contracted with only one managed care plan will be assigned to that managed care plan.~~]

[~~(10) PCP restrictions on Client age, gender, and capacity will be considered as limitations to default assignments to PCPs.~~]

(5) [~~(11)~~] Treatment of family members. Family members will [~~shall~~] be defaulted to the same PCP, health care MCO, and dental MCO [~~managed care plan~~] to the maximum extent possible within the limitation of the MCO's capacity and PCP restrictions on member [~~client~~] age and [~~,~~] gender[~~, and capacity by managed care plan as well as geographic proximity~~].

[~~(12) The detailed default methodology developed by the Commission will be fully applicable to each managed care plan in the Medicaid managed care program by service area. However, the number of defaults assigned to the state-administered PCCM network will be restricted as follows:~~]

[~~(A) If a member is defaulted to a PCP who is contracted only with the PCCM program, the member will be defaulted to the PCCM program;~~]

[~~(B) If a member is defaulted to a PCP who is contracted with the PCCM program and an MCO, the member will be defaulted to the MCO;~~]

[~~(C) If a member is defaulted to a PCP who is contracted with the PCCM program and two or more MCOs, the member will be defaulted to one of the MCOs on the basis of paragraph (6) of this subsection;~~]

[~~(D) A member will be defaulted to the PCCM program if a PCCM provider is the only PCP within reasonable geographical proximity to the member as defined by the Commission.~~]

[~~(f) A member may request to change managed care plan at any time and for any reason, regardless of whether the managed care plan was selected by the member or assigned by the Commission. Disenrollment will take place no later than the first day of the second month~~

after the month in which the member has requested termination. Managed care plans must inform members of disenrollment procedures at the time of enrollment. Managed care plans must notify members in appropriate communication formats.]

[(g) The Commission shall establish limits for the number of members each PCP may accept to ensure members have reasonable access to the provider. The Commission shall develop criteria to allow exceptions to this limit on a case-by-case basis, provided the exceptions do not adversely affect member access.]

[(h) Recipients who are located more than 30 miles from the nearest PCP in a managed care plan cannot be enrolled in the managed care plan unless an exception is made by the Commission.]

(e) [(i)] Modified default process. HHSC [The Commission] has the option to implement a modified default process of member enrollment, when contracting with a new MCO [managed care plan] or when implementing managed care in a new service area.

(f) Disenrollment.

(1) Disenrollment at a member's request.

(A) Members will be informed of disenrollment opportunities no less than annually.

(B) Except as provided in subsection (c) of this section, during the first 90 days of enrollment in an MCO, a member may request to move to another MCO for any reason. After 90 days with an MCO, a member may move one additional time for any reason. If a member shows good cause, he or she also may move to another MCO at any time.

(C) Members of a health care MCO who are in a hospital, residential substance use disorder treatment, or residential detoxification for substance use disorder treatment cannot move to another health care MCO until discharged.

(D) Disenrollment will take place no later than the first day of the second month after the month in which the member has requested a change.

(2) Disenrollment at an MCO's request.

(A) An MCO may submit a request to HHSC that a member be disenrolled without the member's consent in the following limited circumstances:

(i) the member misuses or loans his or her MCO membership card to another person to obtain services;

(ii) the member is disruptive, unruly, threatening or uncooperative to the extent that the member's membership seriously impairs the MCO's or a provider's ability to provide services to the member or to obtain new members, and member's behavior is not caused by a physical or behavioral health condition; or

(iii) the member steadfastly refuses to comply with managed care restrictions (such as repeatedly using the emergency room in combination with a refusal to allow treatment for the underlying medical condition).

(B) An MCO must take reasonable measures to correct a member's behavior prior to requesting disenrollment. Reasonable measures may include providing education and counseling regarding the offensive acts or behaviors.

(C) HHSC will review all requests for disenrollment. HHSC will grant a request if it determines that all reasonable measures taken by the MCO have failed to correct the member's behavior. If HHSC grants a request, it will notify the member of the disenrollment decision and the availability of HHSC's fair hearings process for an appeal of the disenrollment.

§353.405. Marketing.

(a) Managed care organizations [Care Organizations] (MCOs) must submit a marketing plan and all marketing materials to the Health and Human Services Commission (HHSC) for prior written approval.

(b) MCOs may present their marketing materials to eligible Medicaid clients through any method or media determined to be acceptable by HHSC [the Commission]. The media may include[, but are not limited to]: written materials, such as brochures, posters, or fliers, which can be mailed directly to the client or left at HHSC eligibility offices; enrollment events; and public service announcements on radio.

(c) MCO enrollment or marketing representatives are required to complete HHSC's [the Commission's] marketing orientation and training program prior to engaging in marketing activities on behalf of the MCO.

(d) Prohibited marketing practices.

(1) MCOs and providers must [shall] not conduct any direct contact marketing except through enrollment events.

(2) MCOs and providers must [shall] not make any written or oral statement containing material misrepresentations of fact or law relating to their plan or the Medicaid managed care program [Managed Care Program].

(3) MCOs and providers must [shall] not make false, misleading or inaccurate statements relating to services or benefits, providers, or potential providers through their plan.

(4) MCOs and providers must [shall] not offer Medicaid recipients material or financial gain as an inducement for enrollment, unless an exception is made by HHSC [the Commission].

(5) Marketing or enrollment practices of MCOs and providers must [shall] not discriminate against a client because of a client's race, creed, age, color, religion, national origin, ancestry, marital status, sexual orientation, physical or mental disability, health status, or existing need for medical care.

§353.407. Requirements of Managed Care Plans.

(a) Entities or individuals who subcontract with a managed care organization [Managed Care Organization] (MCO) to provide benefits, perform services, or carry out any essential function of the MCO contract must [shall] meet the same qualifications and contract requirements as the MCO for the service, benefit, or function delegated under the subcontract.

(b) An MCO [Primary Care Case Management (PCCM) and MCOs] must reimburse a Federally Qualified Health Center (FQHC), a Rural Health Clinic (RHC), or a municipal health department's public clinic for health care [healthcare] services provided to a member outside of regular business hours, as defined at §353.2(60) [§353.2(55)] of this title (relating to Definitions), at a rate that is equal to the allowable rate for those services as determined under §32.028(e) and (f), Human Resources Code, if the member does not have a referral from the member's primary care provider.

(c) An MCO must [The Commission will require all MCOs to] comply with the Health and Human Services Commission's (HHSC's) policy on contracting and subcontracting with historically underutilized businesses (HUBs). HHSC's [The Commission's] policy is to meet the goals and good faith effort requirements as stated in the Comptroller of Public Accounts rules at 34 TAC Chapter 20, Subchapter B

[§§20.11 - 20.28] (relating to Historically Underutilized Business Program).

§353.409. Scope of Services.

(a) A managed care organization (MCO) must provide covered services to members. The MCO is not responsible for providing or paying for non-capitated services or members' cost sharing obligations, if any. [All Managed Care Organizations (MCOs) shall provide services and benefits available to Medicaid clients under the Medicaid program, as defined in Chapter 354 of this title, relating to Medicaid Health Services, except services that are excluded from the Medicaid Managed Care Program.]

(b) The Health and Human Services Commission (HHSC) will establish the scope and level of benefits, which all MCOs must agree to provide as a condition for participation. These requirements may exceed the scope and level of covered benefits and services available to fee-for-service Medicaid clients. These requirements will be contained in all contracts entered into by an MCO and HHSC [the Commission].

(c) MCOs are encouraged to provide any value-added services or benefits beyond the level and scope required as a condition for participation in the competitive procurement process. These services and benefits must be approved by HHSC and cannot increase the cost borne or capitation rates paid by HHSC [the Commission] during any current contract term or in any subsequent contract term. These services or benefits cannot violate any other state or federal rule or regulation.

(d) A value-added service may be unique to an MCO, and limited to a member who meets the MCO's qualification criteria for the service.

(e) Before approving a value-added service, HHSC will determine whether it is an actual health care service, dental service, benefit, or positive incentive designed to promote a healthy lifestyle and improve a health or dental outcome. HHSC will not approve best practice approaches to delivering covered services as value-added services. Examples of potential value-added services include: health or dental-related programs; programs that encourage health-conscious behaviors; and for children enrolled in STAR Health, non-health care services and benefits that support the child's physical, mental, or developmental well being.

§353.411. Accessibility of Services.

(a) Requirements for health care managed care organizations (health care MCOs).

(1) [(a)] A health care MCO [Managed Care Organizations (MCOs)] must provide a broad-based and accessible primary care provider (PCP) network within the service area to ensure member accessibility to providers in time, distance, cultural competency, and language.

(2) [(b)] A health care MCO [MCOs] must have pediatric and family practitioner PCPs in their network of providers in sufficient numbers to provide regular and preventive pediatric care and Texas Health Steps (THSteps) services to all eligible children enrolled in the service area.

(3) [(c)] A health care MCO [MCOs] must have PCPs and acute care hospitals available throughout the service area to ensure that no member must travel more than 30 miles from his or her residence to access the PCP, unless the Health and Human Services Commission (HHSC) has made an exception.

(4) [(d)] A health care MCO [MCOs] must have PCPs in sufficient numbers to ensure that no member must wait an unreasonable amount of time for an appointment, and that no member must wait an unreasonable amount of time to be seen at their appointed time.

(5) [(e)] A health care MCO [MCOs] must ensure the reasonable availability and accessibility of specialists for all covered services requiring specialty care [in all areas of medical and behavioral health practice]. Specialists must also be reasonably accessible to members in time, distance, cultural competency, and language.

(6) [(f)] A member of a health care MCO must not be required to travel in excess of 75 miles from his or her residence to secure initial contact with referral specialists; special hospitals; psychiatric hospitals; diagnostic and therapeutic services; and single service health care physicians, dentists, or providers, except as provided in subsections (c) [(g)] and (d) [(h)] of this section.

(b) Requirements for dental managed care organizations (MCOs).

(1) A dental MCO must provide a broad-based and accessible main dentist network within the service area to ensure member accessibility to providers in time, distance, cultural competency, and language.

(2) A dental MCO must have main dentist providers in their network in sufficient numbers to provide regular and preventive dental care and THSteps services to all eligible children enrolled in the service area.

(3) A dental MCO must have general dental providers throughout the service area to ensure that no member must travel more than 30 miles to access such providers in urban counties and 75 miles in rural counties, unless HHSC has made an exception.

(4) A dental MCO must have general dental providers in sufficient numbers to ensure that no member must wait an unreasonable amount of time for an appointment, and that no member must wait an unreasonable amount of time to be seen at their appointed time.

(5) A dental MCO must ensure the reasonable availability and accessibility of dental specialists for all covered services. Dental specialists must also be reasonably accessible to members in time, distance, cultural competency, and language.

(6) A member of a dental MCO must not be required to travel in excess of 75 miles from his or her residence to secure initial contact with referral dental specialists, unless HHSC has made an exception

(c) [(g)] Service or provider not available. If any service or provider is not available to a member within the mileage radius specified in subsections (a)(3), (a)(6), (b)(3), or (b)(6) [subsection (f)] of this section, the MCO must submit to HHSC [the Commission] for approval data that indicates covered health care services or dental services are not available to the member within the required distance.

(d) [(h)] Service or provider outside the service area. The provisions in subsections (a)(3), (a)(6), (b)(3), and (b)(6) [subsection (f)] of this section do not preclude an MCO from making arrangements with another source outside the service area for members to receive a higher level of skill or specialty than the level that is available within the MCO service area. For health care MCOs, this can include [such as, but not limited to,] treatment of cancer, burns, and cardiac diseases.

(e) Provider education and training.

(1) [(i)] A health care MCO [MCOs] must provide education and training to providers on the specific health and behavioral health problems and needs of [Medicaid Managed Care Program] members.

(2) A dental MCO must provide education and training to providers on the specific dental health problems and needs of members.

(3) All MCOs must provide education and training regarding [~~, and~~] the contract and rule requirements for accessibility and availability. MCOs and HHSC will [~~MCO's and the Commission shall~~] cooperate and coordinate education and training activities for providers.

(f) [~~(j)~~] Cultural competency plan. An MCO [~~MCOs~~] must develop a written cultural competency plan describing how the MCO will effectively provide health care services or dental services to members from varying cultures, races, ethnic backgrounds, and religions to ensure those characteristics do not pose barriers to gaining access to needed services. As part of the requirement to develop the cultural competency plan, the MCO must at a minimum:

(1) employ multi-cultural and multi-lingual staff;

(2) make available interpreter services for members as necessary to ensure availability of effective communication regarding treatment, medical history, or health education;

(3) display to HHSC through the written plan a method for incorporating the plan into the MCO's [~~MCOs~~] policy-making process, administration, and daily practices; and

(4) submit the written plan to HHSC for review and approval at intervals specified by HHSC [~~the department~~].

(g) [~~(k)~~] Verbal and physical barriers. An MCO [~~MCOs~~] must ensure that communication and [~~or~~] physical access barriers do not deter members' timely access to health care services or dental services. The MCO must [~~MCOs shall~~] provide information in appropriate communication formats, including formats accessible to people with disabilities.

(h) [~~(l)~~] Significant traditional providers. An MCO must not exclude [~~MCOs are prohibited from excluding~~] Significant Traditional Providers from its [~~their~~] network for a period of time and under conditions determined by HHSC [~~the state~~] and specified in the contract.

(i) [~~(m)~~] Provider manual. An MCO [~~MCOs~~] must develop a written provider manual [~~manuals~~] clearly stating the policies and procedures adopted by the MCO to meet the provider's duties and obligations required by these and other agency rules and the contract.

§353.413. Managed Care Benefits and Services for Children Under 21 Years of Age.

(a) A managed care organization (MCO) must [~~The Commission will require all participating managed care organizations (MCOs) to~~] provide comprehensive, timely, and cost-effective diagnostic, screening, and treatment services for the medical, vision, hearing, and dental needs of Medicaid managed care program [~~Managed Care Program~~] members under the age of 21, at a level and frequency that meet the requirements of the federal EPSDT program [~~Program~~], as determined by the Health and Human Services Commission (HHSC). These requirements will be contained in all contracts, as applicable to each managed care program.

(b) An [~~The Commission will require each~~] MCO must [~~to~~] make available special training about Texas Health Steps (THSteps) benefits and goals to all providers of health and dental services contracting with the MCO to providers' staffs, and to all employees and contractors of the MCO who will provide oral presentations or marketing to members or prospective members. To fulfill this requirement, the MCO [~~MCOs~~] may use the training programs created by HHSC [~~the Commission~~] or its contractors, or the MCO [~~they~~] may create its [~~their~~] own training programs. Any training program created by the MCO under this subsection must meet the requirements of and be approved by HHSC [~~the Commission~~].

(c) An MCO [~~MCOs~~] must coordinate and cooperate with HHSC [~~the Commission~~] in developing effective outreach, access, and monitoring systems to ensure that all qualified members receive THSteps benefits.

(d) The managed care programs of participating MCOs are intended to complement and enhance the effectiveness and availability of THSteps benefits in the service areas. HHSC will [~~The Commission may~~] not delegate the responsibility and accountability for monitoring and ensuring that THSteps benefits are available and accessible to all eligible children.

§353.415. Member Complaint and Appeal Procedures.

(a) Managed care organizations (MCOs) [~~Care Organizations (MCO)~~] must develop and maintain a system and process for taking, tracking, reviewing, and reporting member complaints and appeals.

(b) MCOs must establish and maintain internal procedures for the resolution of member complaints and appeals. The procedures must be in writing. The procedures must be detailed and specific regarding how complaints and appeals are to be taken, to whom complaints are referred, and by when a complaint must be resolved.

(c) MCOs must establish a procedure to assist members in understanding and using the MCO's internal complaint and appeal process. The member's complaint and appeal procedure must be:

(1) in writing and distributed to each member upon enrollment;

(2) provided to the member each time the member's benefits are reduced, denied, or terminated for any reason;

(3) easy for members to understand and follow; and

(4) contain a prominent notice to the member that complies with the fair hearing [~~Fair Hearings~~] rules found in Chapter 357, Subchapter A of this title[~~,~~] (relating to Uniform Fair Hearing Rules) [~~Hearings~~], stating the member retains all rights as a Medicaid client to a fair hearing [~~Fair Hearing~~] through the Health and Human Services Commission (HHSC), in addition to the MCO's complaint and appeal process.

(d) HHSC [~~The Commission~~] will review the MCO's complaint and appeals procedures to determine if they comply with HHSC's standards before HHSC approves use of the procedures. Reports containing complaint summaries must be submitted to HHSC [~~the Commission~~] in compliance with HHSC [~~Commission's~~] policy.

(e) HHSC retains [~~The Commission shall retain~~] the authority to make the final decision following HHSC's [~~the Commission's~~] fair hearing process.

§353.417. Quality Assessment and Performance Improvement.

(a) Each managed care organization (MCO) must develop and implement an ongoing quality assessment and performance improvement (QAPI) program for services it furnishes to its enrollees. The MCO must maintain and provide documentation of its compliance for the Health and Human Services Commission's (HHSC's) review, including performance measurement data. The MCO's quality assessment and performance improvement program must meet the requirements contained in 42 CFR §438.240 and, at a minimum, include:

(1) a program of performance improvement projects that focus on clinical and non-clinical areas;

(2) mechanisms to assess the quality and appropriateness of care furnished to enrollees with special health care needs;

(3) mechanisms to detect both under and over-utilization of services;

(4) practice guidelines that meet CMS requirements under 42 CFR §438.236.

(b) An MCO may subcontract QAPI functions. An MCO must not delegate responsibility for QAPI compliance. [The Quality Assessment Performance Improvement (QAPI) functions may be subcontracted but the responsibility for QAPI compliance cannot be delegated by the MCO.]

(c) HHSC [The Commission] will develop monitoring and review systems and procedures to ensure MCO compliance with MCO contracts, this subchapter, and all related state and federal rules, regulations, and guidelines. HHSC [Commission] monitoring and review includes [will include, but not be limited to,] the following.

(1) HHSC monitors [The Commission will monitor] each MCO to ensure it is following its QAPI standards.

(2) An MCO must [The Commission will require MCO to] submit QAPI information at regular and periodic intervals.

(3) An MCO must [The Commission will require all MCOs to] submit to periodic inspection and review to determine compliance with all contract terms, and state and federal rules[, regulations,] and policies.

(d) Periodic evaluation [Evaluation] of each MCO's quality of services in each Medicaid managed care service area and the cost-effectiveness, member access, and quality of care under each federal waiver will [shall] be conducted by independent, external entities [after initial implementation of Medicaid managed care in a particular service area].

(1) The quality evaluation must be conducted at the end of each year. [the first year following initial implementation; and the]

(2) The assessment of cost-effectiveness, member access, and quality of care under each federal waiver must be conducted according to the terms of an approved federal waiver [once during the first two years of the time period for which a waiver has been approved].

(3) HHSC will determine the need for additional evaluations after completing the evaluations described in paragraphs (1) and (2) of this subsection. [The Commission will reevaluate the periodicity of both evaluation types after each evaluation is initially completed in a managed care service area.]

§353.419. Financial Standards.

(a) A managed care organization [Managed Care Organizations] (MCO) must maintain compliance with the MCO contract requirements, and the Texas Insurance Code and rules promulgated and administered by the Texas Department of Insurance, requiring a fiscally sound operation.

(b) The Health and Human Services Commission (HHSC) may share in the experience rebates in accordance with §353.3 of this chapter (relating to [,] Experience Rebate in the Managed Care Program) [Organization].

(c) HHSC [The Commission] may establish incentive payment programs to encourage MCOs to meet or exceed the goals and objectives of the Medicaid managed care program [Managed Care Program] established by HHSC [the Commission] through its contract.

§353.421. Special Disease Management for Health Care MCOs.

(a) For purposes of this rule, "Special Disease Management" means a program of coordinated healthcare interventions and communications for populations with conditions in which patient self-care efforts are significant.

(b) In order for a health care managed care organization (health care MCO) to receive a contract from the Health and Human Services Commission (HHSC) to provide special disease management services, the health care MCO [managed care organization] must:

(1) Implement policies and procedures to ensure that members requiring special disease management services are identified and enrolled into a disease management program;

(2) Develop and maintain screening and evaluation procedures for the early detection, prevention, treatment, or referral of participants at risk for or diagnosed with chronic conditions such as heart disease, chronic kidney disease and its medical complications, respiratory illness including asthma, diabetes, and HIV infection or AIDS;

(3) Ensure that all members identified for special disease management are enrolled in and have the opportunity to opt out of special disease management services within 30 days while still maintaining access to all other covered services; and

(4) Show evidence of the ability to manage complex diseases in the Medicaid population. Such evidence shall be demonstrated by the health care MCO's [managed care organization's] compliance with this subchapter.

(c) Special disease management programs must include:

(1) Patient self-management education;

(2) Patient education regarding the role of the provider;

(3) Evidence-supported models, standards of care in the medical community, and clinical outcomes;

(4) Standardized protocols and participation criteria;

(5) Physician-directed or physician-supervised care;

(6) Implementation of interventions that address the continuum of care;

(7) Mechanisms to modify or change interventions that have not been proven effective;

(8) Mechanisms to monitor the impact of the special disease management program over time, including both the clinical and the financial impact;

(9) A system to track and monitor all special disease management participants for clinical, utilization, and cost measures;

(10) Designated staff to implement and maintain the program and assist members in accessing program services;

(11) A system that enables providers to request specific special disease management interventions; and

(12) Provider information, including the differences between recommended prevention and treatment and actual care received by special disease management participants, information concerning the participant's adherence to a service plan and reports on changes in each participant's health status.

(d) Special disease management programs must have performance measures for particular diseases. HHSC will review the performance measures submitted by a special disease management program for comparability with the relevant performance measures in §32.057, Human Resources Code, relating to contracts for disease management programs.

(e) A health care MCO [Managed care organizations] implementing a special disease management program for chronic kidney disease and its medical complications that includes screening for and diagnosis and treatment of this disease and its medical complications, must, for the screening, diagnosis and treatment, use generally recognized clinical practice guidelines and laboratory assessments that identify chronic kidney disease on the basis of impaired kidney function or the presence of kidney damage.

(f) A health care MCO [managed care organization] that develops and implements a special disease management program must [shall] coordinate participant care with a provider of a disease management program under §32.057, Human Resources Code, during a transition period for patients that move from one disease management program to another 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.

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Steve Aragon
General Counsel
Texas Health and Human Services Commission
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SUBCHAPTER G. STAR+PLUS

1 TAC §§353.601, 353.603, 353.605, 353.607

Statutory Authority

The amendments are proposed under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; and Human Resources Code §32.021 and Texas Government Code §531.021, which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas and to adopt rules and standards for program administration.

The amendments affect Texas Human Resources Code, Chapter 32, and Texas Government Code, Chapters 531 and 533. No other statutes, articles, or codes are affected by this proposal.

§353.601. General Provisions.

(a) The Texas Health and Human Services Commission administers the STAR+PLUS program [for the delivery of Medicaid-covered acute and long-term services and supports. Covered services include all Medicaid State Plan primary and acute care services and all long-term services and supports covered by Medicaid].

(b) [The STAR+PLUS program operates under the authority of 1915(b) and 1915(c) waivers.] Rules governing the operation of the STAR+PLUS program will be in accordance with Subchapter E of this chapter (relating to Standards for Medicaid Managed Care).

(c) HHSC selects STAR+PLUS managed care organizations (MCOs) using the purchasing methods described in Chapter 391, Subchapter D of this title (relating to Purchases of Goods and Services). [Through competitive procurement, managed care organizations (MCOs) are selected to provide the Medicaid-covered acute care services and long-term services and supports.]

(d) The STAR+PLUS program serves members whose primary residence is in one of the following STAR+PLUS MCO service areas:

(1) Bexar, which consists of Bandera, Bexar, Atascosa, Comal, Guadalupe, Kendall, Medina, and Wilson counties;

(2) Harris, which consists of Austin, Harris, Brazoria, Fort Bend, Galveston, Matagorda, Montgomery, Waller, and Wharton counties [County];

[(3) Harris Contiguous, which consists of Brazoria, Fort Bend, Galveston, Montgomery, and Waller counties;]

(3) [(4)] Nueces, which consists of Nueces, Aransas, Bee, Brooks, Calhoun, Goliad, Jim Wells, Karnes, Kenedy, Kleberg, Live Oak, Refugio, San Patricio, and Victoria counties;

(4) [(5)] Travis, which consists of Travis, Bastrop, Burnet, Caldwell, Hays, Fayette, Lee, and Williamson counties;

(5) [(6)] Dallas, which consists of Dallas, Collin, Ellis, Hunt, Kaufman, Navarro, and Rockwall counties;

(6) [(7)] Tarrant, which consists of Tarrant, Denton, Hood, Johnson, Parker, and Wise counties; [or]

(7) Hidalgo, which consists of Duval, Hidalgo, Jim Hogg, Maverick, Cameron, McMullen, Starr, Webb, Willacy, and Zapata counties;

(8) Lubbock, which consists of Lubbock, Lamb, Hale, Floyd, Hockley, Crosby, Terry, Lynn, Garza, Carson, Deaf Smith, Hutchinson, Potter, Randall, and Swisher counties;

(9) El Paso, which consists of El Paso and Hudspeth counties;

(10) Jefferson, which consists of Chambers, Hardin, Jasper, Jefferson, Liberty, Newton, Orange, Polk, San Jacinto, Tyler, and Walker counties; or

(11) [(8)] Other service areas and counties as authorized by a federal waiver [amendment] approved by the Centers for Medicare and Medicaid Services.

§353.603. Member Participation.

(a) Except as provided in subsections (b) and (d) of this section, enrollment in the STAR+PLUS program is *mandatory* for Medicaid recipients who live in a STAR+PLUS service area and meet one or more of the following criteria:

(1) Have a physical or mental disability and qualify for Supplemental Security Income (SSI) benefits or for Medicaid due to low income;

(2) Qualify for STAR+PLUS Home and Community-Based Waiver Services [1915(c) Nursing Facility waiver services];

(3) Are age 21 or older and receive Medicaid because they are in a Social Security Exclusion program and meet financial criteria for STAR+PLUS Home and Community-Based Waiver Services [1915(c) Nursing Facility waiver services]; or [and/or]

(4) Are age 21 or older and are receiving SSI.

(b) Enrollment in the STAR+PLUS program is *voluntary* for children under age 21 receiving SSI.

(c) Medicaid recipients will have a choice among at least two managed care organizations (MCOs).

(d) The following Medicaid recipients *cannot* participate in the STAR+PLUS program:

(1) Residents of nursing facilities;

(2) STAR+PLUS members who have been in a nursing facility for more than four consecutive months;

(3) Clients receiving Medicaid 1915(c) waiver services, other than Community-Based Alternatives services;

(4) Residents of intermediate care facilities for persons with mental retardation (ICFs/MR);

(5) Persons [~~Consumers~~] not eligible for full Medicaid benefits[~~, such as Frail Elderly program members, Qualified Medicare Beneficiaries, Specified Low-Income Medicare Beneficiaries, Qualified Disabled Working Individuals, and undocumented aliens~~]; and

(6) Children in the conservatorship of the Texas Department of Family and Protective Services.

(e) Dual eligible clients.

(1) Enrollment in Medicare does not affect eligibility for the STAR+PLUS program.

(2) Individuals who are covered by both Medicare and Medicaid (also known as "dual eligibles") and participate in the STAR+PLUS program [~~will continue to~~] receive most acute care services through their Medicare provider, and STAR+PLUS Home and Community-Based Waiver Services through the STAR+PLUS MCO. The STAR+PLUS program does not change the way dual eligibles [~~they~~] receive Medicare services.

(f) An individual is eligible for [~~1915(c)~~] STAR+PLUS Home and Community-Based Waiver Services [~~waiver services~~] if the individual:

(1) is 21 years of age or older;

(2) has been determined by the Texas Health and Human Services Commission to be financially eligible for Medicaid;

(3) is enrolled in the STAR+PLUS program;

(4) meets the level-of-care/medical necessity criteria for nursing facility placement according to applicable state and federal regulations, and as verified by an annual assessment;

(5) has an approved individual service plan with an estimated annual cost that does not exceed the applicable individual cost ceiling and service limits;

(6) chooses STAR+PLUS Home and Community-Based Waiver Services [~~waiver services~~] as an alternative to institutional care as described in the Code of Federal Regulations, Title 42, §441.302(d); and

(7) resides:

(A) in their own home;

(B) in a licensed assisted living facility contracted with the applicant's/member's MCO to provide STAR+PLUS Home and Community-Based Waiver Services [~~waiver services~~]; or

(C) in an adult foster care home contracted with the member's MCO to provide STAR+PLUS Home and Community-Based Waiver Services [~~waiver services~~].

(g) An individual may apply for [~~1915(c)~~] STAR+PLUS Home and Community-Based Waiver Services [~~waiver services~~] when the individual is in a nursing facility and is seeking a return to the community.

§353.605. Participating Providers.

Acute and long-term services and supports providers who traditionally have served Medicaid clients are given the opportunity to participate in STAR+PLUS [~~contract with~~] managed care organizations (MCOs), provided they meet licensing standards, the MCO's credentialing standards, agree to the MCO's contract provisions, and agree to the MCO's payment arrangements.

§353.607. STAR+PLUS Handbook.

The *STAR+PLUS Handbook* includes policies and procedures to be used by all health and human services agencies and their contractors and providers in the delivery of [~~1915(b) and/or 1915(c)~~] STAR+PLUS Program [~~waiver~~] services to eligible members. The *STAR+PLUS Handbook* can be found on the Texas Health and Human Services Commission website.

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. INTEGRATED CARE MANAGEMENT PROGRAM

1 TAC §§353.701 - 353.703

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

Statutory Authority

The repeals are proposed under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; and Human Resources Code §32.021 and Texas Government Code §531.021, which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas and to adopt rules and standards for program administration.

The repeals affect Texas Human Resources Code, Chapter 32, and Texas Government Code, Chapters 531 and 533. No other statutes, articles, or codes are affected by this proposal.

§353.701. General Provisions.

§353.702. Client Participation.

§353.703. Participating Providers.

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. STAR HEALTH

1 TAC §353.701, §353.702

Statutory Authority

The new rules are proposed under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; and Human Resources Code §32.021 and Texas Government Code §531.021, which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas and to adopt rules and standards for program administration.

The new rules affect Texas Human Resources Code, Chapter 32, and Texas Government Code, Chapters 531 and 533. No other statutes, articles, or codes are affected by this proposal.

§353.701. General Provisions.

(a) The Health and Human Services Commission (HHSC) administers the STAR Health program.

(b) Rules governing the operation of the program will be in accordance with Subchapter E of this chapter (relating to Standards for Medicaid Managed Care).

(c) HHSC selects one or more STAR Health managed care organizations using the purchasing methods described in Chapter 391, Subchapter D of this title (relating to Purchases of Goods and Services).

(d) The STAR Health program serves members in all areas of the state.

§353.702. Member Participation.

(a) Children and young adults in the following categories are eligible to participate in the STAR Health program:

(1) a child in the conservatorship of the Department of Family and Protective Services, if the state as conservator elects to place the child in the STAR Health program;

(2) a young adult from age 18 through the month of his or her 22nd birthday who voluntarily agrees to continue in foster care placement, if the state as conservator elects to place the child in the STAR Health program;

(3) a young adult from age 18 through the month of his or her 21st birthday who is participating in the Medicaid for Transitioning Foster Care Youth Program; and

(4) a young adult from age 21 through the month of his or her 23rd birthday who is participating in the Former Foster Care in Higher Education (FFCHE) Program.

(b) Although young adults participating in the FFCHE Program are not Medicaid beneficiaries under Title XIX of the Social Security Act, they receive the same covered services and benefits as other eligible participants in the STAR Health 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 December 12, 2011.

TRD-201105504
Steve Aragon
General Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: January 22, 2012
For further information, please call: (512) 424-6576

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SUBCHAPTER I. STAR

1 TAC §353.801, §353.802

Statutory Authority

The new rules are proposed under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; and Human Resources Code §32.021 and Texas Government Code §531.021, which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas and to adopt rules and standards for program administration.

The new rules affect Texas Human Resources Code, Chapter 32, and Texas Government Code, Chapters 531 and 533. No other statutes, articles, or codes are affected by this proposal.

§353.801. General Provisions.

(a) The Texas Health and Human Services Commission (HHSC) administers the State of Texas Access Reform (STAR) program.

(b) Rules governing the operation of the program will be in accordance with Subchapter E of this chapter (relating to Standards for Medicaid Managed Care).

(c) HHSC selects STAR managed care organizations using the purchasing methods described in Chapter 391, Subchapter D of this title (relating to Purchases of Goods and Services).

(d) The STAR program serves members in all service areas in the state.

§353.802. Member Participation.

(a) Enrollment in the State of Texas Access Reform (STAR) program is *mandatory* for Medicaid recipients who meet the criteria in one or more of the following categories:

(1) Temporary Assistance for Needy Families (TANF) adults--Individuals age 21 and over who are eligible for the TANF program. This category may also include some pregnant women.

(2) TANF children--Individuals birth through age 20 who are eligible for the TANF program. This category may also include some pregnant women and some children less than one year of age.

(3) Pregnant women receiving Medical Assistance only (MAO)--Pregnant women whose family income is below 185% of the FPL.

(4) Pregnant women (MAO) under age 18 whose family income is below 185% of the FPL.

(5) Newborns (MAO)--Children under age one born to Medicaid-eligible mothers.

(6) Expansion children (MAO), which covers:

(A) children under age 18 who are ineligible for TANF because of the applied income of their stepparents or grandparents;

(B) children under age 1 whose family income is below 185% of the FPL; and

(C) children age 1 through age 5 whose family income is at or below 133% of the FPL.

(7) Federal mandate children (MAO)--Children age 6 through age 18 whose family income is below 100% of the FPL.

(8) Supplemental Security Income (SSI) Medicaid-eligible adults who are not enrolled in Medicare and reside in all areas where STAR+PLUS is not an option.

(b) Enrollment in the STAR program is *voluntary* for SSI Medicaid-eligible children who are not enrolled in Medicare and reside in a service area where STAR+PLUS is not available.

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 December 12, 2011.

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Steve Aragon
General Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: January 22, 2012
For further information, please call: (512) 424-6576

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SUBCHAPTER F. SPECIAL INVESTIGATIVE UNITS

1 TAC §§353.501 - 353.505

The Texas Health and Human Services Commission (HHSC) proposes to amend Chapter 353, Subchapter F, §§353.501 - 353.505, concerning special investigative units of managed care organizations (MCOs).

Background and Justification

The amendments are proposed in part to comply with House Bill (H.B.) 1720, 82nd Legislature, Regular Session, 2011, which added §§531.1131, 531.1132, and 531.117 to the Texas Government Code as part of the Legislature's continuing efforts to curb Medicaid waste, abuse, and fraud. The proposed amendments implement legislative direction giving an MCO additional authority to conduct fraud and abuse recovery and strengthening the coordination efforts between HHSC and MCOs to prevent and reduce Medicaid fraud.

The amendments are also proposed as conforming changes to other proposed rules in Chapter 353, concerning the expansion of managed care in Texas, published elsewhere in this issue of the *Texas Register.* With the incorporation of dental services into managed care, references to dental services and distinctions between requirements for a dental MCO and for a health care MCO are incorporated as applicable in Subchapter F.

Further, the amendments are proposed to update the rules to reflect current policy and contract language; to revise Texas Administrative Code references as appropriate; and to clarify language.

Section-by-Section Summary

The proposed amendment to §353.501: (1) adds references to dental services; (2) updates the time frame an MCO has to submit a plan to prevent and reduce waste, abuse, and fraud from 60 days before the start of the state's fiscal year to 90 days before the start of the state's fiscal year to match existing policy; and (3) clarifies that remedies may be imposed in addition to sanctions to match existing MCO contract language.

The proposed amendment to §353.502: (1) adds a new requirement that the description in the plan of an MCO's procedures for detecting possible acts of provider waste, abuse, and fraud must include verification that an MCO member actually received services the provider billed; (2) specifies that if an MCO selects a sample based upon 15% of a provider's claims related to waste, abuse, and fraud, the sample must include claims relating to at least 50 recipients; (3) adds dental records to the records an MCO must review when suspicious indicators of waste, fraud, and abuse exist; (4) replaces "physician" with the broader term "provider" to include providers other than physicians; (5) updates requirements concerning an MCO's procedures for educating recipients and providers and training personnel to prevent waste, abuse, and fraud to indicate MCO subcontractors must receive waste, abuse, and fraud training annually; the training must be specific to the area of responsibility for the MCO and subcontractor; general training must be provided to MCO staff and subcontractors under certain circumstances; and the MCO must provide training to new MCO and subcontractor staff directly involved with Medicaid within 90 days of employment; and (6) requires an MCO to submit a report listing all investigations that resulted in no findings of waste, abuse, or fraud to the HHSC Office of Inspector General (HHSC-OIG) on a monthly instead of a quarterly basis to align with current policy.

The proposed amendment to §353.503 makes only technical corrections.

The proposed amendment to §353.504: (1) clarifies that an MCO cannot charge for records requested by certain entities; (2) clarifies that dental records and study models related to orthodontia services are included in the request for record review; and (3) adds language related to contractual remedies to align the rule with existing contract language.

The proposed amendment to §353.505 replaces the current provisions of the section to comply with statutory requirements in Texas Government Code §531.1131 as added by H.B. 1720. The amendment also incorporates current HHSC policy allowing for MCO recoveries on fraudulent activity under a threshold amount, and rearranges the information for clarity.

Fiscal Note

Greta Rymal, Deputy Executive Commissioner for Financial Services, has determined that, for the first five years the proposed amendments are in effect, there are foreseeable implications relating to costs or revenues of state government. There are no foreseeable implications relating to costs or revenues of local governments.

The effect on state government for the first five years the proposed amendments are in effect is an estimated general revenue cost savings of $122,423,969 in FY 2012; $265,094,954 in FY 2013; $271,820,147 in FY 2014; $273,320,860 in FY 2015; and $274,779,800 in FY 2016, and an estimated increase in revenue of $4,106,098 in FY 2012; $206,008,427 in FY 2013; $158,296,437 in FY 2014; $156,611,574 in FY 2015; and $169,835,498 in FY 2016.

Ms. Rymal anticipates that there will not be an economic cost to persons who are required to comply with the amendments.

There is no anticipated negative impact on local employment.

Small Business and Micro-business Impact Analysis.

Under §2006.002 of the Government Code, a state agency proposing an administrative rule that may have an adverse

economic effect on small businesses must prepare an economic impact statement and, generally, a regulatory flexibility analysis. The economic impact statement estimates the number of small businesses subject to the rule and projects the economic impact of the rule on small businesses. The regulatory flexibility analysis describes the alternative methods the agency considered to achieve the purpose of the proposed rule while minimizing adverse effects on small businesses. A regulatory flexibility analysis is not required if the proposed rule is required by a state or federal mandate.

Ms. Rymal has determined that the proposed amendments may have an adverse economic effect on small businesses and micro-businesses.

HHSC estimates that the number of small businesses or micro-businesses subject to the proposed amendments rules is 1,042. The projected economic impact for a small business or micro-business is about $22,300,000 in FY 2012 and $49,100,000 in FY 2013.

The proposed rules are required under state law.

Public Benefit

Billy Millwee, Deputy Executive Commissioner for Health Services, has determined that for each year of the first five years the proposed amendments are in effect, the anticipated public benefit expected as a result of enforcing the rules will be a reduction in fraud, waste, and abuse of public funds.

Regulatory Analysis

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

Takings Impact Assessment

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

Public Comment

Written comments on the proposed amendments may be submitted to Gary Young, Medicaid/CHIP Division, Texas Health and Human Services Commission, Mail Code H320, 11209 Metric Blvd., Bldg. H, Austin, Texas 78758; by fax to (512) 491-1972; or by e-mail to gary.young@hhsc.state.tx.us within 30 days of publication of this proposal in the *Texas Register.*

Public Hearing

A public hearing is scheduled for January 17, 2012, from 9:00 a.m. to 11:00 a.m. in the John H. Winters Building, Public Hearing Room 125, located at 701 W. 51st Street, Austin, Texas 78751. Persons requiring further information, special assistance, or accommodations should contact Leigh A. Van Kirk at (512) 491-2813.

Statutory Authority

The amendments are proposed under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority, and §531.1131(e), which requires the Executive Commissioner of HHSC to adopt rules necessary to implement the law regarding payment recovery efforts, including procedures that must be followed by an MCO when engaging in payment recovery efforts; and Human Resources Code §32.021 and Texas Government Code §531.021, which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas and to adopt rules and standards for program administration

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

§353.501. Purpose.

(a) This subchapter implements the Health and Human Services Commission's (HHSC), Office of Inspector General (OIG) authority to approve annually, each managed care organization (MCO) plan to prevent and reduce waste, abuse, and fraud. This authority is granted by Chapter 531, Subchapter C, Government Code, [~~Section~~] §531.113.

(b) An MCO that provides or arranges for the provision of health care services or dental services to an individual under the Medical Assistance Program (Medicaid), must arrange for a special investigative unit to investigate fraudulent claims and other types of program abuse by recipients and providers. An MCO may choose to:

(1) establish [~~Establish~~] and maintain the special investigative unit within the MCO [~~managed care organization~~]; or

(2) contract [~~Contract~~] with another entity for the investigation.

(c) An MCO must:

(1) develop a plan to prevent and reduce waste, abuse, and fraud;[~~.~~]

(2) submit the plan [~~The plan must be submitted~~] annually to the HHSC-OIG for approval each year the MCO is enrolled with the State of Texas; and[~~.~~]

(3) submit the plan 90 days before [~~The plan must be submitted 60 days prior to~~] the start of the State fiscal year.

(d) If HHSC-OIG does not approve the initial plan to prevent and reduce waste, abuse, and fraud [~~is not approved~~], the MCO must resubmit the plan to HHSC-OIG within 15 working days of receiving the denial letter, which will explain the deficiencies. If the plan is not resubmitted within the time allotted, the MCO will be in default and remedies or sanctions may be imposed.

(e) If the MCO elects to contract with another entity for the investigation of fraudulent claims and other types of program abuse as referenced in subsection [~~paragraph~~] (b)(2) of this section, the MCO must comply with [~~adhere to~~] all requirements of Title [~~Chapter~~] 42, §438.230 of the Code of Federal Regulations.

§353.502. Managed Care Organization's Plans and Responsibilities in Preventing and Reducing Waste, Abuse, and Fraud.

(a) Each managed care organization (MCO) subject to this section must develop a plan to prevent and reduce waste, abuse, and fraud and submit that plan annually to the Health and Human Services Commission (HHSC), Office of Inspector General (OIG) for approval.

(b) The MCO is responsible for investigating possible acts of waste, abuse, or fraud for all services, including those that the MCO subcontracts to outside entities.

(c) The plan submitted to the HHSC-OIG must include the following information [~~below~~] to be considered for approval.

(1) A description of the MCO's procedures for detecting possible acts of waste, abuse, and [~~or~~] fraud by providers. The description must address each of the following requirements:

(A) use [~~Use~~] of audits to monitor compliance and assist in detecting and identifying Medicaid program violations and possible waste, abuse, and fraud overpayments through data matching, analysis, trending, and statistical activities;

(B) monitoring [~~Monitoring~~] of service patterns for providers, subcontractors, and recipients;

(C) use [~~Use~~] of a hotline or another mechanism to report potential or suspected violations;

(D) use [~~Use~~] of random payment review of claims submitted by providers for reimbursement to detect potential waste, abuse, or fraud;

(E) use [~~Use~~] of edits or other evaluation techniques to prevent payment for fraudulent or abusive claims; [~~and~~]

(F) use [~~Use~~] of routine validation of MCO data; and[~~.~~]

(G) verification that MCO members actually received services that were billed.

(2) A description of the MCO's procedures for investigating possible acts of waste, abuse, and fraud by providers. The procedures must satisfy the requirements in subparagraphs (A) - (C) of this paragraph.

(A) The MCO must [~~MCOs are required to~~] conduct a preliminary investigation [~~preliminary investigations. The preliminary investigation must be conducted~~] within 15 working days of the identification or [~~and/or~~] reporting of suspected or [~~and/or~~] potential waste, abuse, or fraud.

(B) The [~~requirements for a~~] preliminary investigation must include [~~but are not limited to~~] the following:

(i) Determining if the MCO has received any previous reports of incidences of suspected waste, abuse, or fraud or conducted any previous investigations of the provider in question. If so, the investigation should include a review of all materials related to the previous investigations, the outcome of the previous investigations, and a determination of whether the new allegations are the same or relate to the previous investigation.

(ii) Determining if the service provider has received any educational training from the MCO in regard to the allegation.

(iii) Conducting a review of the provider's billing pattern to determine if there are any suspicious indicators.

(iv) Reviewing the provider's payment history for the past three years, if available, to determine if there are any suspicious indicators.

(v) Reviewing the policies and procedures for the program type in question to determine if what has been alleged is a violation.

(C) If it is determined that suspicious indicators of possible waste, abuse, or fraud exist, within 15 working days from the conclusion of subparagraphs (A) and (B) of this paragraph, the MCO must select a sample for further review. The sample must consist of a minimum of 50 recipients or 15% of a provider's claims related to the suspected waste, abuse, and fraud; provided, however, that if the MCO selects a sample based upon 15% of the claims, the sample must include claims relating to at least 50 recipients. The MCO must:[~~.~~]

(i) within [~~Within~~] 15 working days of the selection of the sample, request medical or dental records and encounter data for the sample recipients; and[~~.~~]

(ii) review [~~Review~~] the requested medical or dental records and encounter data within 45 working days of receipt of the records to:

(I) validate the sufficiency of service delivery data and to assess utilization and quality of care;[~~.~~]

(II) ensure that the encounter data submitted by the provider is accurate; and[~~.~~]

(III) evaluate if the review of other pertinent records is necessary to determine if waste, abuse, or fraud has occurred. If the review of additional records is necessary then conduct such review.

(3) A description of the MCO's procedures for detecting possible acts of waste, abuse, and fraud by recipients. The description must address the following:

(A) Review of claims when waste, abuse, or fraud is suspected or reported to determine if:

(i) Treatment(s) and/or medication(s) prescribed by more than one provider appears to be duplicative, excessive, or contraindicated; and

(ii) Recipients are using more than one provider [~~physician~~] to obtain similar treatments and /or medications; and[~~,~~]

(iii) Providers other than the assigned Primary Care Provider (PCP) are treating the recipient, and there is no evidence that the recipient was treated by the assigned PCP for a similar or related condition; and[~~,~~]

(iv) The recipient has a high volume of emergency room visits with a non-emergent diagnosis.

(B) Review of medical or dental records for the recipients in question if claims review does not clearly determine if waste, abuse, or fraud has occurred.

(C) For a health care MCO, use [~~Use~~] of edits or other evaluation techniques to identify possible overuse or [~~and/or~~] abuse of psychotropic or [~~and/or~~] controlled medications by recipients who are allegedly treated at least monthly by two or more physicians. A physician includes [~~but is not limited to~~]: psychiatrists, pain management specialists, anesthesiologists, and physical medicine and rehabilitation specialists.

(4) A description of the MCO's procedures for investigating possible acts of waste, abuse, and fraud by recipients. The procedures must satisfy the requirements in subparagraphs (A) and (B) of this paragraph, as applicable.

(A) An MCO must [~~MCOs are required to~~] conduct a [~~preliminary investigations. The~~] preliminary investigation [~~must be conducted~~] within 15 working days of the identification or [~~and/or~~] reporting of suspected or [~~and/or~~] potential waste, abuse, or fraud.

(B) For a health care MCO, [~~The requirements for~~] a preliminary investigation must include [~~consist of but are not limited to~~] the following:

(i) Review of acute care and emergency room claims submitted by providers for the [~~suspected~~] recipient suspected of waste, abuse, or fraud.

(ii) Analysis of [~~Analyze~~] pharmacy claim data submitted by providers for the [~~suspected~~] recipient suspected of waste, abuse, or fraud to determine possible abuse of controlled or non-controlled medications. If the MCO does not have the data necessary to conduct the pharmacy claims review, the MCO must request the data within 15 working days of the initial identification or [~~and/or~~] reporting of the suspected or potential waste, abuse, or fraud.

(iii) Analysis of [~~Analyze~~] claims submitted by providers to determine if the diagnosis is appropriate for the medications prescribed.

(5) A description of the MCO's internal procedures for referring possible acts of waste, abuse, or fraud to the MCO's Special Investigative Unit (SIU) and the mandatory reporting of possible acts of waste, abuse, or fraud by providers or recipients to the HHSC-OIG. The procedures must satisfy the requirements in subparagraphs (A) - (E) of this paragraph.

(A) Assign an officer or director the responsibility and authority for reporting all investigations resulting in a finding of possible acts of waste, abuse, or fraud to the OIG. An officer could be but is not limited to a Compliance Officer, a Manager of Government Programs, or a Regulatory Compliance Analyst.

(B) Provide specific and detailed internal procedures for officers, directors, managers, and employees to report possible acts of waste, abuse, and fraud to the MCO's SIU. The procedures must include but are not limited to:

(i) Guidance regarding what information must be reported to the MCO's SIU.

(ii) A requirement that information must be reported to the MCO's SIU within 24 hours of identification or reporting of suspected waste, abuse, and fraud.

(C) Provide specific and detailed internal procedures for the SIU to report investigations resulting in a finding of waste, abuse, or fraud to the assigned officer or director.

(i) Guidance regarding what information must be reported to the assigned officer or director.

(ii) A requirement that possible acts of waste, abuse, or fraud be reported to the assigned officer or director must occur within 15 working days of making the determination.

(D) Utilizing the HHSC-OIG fraud referral form, the assigned officer or director must report and refer all possible acts of waste, abuse or fraud to the HHSC-OIG within 30 working days of receiving the reports of possible acts of waste, abuse or fraud from the SIU. The report and referral must include an investigative report identifying the allegation, statutes/regulations violated or considered, and the results of the investigation; copies of program rules and regulations violated for the time period in question; the estimated overpayment identified; a summary of interviews conducted; the encounter data submitted by the provider for the time period in question; and all supporting documentation obtained as the result of the investigation. This requirement applies to all reports of possible acts of waste, abuse, and fraud with the exception of an expedited referral.

(E) An expedited referral is required when the MCO has reason to believe that a delay may result in:

(i) harm or death to patients

(ii) the loss, destruction, or alteration of valuable evidence; or

(iii) a potential for significant monetary loss that may not be recoverable; or

(iv) hindrance of an investigation or criminal prosecution of the alleged offense.

(6) A description of the MCO's procedures for educating recipients and providers and training personnel to prevent waste, abuse, and fraud. The procedures must satisfy the requirements in subparagraphs (A) - (H) of this paragraph.

(A) On an annual basis, the MCO must ensure that [~~organization shall provide~~] waste, abuse, and fraud training is provided to each employee and subcontractor who is directly involved in any aspect of Medicaid. At a minimum, training is required for all individuals responsible for data collection, provider enrollment or disenrollment, encounter data, claims processing, utilization review, appeals or grievances, quality assurance, and marketing.

(B) The training must be specific to the area of responsibility for the MCO and subcontractor staff receiving the training and contain examples of waste, abuse, or fraud in their particular area of interest.

(C) The MCO [~~organization~~] must ensure that [~~provide~~] general training is provided to all Medicaid managed care staff of the MCO and its subcontractors who are [~~that is~~] not directly involved with the areas listed in subparagraph (A) of this paragraph. The general training must provide information about the definition of waste, abuse, and fraud; [~~,~~] how to report suspected waste, abuse, and fraud; and to whom the suspected waste, abuse, and fraud is reported.

(D) The organization must provide waste, abuse, and fraud training to all new MCO and subcontractor staff that will be directly involved with any aspect of Medicaid within 90 days of the employee's employment date.

(E) Provide updates to all affected areas when changes to policy and/or procedure may affect their area(s). The updates must be provided within 20 working days of the changes occurring.

(F) Educate recipients, providers, and employees about their responsibilities, the responsibility of others, the definition of waste, abuse, and fraud and how and where to report it. Appropriate methods of educating recipients, providers, and employees may include but are not limited to newsletters, pamphlets, bulletins, and provider manuals.

(G) The MCOs will maintain a training log for all training pertaining to waste, abuse, and/or fraud in Medicaid. The log must include the name and title of the trainer, names of all staff attending the training, and the date and length of the training. The log must be provided immediately upon request to the HHSC-OIG, Office of the Attorney General's (OAG)-Medicaid Fraud Control Unit (MFCU) and OAG-Civil Medicaid Fraud Division (CMFD), and the United States Health and Human Services-Office of Inspector General (HHS-OIG).

(H) Written standards of conduct, and written policies and procedures that include a clearly delineated commitment from the MCOs for detecting, preventing and investigating waste, abuse, and fraud.

(7) The name, title, address, telephone number, and fax number of the assigned officer or director responsible for carrying out the plan.[~~;~~]

(A) The person carrying out the plan should be but is not limited to a Compliance Officer, a Manager of Government Programs, Regulatory Compliance Analyst, Director of Quality Integrity, or a person in senior management.

(B) When the person that is responsible for carrying out the plan changes, the required information is to be reported to HHSC-OIG within 15 working days of the change.

(8) A description, process flow diagram, or chart outlining the organizational arrangement of the MCO's personnel responsible for investigating and reporting possible acts of waste, abuse, or fraud.[~~;~~ ~~and,~~]

(9) Advertising and marketing materials utilized by the MCOs must be complete and accurately reflect the information about the MCO. Marketing materials includes any informational materials targeted to recipients.

(d) Each MCO must satisfy the requirements in paragraphs (1) - (3) of this subsection related to investigations of waste, abuse, and fraud conducted by the MCO's SIU.

(1) On a monthly [~~quarterly~~] basis, submit to the HHSC-OIG a report listing all investigations conducted that resulted in no findings of waste, abuse, or fraud. The report must [~~shall~~] include the allegation, the investigated [~~suspected~~] recipient's or provider's Medicaid number, the source, the time period in question, and the date of receipt of the identification and/or reporting of suspected and/or potential waste, abuse, or fraud.

(2) Maintain a log of all incidences of suspected waste, abuse and fraud[~~,~~] received by the MCO regardless of the source. The log must [~~shall~~] contain the subject of the complaint, the source, the allegation, the date the allegation was received, the recipient's [~~recipient~~] or provider's [~~providers~~] Medicaid number, and the status of the investigation.

(3) The log should be provided at the time of a reasonable request to the HHSC-OIG, OAG-MFCU, OAG-CMFD, and the HHS-OIG. A reasonable request means a request made during hours that the business or premises is open for business.

(e) MCOs must maintain the confidentiality of any patient information relevant to an investigation of waste, abuse, or fraud.

(f) MCOs must retain records obtained as the result of an investigation conducted by the SIU for a minimum period of five years or until all audit questions, appealed hearings, investigations, or court cases are resolved.

(g) Failure of the provider to supply the records requested by the MCO will result in the provider being reported to the HHSC-OIG as refusing to supply records upon request and the provider may be subject to sanction or immediate payment hold.

§353.503. Managed Care Organization's Contracts.

If a managed care organization [~~Managed Care Organization~~] (MCO) contracts for the investigation of fraudulent claims and other types of programs abuse by recipients and providers under §353.501(e) of this chapter (relating to Purpose) [~~subsection 353.501(e)~~], within 10 working days of executing the contract the MCO must [~~shall~~] file with the Health and Human Services Commission, Office of Inspector General (HHSC-OIG):

(1) a [~~A~~] copy of the written contract including any and all attachments.

(2) the [~~The~~] names, titles, addresses, telephone numbers, and fax numbers of the principals of the entity with which the MCO has contracted; and

(3) a [~~A~~] description of the qualifications of the principals of the entity with which the MCO has contracted to perform the contracted responsibilities.

§353.504. Review of Managed Care Organization's Records.

(a) Immediately upon request, the Health and Human Services Commission, Office of Inspector General (HHSC-OIG), Office of the Attorney General-Medicaid Fraud Control Unit (OAG-MFCU) and OAG, Office of the Attorney General-Civil Medicaid Fraud Division (OAG-CMFD), and the United States Health and Human Services, Office of Inspector General (HHS-OIG) may review the records of a managed care organization [~~Managed Care Organization~~] (MCO) to determine compliance with this subchapter.

(b) Upon receipt of a record review request from any state or federal agency authorized to conduct compliance, regulatory, or program integrity functions, an [~~a~~] MCO must:

(1) At no charge to the entities identified in subsection (a) of this section, provide [~~Provide~~] the records requested by a properly identified agent of any state or federal agency authorized to conduct compliance, regulatory, or program integrity functions on the provider, person, MCO, or the services rendered by the provider or person within 24 hours of the request.

(2) An exception to the 24 hours stated in paragraph (1) of this subsection may be made when the OIG or another state or federal agency representative reasonably believes that the requested records are about to be altered or destroyed or that the request may be completed at the time of the request and/or in less than 24 hours.

(c) The request for record review may include [~~includes~~], but is not limited to:

(1) clinical medical or dental patient records;

(2) other records pertaining to the patient;

(3) any other records of services provided to Medicaid or other health and human services program recipients and payments made for those services;

(4) documents related to diagnosis, treatment, service, lab results, charting;

(5) billing records, invoices, documentation of delivery items, equipment, or supplies;

(6) radiographs and study models related to orthodontia services;

(7) business and accounting records with backup support documentation;

(8) statistical documentation;

(9) computer records and data; and

(10) contracts with providers and subcontractors.

(d) Failure to produce the records or make the records available for the purpose of reviewing, examining, and securing custody of the records may result in HHSC imposing contractual remedies or HHSC-OIG imposing sanctions against the MCO as described in [~~1 TAC (Texas Administrative Code),~~] Chapter 371, Subchapter G of this title (relating to Legal Action Relating to Providers of Medical Assistance), or both remedies and sanctions[~~, §371.1609, Grounds for Fraud Referral and Administrative Sanction~~].

§353.505. Recovery of Funds.

(a) If a managed care organization (MCO) suspects fraud or abuse has occurred in the Medicaid or CHIP program, based on information, data, or facts obtained by the MCO, it must:

(1) immediately notify the Health and Human Services Commission-Office of Inspector General (HHSC-OIG) and the Office of the Attorney General (OAG);

(2) following the completion of ordinary due diligence regarding a suspected overpayment, begin payment recovery efforts except as provided in subsection (b) of this section; and

(3) ensure that any payment recovery efforts in which the MCO engages are in accordance with this subchapter.

(b) If the amount to be recovered exceeds $100,000, the MCO may not engage in payment recovery efforts if the MCO receives notice from the HHSC-OIG or the OAG indicating that the MCO is not authorized to proceed with recovery effort. Such notice must be supplied no later than the tenth business day after the MCO notifies the HHSC-OIG and OAG of the suspected fraud or abuse.

(c) If the HHSC-OIG or the OAG has assumed responsibility for completion of the investigation and final disposition of any administrative, civil, or criminal action taken by the state or federal government, the HHSC-OIG or the OAG will determine and direct the collection of any overpayment.

(d) An MCO may retain any money recovered by the MCO.

(e) The HHSC-OIG will distribute any amounts collected to the MCO, less any costs of investigation and collection proceedings.

(f) An MCO must submit a quarterly report to the HHSC-OIG detailing the amount of money recovered.

~~[(a) Upon completion of the investigation and final disposition of any administrative, civil, or criminal action taken by the state or federal government, the Health and Human Service Commission-Office of Inspector General (HHSC-OIG) will determine and direct the collection of any overpayment.]~~

~~[(b) Overpayments collected as a result of an investigation will be distributed to the Managed Care Organization (MCO) unless HHSC-OIG determines that an alternative distribution is indicated.]~~

~~[(c) If the HHSC-OIG determines that an MCO is not entitled to all or any portion of the distribution of funds collected as a result of an overpayment then HHSC-OIG will provide the MCO with a written explanation indicating the rationale for the alternative distribution of funds.]~~

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 December 12, 2011.

TRD-201105493
Steve Aragon
General Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: January 22, 2012
For further information, please call: (512) 424-6576

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SUBCHAPTER J. OUTPATIENT PHARMACY SERVICES

1 TAC §§353.901, 353.903, 353.905, 353.907, 353.909, 353.911, 353.913, 353.915

The Texas Health and Human Services Commission (HHSC) proposes new Subchapter J, consisting of §§353.901, 353.903, 353.905, 353.907, 353.909, 353.911, 353.913, and 353.915, concerning outpatient pharmacy services in the Medicaid managed care program.

Background and Justification

The new rules are proposed to comply with Senate Bill 7 (S.B. 7), 82nd Legislature, First Called Session, 2011, and the cost-saving initiatives in the 2012-13 General Appropriations Act (Article II, Health and Human Services Commission, House Bill 1, 82nd Legislature, Regular Session, 2011).

Section 1903 of the Social Security Act (42 U.S.C. §1396b) authorizes a state, subject to federal approval, to contract with a qualified managed care organization for the purpose of providing medical care and services to eligible individuals and to receive federal reimbursement for the costs of such contract. An eligible managed care organization is one that, among other requirements, is compensated for the provision of health services to eligible recipients and has assumed full financial risk for the provision of such services. 42 U.S.C. §1395mm. Federal regulations codified at 42 C.F.R. §438.60 (which prohibit a state from making supplemental or additional payments to providers that are paid by or contracted with an MCO) have been interpreted to generally prohibit the state from mandating payment of specific provider rates by managed care organizations. The concept of a "risk contract," as that term is defined in federal regulations at 42 C.F.R. §438.2, necessarily requires the state to avoid interference with rates paid by an MCO to a contracted provider.

This policy has been confirmed by the Texas Legislature in at least two separate enactments. Government Code §533.005(a)(12), enacted in 2005, requires HHSC to ensure that its contracts with Medicaid managed care organizations include provisions that require each managed care organization to reimburse a provider that is not enrolled in the organization's network "at a rate that is equal to the allowable rate for those services, as determined under §32.028 and §32.0281, Human Resources Code."

Government Code §536.005, which also was enacted as part of Senate Bill 7, requires HHSC to convert, to the extent possible, hospital payment reimbursement systems under the Medicaid and Children's Health Insurance Program managed care programs to a diagnosis-related groups (DRG) payment methodology. Subsection (b) of the statute provides that, even if the DRG methodology is implemented, HHSC is not authorized "to direct a managed care organization to compensate physicians and other health care providers providing services under the organization's managed care plan on a diagnosis-related groups methodology."

HHSC believes these provisions confirm legislative intent that, in the absence of legislation specifically directing HHSC to establish managed care provider rates, HHSC is not otherwise authorized to establish the rates that a contracted managed care organization must pay health care providers that are enrolled in its provider network.

Section 531.069, Government Code, requires HHSC to periodically evaluate the potential cost-effectiveness of including a prescription drug benefit in the Medicaid managed care program. The 82nd Texas Legislature enacted Section 1.02 of Senate Bill 7 during its first called session. This provision directs HHSC to include an outpatient pharmacy benefit in each contract for Medicaid managed care services.

To fully implement the Legislature's direction regarding the expansion of the Medicaid managed care program, including the

incorporation of outpatient pharmacy services, HHSC is seeking a waiver under Section 1115 of the federal Social Security Act (42 U.S.C. §1315a) (1115 waiver). The 1115 waiver must be approved by the Centers for Medicare and Medicaid Services (CMS). The new rules are proposed to implement the statutory mandates consistent with the pharmacy provisions of the federally approved 1115 waiver and to comply with cost-saving initiatives in the 2012-13 General Appropriations Act.

In compliance with Texas Government Code §533.005(a)(23), added by Senate Bill 7 in the 82nd Legislature's first called session, the proposed new rules in Subchapter J do the following: (1) require managed care organizations to adopt and exclusively use HHSC's Medicaid formulary and preferred drug list and to implement prior authorization and drug utilization review processes; (2) inform MCOs that they are not authorized to negotiate rebates with drug companies or to receive confidential drug pricing information, and that they may not require members to obtain drugs from mail-order pharmacies; (3) address exclusive contracting for specialty pharmacy services; (4) address network participation and access-to-network-pharmacy requirements; and (5) describe MCO requirements concerning out-of-network pharmacy providers.

Section-by-Section Summary

Proposed new §353.901 describes the purpose and statutory authority for the rules in the subchapter, and the subchapter's application to health care MCOs. The subchapter does not apply to dental MCOs because outpatient pharmacy services are not included in dental MCOs' capitation structures.

Proposed new §353.903 provides definitions for the words and terms used in the subchapter.

Proposed new §353.905 describes the requirements for an MCO to provide outpatient pharmacy services. The new section:

Requires an MCO to use HHSC's Medicaid formulary and preferred drug list, to comply with certain other pharmacy services rules in Chapter 354, to comply with state and federal laws regarding prior authorization procedures, and to include pharmacies and pharmacists that meet the stated criteria in their networks.

States that an MCO is not authorized to negotiate rebates with drug companies, to receive confidential drug pricing, or to require its members to use mail-order pharmacies for their covered outpatient drugs.

Requires an MCO to enter into a provider agreement with any pharmacy provider that meets the MCO's credentialing requirements and agrees to the MCO's financial and other terms, but creates an exception for agreements relating to specialty drugs, as outlined in Texas Government Code §533.005(a)(23)(G) - (H). Separate from this proposal, HHSC is proposing new §354.1853, which is referenced in §353.905 as the source of the definition for a specialty drug.

Requires an MCO to allow pharmacy providers to fill prescriptions for covered outpatient drugs ordered by any licensed prescriber regardless of the prescriber's network participation.

Requires an MCO to pay claims in accordance with the Texas Insurance Code's requirements; and

Requires compliance with certain requirements in Chapter 354, Subchapter F (relating to Pharmacy Services) and Subchapter W (relating to Pharmacy Limitations).

Proposed new §353.907 describes the conditions under which an MCO may and may not require a prior authorization.

Proposed new §353.909 describes the requirements for pharmacy providers that provide services to Medicaid managed care recipients.

Proposed new §353.911:

Requires members to use network pharmacies, with the exception of emergency outpatient pharmacy services provided by out-of-network pharmacy providers.

Allows members to receive up to a 90-day supply of a covered drug without additional prior authorization.

Prohibits MCOs from requiring members to use or pay for mail order prescriptions and services.

Proposed new §353.913:

Confirms the responsibility of the participating MCOs to offer a network of pharmacy providers that meets the needs of their members who are Medicaid recipients.

Prohibits an MCO from refusing to reimburse an out-of-network pharmacy provider for emergency covered outpatient pharmacy services.

Describes the reimbursement methodology if an MCO and an out-of-network pharmacy provider cannot agree on a reimbursement amount.

Describes an MCO's reporting requirements concerning out-of-network pharmacy utilization, as well as the standards by which excessive use of out-of-network pharmacy services will be determined.

Describes the provider complaint process, including the time frames for HHSC's response and for any action required from the MCO if HHSC determines that the complaint is valid.

Describes when HHSC will require a corrective action plan for an MCO, what the plan will require, and what actions are taken either by HHSC or an MCO as a result of the need for a corrective action plan.

Proposed new §353.915 provides HHSC's requirements governing access to network pharmacies by the MCO's members.

Fiscal Note

Greta Rymal, Deputy Executive Commissioner for Financial Services, has determined that, for the first five years the new sections are in effect, there are foreseeable implications relating to costs or revenues of state government. There are no foreseeable implications relating to costs or revenues of local governments. There are no anticipated economic costs to persons who are required to comply with the proposed rules. There is no anticipated effect on employment in a local economy.

The effect on state government for the first five years the proposed new sections are in effect is an estimated general revenue cost of $11,481,636 in FY 2012; and an estimated general revenue cost savings of $12,159,719 in FY 2013; $27,511,643 in FY 2014; $30,849,420 in FY 2015; and $34,708,729 in FY 2016; and an estimated increase in revenue of $0 in FY 2012; $50,920,910 in FY 2013; $38,738,686 in FY 2014; $42,833,755 in FY 2015; and $47,398,369 in FY 2016.

Small Business and Micro-business Impact Analysis

Under §2006.002 of the Government Code, a state agency proposing an administrative rule that may have an adverse economic effect on small businesses must prepare an economic impact statement and a regulatory flexibility analysis. The economic impact statement estimates the number of small businesses subject to the rule and projects the economic impact of the rule on small businesses. The regulatory flexibility analysis describes the alternative methods the agency considered to achieve the purpose of the proposed rule while minimizing adverse effects on small businesses.

HHSC collects very limited cost data from pharmacies that currently are enrolled in the Medicaid Vendor Drug Program. The minimal financial information collected from pharmacies during claims processing is insufficient to determine the size of the business. Specifically, HHSC collects data concerning the usual and customary price a pharmacy charges the general public for products reimbursed by Medicaid *(see* 1 TAC §355.8544) and, when required pursuant to an audit, pharmacy invoices for products reimbursed by Medicaid. Accordingly, HHSC is unable to determine whether or to what extent a non-chain pharmacy that is currently enrolled in the Medicaid Vendor Drug Program is a small business or micro-business.

Nonetheless, HHSC estimates that 996 independent pharmacies in Texas may be small businesses or micro-businesses and that the proposed new rules may have an adverse economic effect on some of these businesses related to the carve-in of pharmacy benefits into managed care capitation rates. The economic impact from the proposed rules, however, is uncertain, and the following analysis represents HHSC's best estimate of the potential adverse economic effect pharmacy carve-in may have on pharmacies across the state, including small and micro-businesses.

During the 2011 Legislative Session, HHSC informed the Legislature of anticipated cost savings that it hoped would result from the pharmacy carve-in. Those estimated cost savings (outlined in the Fiscal Note section above) result from efficiencies that the agency hopes would be achieved by changing the way HHSC pays for Medicaid pharmacy services. The marketplace will determine the amount of efficiencies that are actually achieved because a Medicaid managed care model necessarily involves negotiations of rates between managed care entities and providers, without rate-setting interference by HHSC.

HHSC estimates that 996 independent pharmacies in Texas that may be small businesses or micro-businesses will be affected by the proposed rules and may experience an adverse economic impact as a result of the pharmacy carve-in. The extent of the effect depends on the negotiations that occur between the MCOs and the pharmacies and on the number of pharmacies that already have a contractual relationship with a pharmacy benefits manager or MCO. Because, as noted above, the outcome of the negotiations are outside of HHSC's authority to control, the amount of adverse economic impact to pharmacies cannot be calculated with certainty. Another factor that makes the economic impact difficult to calculate is that a provider's revenue from the Medicaid program is contingent on the volume of Medicaid recipients it serves. HHSC cannot predict with certainty the future utilization of pharmacy benefits by the Medicaid population; however, HHSC believes that utilization management controls implemented by managed care organizations will result in lower utilization and therefore likely reduce pharmacy revenues.

Given these areas of uncertainty, HHSC used a set of MCO pharmacy reimbursement assumptions to estimate the amount of impact on those pharmacies that are likely to qualify as small or micro-businesses under the definitions in Texas Government Code §2006.001. The MCO pharmacy reimbursement assumptions were based on pharmacy reimbursement information provided by the MCOs. We then applied the assumptions to actual claims experience from fiscal year 2011, using a sample size that represented more than 37 million claims, in the current fee-for-service Vendor Drug Program (VDP) to arrive at estimated reimbursements to pharmacies in managed care. We then compared the estimated reimbursements to the actual VDP pharmacy cost experience. In general, we found that dispensing fees paid under managed care will be significantly less than under VDP, while ingredient costs under managed care will be greater than under VDP. These assumptions produced the following results:

(1) Overall pharmacy reimbursement under managed care will be 2.6% less than under VDP;

(2) Independent pharmacy reimbursement under managed care will be 6.0% less than under VDP; and

(3) Chain pharmacy reimbursement under managed care will be 0.3% less than under VDP.

For purposes of this analysis, "independent pharmacies" were defined as all pharmacies with four or fewer store locations. HHSC recognizes that this definition of "independent" pharmacies likely results in a greater number of pharmacies than would qualify under Government Code §2006.001, which defines a "small business" as one that is independently owned and operated and has fewer than 100 employees or less than $6 million in annual gross receipts. HHSC does not readily have access to employment or financial data for these providers, and thus could not estimate the impact to the particular subset of independent pharmacy providers contemplated by the statute.

As stated in the background and justification section above, HHSC is required by state law to carve pharmacy services into managed care. In conducting the regulatory flexibility analysis required by Government Code §2006.002, HHSC recognizes that, while the proposed rules may have an economic effect on pharmacy businesses in the state, the rules do not actually regulate pharmacies. Participation by pharmacy providers and all healthcare providers in the Medicaid program is voluntary. The proposed rules do not impose duties or obligations on pharmacies and do not require regulatory compliance. Any "regulatory flexibility" HHSC could consider as an alternative to the pharmacy carve-in would fail to comply with the directive of the Texas Legislature in S.B. 7 to carve pharmacy services into managed care. However, HHSC did consider, but ultimately declined to implement at this time, the following options related to certain aspects of the managed care pharmacy benefit:

1) Mail order prescriptions. HHSC considered the potential cost savings and other likely impacts of requiring Medicaid recipients who are enrolled in managed care organizations to obtain all or most of their prescription drugs through mail order delivery. However, S.B. 7 and Rider 81 of the General Appropriations Act placed limitations on the use of mail-order pharmacies. The Legislature instructed that "the managed care organization may include mail-order pharmacies in its networks, but may not require enrolled recipients to use those pharmacies, and may not charge an enrolled recipient who opts to use this service a fee, including postage and handling fees(.)" S.B.7, Sec. 1.02, 82nd Leg., 1st C.S., 2011 (amending Tex. Gov't Code §355.005). Thus, while mail order can be offered as an option for members of an MCO,

the Legislature has prohibited the imposition of a requirement that members use mail order for pharmacy benefits.

2) Selective contracting. HHSC considered the potential for increased cost savings and other impacts from a selective contracting arrangement with large chain pharmacies. Selective contracting could result in substantially increased cost savings to the state. However, selective contracting could also result in more severe impacts on small businesses because many small and independent pharmacies would no longer be able to serve Medicaid managed care members unless they sub-contracted with one of the large chain pharmacies with which HHSC selectively contracted.

3) Supplemental reimbursement to some pharmacies. HHSC considered the potential option of mandating a supplemental reimbursement to some independent pharmacies in order to offset the loss in revenue they may experience as a result of their participation in Medicaid managed care programs. Limitations exist in federal law concerning state-mandated provider rates in managed care. Federal regulations at 42 C.F.R. §438.60 prohibit the state from making supplemental or additional payments to providers that are paid by or contracted with an MCO. Additionally, the state cannot require MCOs to make payments to network providers in any certain amount because such a requirement would conflict with the concept of a "risk contract," as that term is defined in federal regulations at 42 C.F.R. §438.2.

Public Benefit

Billy Millwee, Deputy Executive Commissioner for Health Services, has determined that for each year of the first five years the proposed new rules are in effect, the anticipated public benefit expected as a result of enforcing the rules will be the delivery of outpatient pharmacy services to members through Medicaid managed care programs in Texas, which will promote more efficient service delivery and better coordination of care.

Regulatory Analysis

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

Takings Impact Assessment

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

Public Comment

Written comments on the proposed new sections may be submitted to Gary Young, Medicaid/CHIP Division, Texas Health and Human Services Commission, Mail Code H320, 11209 Metric Blvd, Bldg. H, Austin, Texas 78758; by fax to (512) 491-1972; or by e-mail to gary.young@hhsc.state.tx.us within 30 days of publication of this proposal in the *Texas Register.*

Public Hearing

A public hearing is scheduled for January 17, 2012 from 9:00 a.m. to 11:00 a.m. in the John H. Winters Building, Public Hearing Room 125, located at 701 W. 51st Street, Austin, Texas 78751. Persons requiring further information, special assistance, or accommodations should contact Leigh A. Van Kirk at (512) 491-2813.

Statutory Authority

The new sections are proposed under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority, and §531.005, which requires HHSC to ensure its contracts with MCOs include an outpatient pharmacy benefit plan for its enrolled recipients; and Human Resources Code §32.021 and Texas Government Code §531.021, which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas and to adopt rules and standards for program administration.

The new sections affect the Human Resources Code, Chapter 32, and the Texas Government Code, Chapters 531 and 533. No other statutes, articles, or codes are affected by this proposal.

§353.901. Purpose.

The purpose of this subchapter is to implement the requirements of Texas Government Code §533.005, which establishes requirements for providing outpatient pharmacy benefits through Medicaid managed care. This subchapter applies to health care managed care organizations.

§353.903. Definitions.

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

(1) Clinical edit--A process for verifying that a member's medical condition matches the clinical criteria for a prescribed drug.

(2) Clinical edit prior authorization (clinical edit PA)--A prior authorization that is granted by a health care managed care organization (health care MCO) prior to dispensing a covered outpatient drug with a clinical edit.

(3) Covered outpatient drug--A drug or biological product included on the formulary and dispensed by a pharmacy in an outpatient setting.

(4) Formulary--The list of covered outpatient drugs for the Texas Medicaid program.

(5) Network provider--A pharmacy provider who has entered into a contract with the health care MCO to provide outpatient drug benefits to Medicaid enrollees.

(6) Non-preferred drug--A covered outpatient drug on the preferred drug list (PDL) that has been designated as non-preferred.

(7) Pharmacy benefits manager (PBM)--An entity that administers the Medicaid outpatient drug benefit on behalf of a health care MCO.

(8) Preferred drug--A covered outpatient drug on the PDL that has been designated as preferred because it has been evaluated to be safe, clinically effective, and cost-effective compared to other drugs in the same therapeutic drug class on the market.

(9) Preferred drug list (PDL)--The list of covered outpatient drugs reviewed by the Pharmaceutical and Therapeutics (P & T) Committee. Reviewed drugs are recommended by the P & T Committee as either preferred or non-preferred and HHSC establishes the final designation.

(10) Preferred drug list prior authorization (PDL PA)--A prior authorization that is granted by a health care MCO prior to dispensing a non-preferred drug.

(11) Prior authorization (PA)--A positive determination made by a health care MCO that a prescription for a covered outpatient drug meets the criteria to be reimbursed by the health care MCO.

§353.905. Managed Care Organization Requirements.

(a) A health care managed care organization (health care MCO) must adopt and exclusively use the Health and Human Services Commission's (HHSC's) Medicaid formulary and preferred drug list.

(b) A health care MCO is not authorized to negotiate rebates for covered outpatient drugs with drug manufacturers, or to receive confidential drug pricing regarding covered outpatient drugs from drug manufacturers.

(c) A health care MCO cannot pay claims submitted by a pharmacy provider who is under sanction or exclusion from the Medicaid or CHIP Programs.

(d) Except as provided in subsection (e) of this section, a health care MCO must enter into a network provider agreement with any pharmacy provider that meets the health care MCO's credentialing requirements, and agrees to the health care MCO's financial terms and other reasonable administrative and professional terms.

(e) A health care MCO may enter into an exclusive contract with a pharmacy provider for services related to specialty drugs, as defined in §354.1853 of this title (relating to Specialty Drugs). A health care MCO is prohibited from entering into exclusive contract for services relating to specialty drugs with a pharmacy owned in full or part by a pharmacy benefits manager contracted with the health care MCO.

(f) A health care MCO must allow pharmacy providers to fill prescriptions for covered outpatient drugs ordered by any licensed prescriber regardless of the prescriber's network participation.

(g) A health care MCO must pay claims in accordance with Texas Insurance Code §843.339, relating to prescription drug claims payment requirements.

(h) An MCO must comply with the rules in Chapter 354, Subchapter F (relating to Pharmacy Services) and Subchapter W (relating to Pharmacy Limitations) of this title with the exception of:

(1) Section 354.1865 (relating to Number-of-prescriptions Limit);

(2) Section 354.1867 (relating to Refills);

(3) Section 354.1873 (relating to Freedom of Choice); and

(4) Division 6 (relating to Pharmacy Claims); and

(5) Section 354.3047 (relating to Quantity Limitations).

§353.907. Prior Authorization Requirements.

(a) A health care managed care organization (health care MCO) may not impose a preferred drug list prior authorization (PDL PA) on a covered outpatient drug before the drug has been considered at a meeting of the Health and Human Services Commission's (HHSC's) Pharmaceutical and Therapeutics Committee.

(b) A health care MCO may not impose a PDL PA on a covered outpatient drug that was prescribed before HHSC's designation of the drug as non-preferred, unless the member has exhausted all of the prescription, including any authorized refills.

(c) A health care MCO must allow a provider to submit a request for prior authorization of a covered outpatient drug by telephone, fax, or electronic communications through the Internet.

(d) A health care MCO must respond to a request for prior authorization by telephone, fax, or electronic communications through the Internet no later than 24 hours after receiving the request. If the health care MCO cannot respond to the prior authorization request within this time, then the health care MCO must allow a pharmacy to dispense a 72-hour supply of the prescribed drug.

(e) A health care MCO cannot require a PDL PA for a preferred drug.

(f) A health care MCO must require a PDL PA for a non-preferred drug.

(g) If a member's medical condition does not match the health care MCO's clinical criteria for dispensing a covered outpatient drug, the health care MCO may require a clinical edit prior authorization (clinical edit PA) for a preferred or non-preferred drug.

(h) HHSC will post on its website clinical edit PAs that are used in HHSC's fee-for-service Vendor Drug Program. A health care MCO must implement all clinical edit PAs that HHSC has designated as "mandatory" for the Medicaid managed care programs.

§353.909. Participating Pharmacy Providers.

(a) To participate in a health care managed care organization's (health care MCO's) network, a pharmacy provider must be licensed with the Texas State Board of Pharmacy, have a national provider identifier, and be enrolled as a Medicaid provider with the Health and Human Services Commission's (HHSC's) Vendor Drug Program.

(b) A pharmacy provider is subject to the Vendor Drug Program rules in Chapter 354, Subchapter F, Division 1 and Division 5 of this title (relating to Participation; and Audits).

(c) The prescription requirements in §354.1863(a), (b), and (d) of this title (relating to Prescription Requirements) apply to all pharmacy providers.

(d) Except as prohibited by the health care MCO, a pharmacy provider may substitute one covered outpatient drug for another covered outpatient drug in a prescription only if authorized by the prescribing physician in accordance with 22 TAC §309.3 (relating to Generic Substitution).

§353.911. Members.

(a) A member must obtain a covered outpatient drug from a network pharmacy provider contracted with the member's health care MCO, except at provided in §353.913 of this subchapter (relating to Managed Care Organization Requirements Concerning Out-of-network Outpatient Pharmacy Services).

(b) A member may receive up to a 90-day supply of a covered outpatient drug.

(c) A health care MCO cannot require a member to obtain a covered outpatient drug from a mail-order pharmacy or charge the member for mail-order services, including the cost of the drug, fees, or other related services.

§353.913. Managed Care Organization Requirements Concerning Out-of-network Outpatient Pharmacy Services.

(a) Network adequacy.

(1) The Health and Human Services Commission (HHSC) is the state agency responsible for overseeing and monitoring the Medicaid managed care program. A health care managed care organization (health care MCO) participating in the Medicaid managed care program must offer a network of pharmacy providers that is sufficient to meet the needs of the health care MCO's members. HHSC will monitor health care MCO members' access to an adequate provider net-

work through reports from the health care MCOs and complaints received from providers and members. The reporting requirements are discussed in subsection (c) of this section.

(2) A health care MCO may not refuse to reimburse an out-of-network pharmacy provider for emergency covered outpatient pharmacy services.

(b) Reasonable reimbursement methodology. If a health care MCO and an out-of-network pharmacy provider cannot agree on a reimbursement amount, then the health care MCO must reimburse the provider at the usual and customary rate that prevails in the service area, unless payment is limited by state or federal law.

(c) Reporting requirements. A health care MCO must submit a quarterly report to HHSC regarding out-of-network pharmacy utilization, as described in §353.4 of this chapter (relating to Managed Care Organization Requirements Concerning Out-of-Network Providers). For purposes of such reporting, the health care MCO will include out-of-network pharmacy utilization under the "other services" category.

(d) Utilization.

(1) Upon review of a report described in subsection (c) of this section, HHSC may determine that a health care MCO exceeded maximum out-of-network usage standards set by HHSC for out-of-network access to covered outpatient pharmacy services during the reporting period.

(2) Out-of-network usage standards. No more than 20 percent of total dollars billed to a health care MCO for covered outpatient pharmacy services may be billed by out-of-network providers.

(e) Provider complaints.

(1) HHSC will accept provider complaints regarding reimbursement for or overuse of out-of-network pharmacy providers and will conduct investigations into any such complaints.

(2) When a pharmacy provider files a complaint regarding out-of-network payment, HHSC will require the health care MCO to submit data to support its position on the adequacy of the payment to the provider. The data will include at a minimum a copy of the claim for services rendered and an explanation of the amount paid and of any amounts denied.

(3) Not later than the 60th day after HHSC receives a pharmacy provider complaint, HHSC will notify the pharmacy provider of the conclusions of HHSC's investigation regarding the complaint. The notification to the complaining pharmacy provider will include:

(A) a description of the corrective actions, if any, required of the health care MCO in order to resolve the complaint; and

(B) if applicable, a conclusion regarding the amount of reimbursement owed to an out-of-network pharmacy provider.

(4) If HHSC determines through investigation that a health care MCO did not reimburse an out-of-network pharmacy provider based on a reasonable reimbursement methodology as described in subsection (b) of this section, HHSC will initiate a corrective action plan. Refer to subsection (f) of this section for information about the contents of the corrective action plan.

(5) If, after an investigation, HHSC determines that additional reimbursement is owed to an out-of-network pharmacy provider, the health care MCO must pay the additional reimbursement owed to the out-of-network pharmacy provider within 90 days from the date the complaint was received by HHSC, or 18 days from the date the clean claim, or information required that makes the claim clean, is received by the health care MCO, whichever comes first.

(6) If the health care MCO does not pay the entire amount of the additional reimbursement by the due date described in paragraph (5) of this subsection, HHSC may require the health care MCO to pay interest on the unpaid amount. If required by HHSC, interest accrues at a rate of 18 percent simple interest per year on the unpaid amount from the due date described in paragraph (5) of this subsection until the date the entire amount of the additional reimbursement is paid.

(7) HHSC will pursue any appropriate remedy authorized in the contract between the health care MCO and HHSC if the MCO fails to comply with a corrective action plan under subsection (f) of this section.

(f) Corrective action plan.

(1) A corrective action plan is required by HHSC in the following situations:

(A) The health care MCO exceeds a maximum standard established by HHSC for out-of-network access to covered outpatient pharmacy services described in subsection (d) of this section; or

(B) The health care MCO does not reimburse an out-of-network pharmacy provider based on a reasonable reimbursement methodology as described in subsection (b) of this section.

(2) A corrective action plan imposed by HHSC will require one of the following:

(A) Reimbursements by the health care MCO to out-of-network pharmacy providers at rates that equal the allowable rates for the health care services as determined under Human Resources Code §32.028 and §32.0281 for all covered outpatient pharmacy services provided during the period:

(i) the health care MCO is not in compliance with a utilization standard established by HHSC; or

(ii) the health care MCO is not reimbursing out-of-network pharmacy providers based on a reasonable reimbursement methodology, as described in subsection (c) of this section;

(B) Initiation of an immediate freeze by HHSC on the enrollment of additional recipients in the health care MCO until HHSC determines that the provider network under the health care MCO can adequately meet the needs of its members;

(C) Education of the health care MCO's members regarding the proper use of the health care MCO's pharmacy provider network; or

(D) Any other actions HHSC determines are necessary to ensure that the health care MCO's members have access to appropriate covered outpatient pharmacy services and that pharmacy providers are properly reimbursed by the health care MCO for providing such services to those recipients.

§353.915. Access to Network Pharmacies.

(a) A health care managed care organization (MCO) must ensure that a member has access to at least one network pharmacy within 15 miles from his or her residence.

(b) A health care MCO must ensure that a member has access to at least one network pharmacy with 24-hour coverage within 75 miles of his or her residence.

(c) If a network pharmacy provider is not available to a member within the mileage radius specified in subsection (a) or (b) of this section, the health care MCO must submit to the Health and Human

Services Commission for approval data that indicates covered outpatient pharmacy services are not available to the member within the required distance.

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 December 12, 2011.

TRD-201105494
Steve Aragon
General Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: January 22, 2012
For further information, please call: (512) 424-6576

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CHAPTER 354. MEDICAID HEALTH SERVICES

SUBCHAPTER A. PURCHASED HEALTH SERVICES

The Texas Health and Human Services Commission (HHSC) proposes to amend §354.1189, concerning the acute care Medicaid billing coordination system; §354.1416, concerning eligibility criteria for the Texas Medicaid Wellness Program; and §354.1417, concerning definitions for the Texas Medicaid Wellness Program.

Background and Justification

The amendments are proposed as conforming changes to proposed amendments and new rules in Chapter 353 of this title, published in this issue of the *Texas Register.* With the expansion of managed care throughout the state of Texas and the resulting elimination of Primary Care Case Management (PCCM) as a managed care model, references to PCCM in §§354.1189, 354.1416, and 354.1417 require deletion.

The amendments also update terminology in the rules for consistency and revise terminology in compliance with House Bill (H.B.) 1481, 82nd Texas Legislature, Regular Session, 2011, regarding person-first respectful language.

Section-by-Section Summary

The amendment to §354.1189 deletes a reference to PCCM and adds "Medicaid" to the title of the acute care billing coordination system to reflect the term used in Government Code §531.02413 and in other references in the section.

The amendment to §354.1416 deletes references to PCCM. The amendment also updates terminology in subsection (a) in compliance with H.B. 1481.

The amendment to §354.1417 deletes a reference to PCCM in paragraph (4) and deletes the definition of PCCM in paragraph (12).

Fiscal Note

Greta Rymal, Deputy Executive Commissioner for Financial Services, has determined that, for the first five years the proposed amendments are in effect, enforcing or administering the amendments does not have foreseeable implications relating to costs or revenues of state or local governments. There are no anticipated economic costs to persons who are required to comply with the proposed rules. There is no anticipated effect on employment in a local economy.

Small Business and Micro-business Impact Analysis

Ms. Rymal has determined that there will be no adverse effect on small businesses or micro-businesses as a result of the proposal.

Public Benefit

Billy Millwee, Deputy Executive Commissioner for Health Services, has determined that, for each year of the first five years the amendments are in effect, the anticipated public benefit expected as a result of enforcing the amendments is that the rules will reflect current terminology and services available.

Regulatory Analysis

HHSC has determined that this proposal is not a "major environmental rule" as defined by §2001.0225 of the Texas Government Code. "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 a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

Takings Impact Assessment

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

Public Comment

Written comments on the proposal may be submitted to Gary Young, Medicaid/CHIP Division, Texas Health and Human Services Commission, Mail Code H320, 11209 Metric Blvd., Bldg. H, Austin, TX 78758; by fax to (512) 491-1972; or by e-mail to gary.young@hhsc.state.tx.us within 30 days of publication of this proposal in the *Texas Register.*

Public Hearing

A public hearing is scheduled for January 17, 2012 from 9:00 a.m. to 11:00 a.m. in the John H. Winters Building, Public Hearing Room 125, located at 701 W. 51st Street, Austin, Texas 78751. Persons requiring further information, special assistance, or accommodations should contact Leigh A. Van Kirk at (512) 491-2813.

DIVISION 11. GENERAL ADMINISTRATION

1 TAC §354.1189

Legal Authority

The amendment is proposed under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with broad rulemaking authority; and the Human Resources Code, §32.021 and Texas Government Code, §531.021(a), which authorize HHSC to administer the federal medical assistance (Medicaid) program in Texas.

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

§354.1189. Acute Care Medicaid Billing Coordination System.

An acute care Medicaid billing coordination system [~~The Acute Care Billing Coordination System~~] is mandated by the Government Code §531.02413. The Health and Human Services Commission (HHSC [~~or Commission~~]) will develop and implement an acute care Medicaid billing coordination system for the fee-for-service [~~and primary care case management~~] delivery model [~~models~~] that identifies whether another entity has primary payor responsibility.

(1) An entity holding a permit, license, or certificate of authority issued by a state regulatory agency must allow HHSC or its designee to access databases that enable it to carry out the purposes of this section. Entities subject to this section are those entities that are, by statute, contract or agreement, legally responsible for the payment of a claim for a health care item or service.

(2) HHSC shall refer any entity that violates this rule to the regulatory agency issuing the permit, license, or certificate of authority for possible administrative sanction.

(3) After September 1, 2008, no public funds shall be expended on entities not in compliance with this section unless a memorandum of understanding is entered into between the entity and HHSC [~~the Commission~~].

(4) Information obtained under this section must be secure and maintain the confidentiality of the client's health records in compliance with security and privacy rules adopted by the U.S. Department of Health and Human Services under the Health Insurance Portability and Accountability Act of 1996 (HIPAA), 45 C.F.R. §§164.302 - 164.318 and §§164.500 - 164.534.

(5) The administrator of the acute care Medicaid billing coordination system shall be determined by HHSC. The administrator shall be responsible for meeting all requirements of the acute care Medicaid billing coordination system.

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 December 12, 2011.

TRD-201105495
Steve Aragon
General Counsel
Texas Health and Human Services Commission
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For further information, please call: (512) 424-6576

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DIVISION 32. TEXAS MEDICAID WELLNESS PROGRAM

1 TAC §354.1416, §354.1417

Legal Authority

The amendments are proposed under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with broad rulemaking authority; and the Human Resources Code, §32.021 and Texas Government Code, §531.021(a), which authorize HHSC to administer the federal medical assistance (Medicaid) program in Texas.

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

§354.1416. Eligibility Criteria.

(a) The Texas Medicaid Wellness Program serves people with disabilities who receive Medicaid services [~~members of the Medicaid disabled~~] and people who receive Temporary Assistance for Needy Families (TANF) [~~populations~~] who:

(1) Receive medical services through fee-for-service [~~or the Primary Care Case Management (PCCM) program~~];

(2) Are able, or have a caregiver who is able, to respond actively to health information and care coordination activities; and

(3) Are identified by the Health and Human Services Commission (HHSC) and the Texas Medicaid Wellness Program vendor as being high-cost and/or high-risk due to chronic illness or condition.

(b) Texas Medicaid Wellness Program client population exclusions:

(1) Medicaid clients that are programmatically excluded from the Texas Medicaid Wellness Program:

(A) Dual Eligible client populations that are eligible for Medicare and Medicaid services;

(B) Clients with Third Party Insurance;

(C) Clients in a Medicaid waiver program [~~other than PCCM~~];

(D) Clients in a managed care program [~~other than PCCM~~];

(E) Clients in a Medicare pilot;

(F) Clients in a hospice program; or

(G) Clients in institutional or community-based long term care service programs (except previously enrolled Texas Medicaid Wellness Program clients in a skilled nursing facility less than 60 consecutive days in a 12 month period); and

(2) Undocumented aliens.

(c) Texas Medicaid Wellness Program client disenrollment:

(1) Clients enrolled in the Texas Medicaid Wellness Program can opt-out of the program at any time.

(2) Clients may be disenrolled from the Texas Medicaid Wellness Program for the following reasons:

(A) Loss of Medicaid eligibility: clients that regain Medicaid eligibility are automatically re-enrolled into the Texas Medicaid Wellness Program during their first month of renewed eligibility; or

(B) The client is unresponsive to, fails to participate in, or cannot be reached for interventions by the Texas Medicaid Wellness Program vendor. HHSC's contract with the Texas Medicaid Health Wellness Program vendor will specify the number of attempts that the vendor must make to reach a client before disenrollment.

§354.1417. Definitions for Wellness Services.

The following terms are specific to the Texas Medicaid Wellness Program, when used in this division, have the following meanings, unless the context clearly indicates otherwise.

(1) Care management--An approach or process for persons with complex needs and/or chronic illness that is focused on preventing acute or urgent care utilization through the use of accepted clinical and non-clinical interventions. These interventions include services such as care coordination; telephone access to nurses skilled in monitoring and providing consultation on how to address disease symptoms and complications, including answering medication questions; providing patient education; self-management care skills; and providing physician-coordinated treatment plans.

(2) Case management--A process whereby covered persons with specific healthcare needs are identified and a care plan is developed and implemented that efficiently utilizes health care resources to achieve the optimum outcome in the most cost-effective manner.

(3) Claim--A request for payment for authorized benefits submitted on the applicable approved form that meets the established itemization requirements.

(4) Texas Medicaid Wellness Program--A [~~is a~~] holistic approach to health care delivery designed to identify and provide services to Medicaid fee-for-service [~~and Primary Care Case Management~~] clients with, or who are at risk for, incurring high-cost medical services due to chronic illness or complex conditions.

(5) Eligible client--An individual who has been designated by the State as eligible for medical care and services under the Medicaid program and meets the requirements for the Texas Medicaid Wellness Program.

(6) Fee-for-Service Reimbursement--The traditional health care payment system under which physicians and other providers receive a payment for each unit of service they provide or an insurance product in which clients are allowed total freedom to choose their health care providers.

(7) Health severity level assessment--An assessment by the Texas Medicaid Wellness Program vendor that determines the appropriate interventions.

(8) Medical assistance program--The program implemented by the State of Texas under the provisions of Title XIX of the Social Security Act, as amended.

(9) Medical home--A community-based system of health care delivery that provides individual patients a known resource (primary care provider or clinic) for all primary and preventive care services. It also provides continuity of care for acute care needs 24 hours a day, including consultative, specialty, and health-related services.

(10) Physician--A doctor of medicine or doctor of osteopathy (MD or DO) legally authorized to practice medicine or osteopathy at the time and place the service is provided.

(11) Preventive care--Comprehensive care emphasizing prevention, early detection, and early treatment of conditions, generally including routine physical examination, immunization, well-person care, and age-appropriate screening exams.

[~~(12) Primary Care Case Management (PCCM) A managed care model allowed under federal regulations in which HHSC contracts with providers to form a managed care provider network.~~]

(12) [~~(13)~~] Primary care provider (PCP)--A physician or provider who has agreed to provide a medical home to Medicaid clients and who is responsible for providing care to patients, maintaining the continuity of patient care and initiating referral for care.

(13) [~~(14)~~] Stratify--A method used by the Texas Medicaid Wellness Program vendor to organize interventions based on the client's specific needs at a given time.

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 December 12, 2011.

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Steve Aragon
General Counsel
Texas Health and Human Services Commission
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CHAPTER 357. HEARINGS
SUBCHAPTER A. UNIFORM FAIR HEARING RULES

1 TAC §357.1

The Texas Health and Human Services Commission (HHSC) proposes to amend §357.1, concerning definitions for its uniform fair hearing rules.

Background and Justification

The amendment to §357.1 is proposed, in part, as a conforming change to proposed amendments, new rules, and repeals of rules in Chapter 353 of this title, published in this issue of the *Texas Register.* With the expansion of managed care throughout the state of Texas and the resulting elimination of Primary Care Case Management as a managed care model, the definition of managed care in Chapter 357 requires revision, and the definition of Primary Care Case Management requires deletion.

The amendment to §357.1 is also proposed to eliminate an obsolete definition. The definition of Integrated Care Management (ICM) Program requires deletion because the program no longer exists.

Section-by-Section Summary

The definitions of Integrated Care Management (ICM) Program at §357.1(24) and Primary Care Case Management (PCCM) at §357.1(31) are deleted. The definition of managed care organization (MCO) at §357.1(26) is updated to cross-reference the definition of MCO in §353.2 of this title. The paragraphs affected by the deletion of the two definitions are renumbered.

Fiscal Note

Greta Rymal, Deputy Executive Commissioner for Financial Services, 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. There are no anticipated economic costs to persons who are required to comply with the proposed rule. There is no anticipated effect on employment in a local economy.

Small Business and Micro-business Impact Analysis

Ms. Rymal has determined that there will be no effect on small businesses or micro-businesses to comply with the proposal, because the amendment concerns definitions in a subchapter governing fair hearings and is not applicable to small or micro-businesses.

Public Benefit

Billy Millwee, Deputy Executive Commissioner for Health Services, has determined that, for each year of the first five years the amendment is in effect, the anticipated public benefit expected as a result of enforcing the amendment is that the rule will not reference obsolete programs.

Regulatory Analysis

HHSC has determined that this proposal is not a "major environmental rule" as defined by §2001.0225 of the Texas Government Code. "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 a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

Takings Impact Assessment

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

Public Comment

Written comments on the proposal may be submitted to Gary Young, Medicaid/CHIP Division, Texas Health and Human Services Commission, Mail Code H320, 11209 Metric Blvd., Bldg. H, Austin, Texas 78758; by fax to (512) 491-1972; or by e-mail to gary.young@hhsc.state.tx.us within 30 days of publication of this proposal in the *Texas Register.*

Public Hearing

A public hearing is scheduled for January 17, 2012 from 9:00 a.m. to 11:00 a.m. in the John H. Winters Building, Public Hearing Room 125, located at 701 W. 51st Street, Austin, Texas 78751. Persons requiring further information, special assistance, or accommodations should contact Leigh A. Van Kirk at (512) 491-2813.

Legal Authority

The amendment is proposed under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with broad rulemaking authority; and the Human Resources Code, §32.021 and Texas Government Code, §531.021(a), which authorize HHSC to administer the federal medical assistance (Medicaid) program in Texas.

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

§357.1. Definitions.

The following words and phrases, when used in this subchapter, have the following meanings unless the context clearly indicates otherwise:

(1) Across the Board Reduction of Services--The agency need not grant a hearing if the sole issue is a Federal or State law requiring an automatic change adversely affecting some or all recipients.

(2) Action Effective Date--The date the agency action becomes effective.

(3) Adequate Notice--Notice in accordance with applicable law, rules, and regulations of the programs.

(4) Agency--Any one of the agencies listed under the Health and Human Services Agencies.

(5) Agency Action--The agency's decision to:

(A) reduce, suspend, terminate or deny benefits or eligibility;

(B) deny certification of a household; or

(C) grant a benefit in an amount less than requested.

(6) Agency Representative--An individual from an agency or its designee who is authorized to represent the agency or its designee in a fair hearing.

(7) Appeal--A request for a review of an agency action or failure to act that may result in a fair hearing.

(8) Appellant--A client who requests a fair hearing.

(9) Authorized Representative--A person designated by the appellant in writing or designated by statute, regulation, or rule or named by the appellant on the record who may act on behalf of the appellant at the fair hearing.

(10) Benefit--A service administered or assistance provided by the agencies or their designees, including determining eligibility for services in the SNAP, TANF, and Medicaid-funded programs, and other agency programs in which state or federal law or rules provide a client the right to a fair hearing.

(11) Certified Spanish/English Interpreter--An interpreter who is certified by one of the following entities:

(A) American Translators Association;

(B) Federally Certified Court Interpreter through the Federal Court Interpreter Certification Examination;

(C) Interpreter Certification offered through a four-year college or university;

(D) State Certification Programs;

(E) United States Department of State (Escort, Seminar, or Conference level); or

(F) Any other nationally recognized certification program.

(12) CFR--Code of Federal Regulations.

(13) Client--A person who applies for or receives benefits from one of the HHS Agencies.

(14) Date of Appeal Request--The date on which the appellant or the appellant's authorized representative clearly expresses, in writing or orally as required, a desire to appeal.

(15) Date of Decision--The date of the hearings officer's decision, as noted on the decision document.

(16) Date of Notice of Agency Action--The date on the written notice informing the client of the agency action.

(17) Day--Calendar day, unless otherwise specified.

(18) Designee--A contractor, employee, or other agent designated to act for an agency.

(19) Fair Hearing--An informal proceeding held before an impartial HHSC hearings officer in which a client appeals an agency action. These hearings are not open to the public.

(20) Health and Human Services (HHS) Agencies:

(A) Health and Human Services Commission (HHSC);

(B) Department of Aging and Disability Services (DADS);

(C) Department of Assistive and Rehabilitative Services (DARS);

(D) Department of Family and Protective Services (DFPS);

(E) Department of State Health Services (DSHS); and

(F) A reference to an agency includes a designee.

(21) Health Plan--Includes managed care organizations [~~MCO's, ICM and PCCM plans~~].

(22) Hearings Administrator--The administrator for fair and fraud hearings in the HHSC Appeals Division who oversees daily operations and staff conducting fair hearings.

(23) Hearings Officer--An HHSC employee designated by the Director of the Appeals Division who is responsible for conducting fair hearings and issuing decisions.

[~~(24) Integrated Care Management (ICM) Program--A Medicaid managed care plan where an ICM Contractor manages and coordinates acute care services and long term services and supports for eligible Medicaid clients.~~]

(24) [~~(25)~~] Language Services--Any services that ensure effective communication for full participation of all parties in a hearing.

(25) [~~(26)~~] Managed Care Organization (MCO)--Has the meaning defined in §353.2 of this title (relating to Definitions). [~~An entity that has a current Texas Department of Insurance certificate of authority to operate as a health maintenance organization (HMO) or as an approved nonprofit health corporation under the Texas Insurance Code.~~]

(26) [~~(27)~~] Nursing Home Action--The nursing home's decision to transfer or discharge a client.

(27) [~~(28)~~] Party--An appellant or his authorized representative or an agency or its representative.

(28) [~~(29)~~] PASARR--Pre-Admission Screening and Resident Review Determination.

(29) [~~(30)~~] Preponderance--The greater weight of the evidence required in a civil lawsuit for the trier of fact to decide in favor of one side or the other. This preponderance is based on the more convincing evidence and its probable truth or accuracy, and not on the amount of evidence.

[~~(31) Primary Care Case Management (PCCM)--A managed care model allowed under federal regulations in which the Commission contracts with providers to form a managed care provider network.~~]

(30) [~~(32)~~] Person with Limited English Language Proficiency (LEP)--Person who does not speak English as a primary language and who has a limited ability to read, speak, write, or understand English.

(31) [~~(33)~~] Prior Authorization Request--A request for services that is reimbursable only if authorization or approval for the services is obtained before services are rendered.

(32) [~~(34)~~] SNAP--Supplemental Nutrition Assistance Program, formerly known as Food Stamps.

(33) [~~(35)~~] TANF--Temporary Assistance for Needy Families.

(34) [~~(36)~~] Texas Health Steps (THSteps)--A program under Medicaid that provides medical and dental check-ups, diagnosis, and treatment to eligible clients from birth through age 20. THSteps was formerly known as EPSDT.

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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Steve Aragon
General Counsel
Texas Health and Human Services Commission
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CHAPTER 370. STATE CHILDREN'S HEALTH INSURANCE PROGRAM

The Texas Health and Human Services Commission (HHSC) proposes to amend §§370.1, 370.4, and 370.10, concerning administration of the State Children's Health Insurance Program (CHIP); §370.21 and §370.49, concerning application screening, referral, processing, renewal, and disenrollment; §§370.301, 370.303, 370.305, 370.307, 370.321, and 370.325, concerning enrollment, disenrollment, and renewal of membership in CHIP; §370.452 and §370.454, concerning CHIP provider requirements; and §§370.501, 370.502, 370.504, and 370.505, concerning special investigative units.

HHSC also proposes to repeal §370.451, concerning definitions; and proposes new §370.311, concerning disenrollment; new §370.455, concerning provider complaints and appeals processes; new Subchapter G, concerning standards for CHIP managed care, consisting of §370.601 and §370.602; and new Subchapter H, concerning outpatient pharmacy services, consisting of §370.701.

Background and Justification

The amendments, repeal, and new rules are proposed primarily as conforming changes to rules proposed in Chapter 353 of this title (relating to Medicaid Managed Care) elsewhere in this issue of the *Texas Register* and to implement cost-saving initiatives as required by the 2012-13 General Appropriations Act (H.B. 1, Article II, Health and Human Services Commission, 82nd Legislature, Regular Session, 2011).

With the expansion of Medicaid managed care as directed by the 82nd Texas Legislature, HHSC is adding outpatient pharmacy services to CHIP consistent with the new outpatient pharmacy services added to Medicaid managed care programs. This is being done under authority granted by Texas Health & Safety

Code §62.051(b) and the cost-savings initiatives in the 2012-13 General Appropriations Act. New Subchapter G is proposed to govern standards for CHIP managed care. New Subchapter H is proposed to govern the new outpatient pharmacy services in CHIP.

Dental services are currently offered through CHIP; however, as a result of the re-procurement for the CHIP dental program, there will be more than one statewide dental managed care organization (MCO) for CHIP, which requires amending the rules to reflect that members will have a choice of dental MCOs. Where possible, the proposed amendments regarding dental services conform to the language in the proposed Medicaid managed care rules in Chapter 353.

Minor grammatical corrections are made as part of the proposed amendments to clarify the text.

Section-by-Section Summary

Subchapter A, Program Administration

The proposed amendment to §370.1 adds new subsection (b) to clarify that the chapter defines requirements for CHIP MCOs; adds new subsection (e) to indicate that the rules in this chapter must be read in conjunction with other relevant state and federal laws, except where indicated; and adds references to dental care where applicable.

The proposed amendment to §370.4: (1) adds definitions for new words and terms to be consistent with words and terms used in Medicaid managed care, and to incorporate definitions from §370.451, which is proposed for repeal; (2) deletes definitions for obsolete terms, such as "children's health insurance program service area" and "health plan;" and (3) adds references to dental services.

The proposed amendment to §370.10 clarifies that HHSC is the single state agency responsible for the CHIP program and adds references to dental coverage.

Subchapter B, Application Screening, Referral, Processing, Renewal, and Disenrollment

The proposed amendment to §370.21 adds a reference to dental coverage.

The proposed amendment to §370.49 clarifies how HHSC or its designee will set a pregnant member's CHIP eligibility expiration date, to be consistent with current policy.

Subchapter C, Enrollment, Renewal, Disenrollment, and Cost Sharing

The title of the subchapter is revised to better reflect its provisions.

The proposed amendments to §§370.301, 370.305, 370.321, and 370.325 change terminology from "health plan" to "MCO."

The proposed amendment to §370.301 also confirms that HHSC or its designee will conduct CHIP enrollment and disenrollment activities.

The proposed amendment to §370.303 adds references to health care MCOs and dental MCOs and adds language to clarify the default assignment methodology for members who fail to select a health care or dental MCO. The amendment also deletes references to not having a choice of health plans due to the Centers for Medicare and Medicaid Service's requirements for choice.

The proposed amendment to §370.307 adds a reference to dental insurance.

Proposed new §370.311 describes conditions under which disenrollment from CHIP can take place. Requirements for disenrollment at a member's request and at an MCO's request are provided.

Subchapter E, Provider Requirements

Section 370.451 is proposed for repeal, as the applicable definitions in the section are proposed for relocation to §370.4. The proposed amendment to §370.452 is a conforming change to revise the Texas Administrative Code reference for the definition of "significant traditional provider."

The proposed amendment to §370.454 replaces references to "HMO" and "exclusive provider benefit plan (EPBP)" with "MCO."

Proposed new §370.455 states that provider complaints and claims payment appeals are handled in accordance with the Texas Insurance Code and Texas Department of Insurance regulations.

Subchapter F, Special Investigative Units

The proposed amendment to §370.501 conforms to proposed changes in the Medicaid managed care rule at §353.501. The proposed amendment adds references to dental services where applicable, changes the due date for an MCO's plan to prevent and reduce waste, abuse, and fraud from 60 days before the start of the state's fiscal year to 90 days before the start of the state's fiscal year to match existing policy; and clarifies that contractual remedies may be imposed if an MCO fails to timely resubmit its revised plan, to match existing MCO contract language.

The proposed amendment to §370.502 conforms to proposed changes in the Medicaid managed care rule at §353.502. The proposed amendment:

Adds a new requirement that the description of an MCO's procedures for detecting possible acts of provider waste, abuse, and fraud must include verification that an MCO member actually received services the provider billed.

Specifies that if an MCO selects a sample based upon 15% of a provider's claims related to waste, abuse, and fraud, the sample must include claims relating to at least 50 recipients.

Adds dental records to the records an MCO must review when suspicious indicators of waste, abuse, and fraud exist.

Replaces "physician" with the broader term "provider" to include providers other than physicians.

Updates requirements concerning an MCO's procedures for educating recipients and providers and training personnel to prevent waste, abuse, and fraud to indicate MCO subcontractors must receive waste, abuse, and fraud training annually; the training must be specific to the area of responsibility for the MCO and subcontractor; general training must be provided to MCO staff and subcontractors under certain circumstances; and the MCO must provide training to new MCO and subcontractor staff, directly involved with Medicaid, within 90 days of employment.

Requires that MCOs must submit a report listing all investigations that resulted in no findings of waste, abuse, or fraud to the HHSC Office of Inspector General (HHSC-OIG) on a monthly, instead of a quarterly, basis to align with current policy.

The proposed amendment to §370.504 conforms to changes proposed in the Medicaid managed care rule at §353.504. The amendment clarifies that MCOs cannot charge for records requested from certain entities; clarifies that dental records and study models related to orthodontia services are included in the request for record review; and adds language related to contractual remedies to align the rule with existing contract language.

The proposed amendment to §370.505 conforms to changes proposed in the Medicaid managed care rule at §353.505. The proposed amendment replaces the current provisions to comply with statutory requirements in Texas Government Code §531.1131 as added by H.B. 1720. The amendment also incorporates current HHSC policy allowing for MCO recoveries on fraudulent activity under a threshold amount, and rearranges the information for clarity.

Subchapter G, Standards for CHIP Managed Care

Proposed new §370.601 applies certain Medicaid managed care rules to CHIP managed care.

Proposed new §370.602 states that member complaints and appeals are handled in accordance with the Texas Insurance Code and Texas Department of Insurance regulations.

Subchapter H, Outpatient Pharmacy Services

Proposed new §370.701 applies the Medicaid managed care rules governing outpatient pharmacy services in proposed new Chapter 353, Subchapter J to CHIP managed care, except that references to the preferred drug list in those rules and §353.913, governing out-of-network pharmacy provides, do not apply in CHIP.

Fiscal Note

Greta Rymal, Deputy Executive Commissioner for Financial Services, has determined that, for the first five years the proposed amendments, repeal, and new rules are in effect, there are foreseeable implications relating to costs or revenues of state government.

The effect on state government for the first five years the proposed amendments, repeal, and new rules are in effect is an estimated general revenue cost savings of $6,013 in FY 2012; $29,730 in FY 2013; $502,318 in FY 2014; $1,043,051 in FY 2015; and $1,659,130 in FY 2016, and an estimated increase in revenue of $0 in FY 2012; $5,193,223 in FY 2013; $3,816,777 in FY 2014; $4,109,386 in FY 2015; and $4,425,416 in FY 2016.

There is no estimated effect on local governments for the first five years the proposed amendments, repeal, and new rules are in effect.

Ms. Rymal anticipates that there will not be an economic cost to persons who are required to comply with the amendments, repeal, and new rules.

There is no anticipated negative impact on local employment.

Small Business and Micro-business Impact Analysis

Under §2006.002 of the Government Code, a state agency proposing an administrative rule that may have an adverse economic effect on small businesses must prepare an economic impact statement and, generally, a regulatory flexibility analysis. The economic impact statement estimates the number of small businesses subject to the rule and projects the economic impact of the rule on small businesses. The regulatory flexibility analysis describes the alternative methods the agency considered to achieve the purpose of the proposed rule while minimizing adverse effects on small businesses.

Ms. Rymal has determined that the proposed new rules may have an adverse economic effect on certain small businesses and micro-businesses related to the carve-in of pharmacy benefits into CHIP managed care capitation rates. The pharmacy carve-in may have an adverse economic effect on pharmacies across the state, including some that are small and micro-businesses.

HHSC estimates that approximately 805 pharmacies in Texas that are small businesses or micro-businesses will be affected by the proposed rules and may experience an adverse economic impact as a result of the pharmacy carve-in to the CHIP managed care program. The exact amount of adverse economic impact to pharmacies cannot be calculated with certainty for several reasons. First, enrollment in CHIP is voluntary for all healthcare providers, including pharmacies. Second, the rate paid by a managed care organization is subject to negotiation, and many pharmacies are already enrolled with pharmacy benefit managers that contract with the managed care organizations. Third, the future utilization of pharmacy benefits is difficult to predict with certainty.

Given these areas of uncertainty, HHSC used the estimated cost savings to the state (see the Fiscal Note above) to estimate the amount of impact on those pharmacies that are likely to qualify as small or micro-businesses under the definitions in Government Code §2006.001. HHSC estimates that the economic impact to small and micro-business pharmacy providers will be approximately $1,360 in FY 2012 and $6,725 in FY 2013.

As stated in the background and justification section above, HHSC is required to carve pharmacy services into the CHIP managed care program to comply with the cost-saving initiatives outlined in the 2012-13 General Appropriations Act. In conducting the regulatory flexibility analysis required by Government Code §2006.002, HHSC determined that there are no feasible alternative methods by which to achieve the goals of the proposed rules without risk of failure to achieve the required savings.

Public Benefit

Billy Millwee, Deputy Executive Commissioner for Health Services, has determined that, for each year of the first five years the amendments, repeal, and new rules are in effect, the anticipated public benefits expected as a result of enforcing the amendments, repeal, and new rules are a CHIP program that is more transparent and accountable, and consistency with Medicaid managed care rules where possible. The public benefit will also include the delivery of outpatient pharmacy services to members of CHIP MCOs, which will promote more efficient service delivery and better coordination of care.

Regulatory Analysis

HHSC has determined that this proposal is not a "major environmental rule" as defined by §2001.0225 of the Texas Government Code. "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 a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

Takings Impact Assessment

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

Public Comment

Written comments on the proposal may be submitted to Gary Young, Medicaid/CHIP Division, Texas Health and Human Services Commission, Mail Code H320, 11209 Metric Blvd., Bldg. H, Austin, Texas 78758; by fax to (512) 491-1972; or by e-mail to gary.young@hhsc.state.tx.us within 30 days of publication of this proposal in the *Texas Register.*

Public Hearing

A public hearing is scheduled for January 17, 2012, from 9:00 a.m. to 11:00 a.m. in the John H. Winters Building, Public Hearing Room 125, located at 701 W. 51st Street, Austin, Texas 78751. Persons requiring further information, special assistance, or accommodations should contact Leigh A. Van Kirk at (512) 491-2813.

SUBCHAPTER A. PROGRAM ADMINISTRATION

1 TAC §§370.1, 370.4, 370.10

Legal Authority

The amendments are proposed under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; and §531.1131(e), which requires the Executive Commissioner of HHSC to adopt rules necessary to implement the law regarding payment recovery efforts, including procedures that must be followed by an MCO when engaging in payment recovery efforts; and Texas Health and Safety Code §62.051(d), which directs HHSC to adopt rules as necessary to implement the Children's Health Insurance Program.

The amendments affect Texas Government Code, Chapter 531, and Texas Health and Safety Code, Chapter 62. No other statutes, articles, or codes are affected by this proposal.

§370.1. Purpose.

(a) This chapter implements the State Children's Health Insurance Program (CHIP), authorized under chapters 62 and 63, Health and Safety Code, in a manner that is timely, efficient, fair, and that promotes access to quality and economical health and dental care for eligible children and their families in Texas.

(b) This chapter also defines requirements for CHIP managed care organizations (MCOs). An MCO must comply with this chapter and the terms of its contract with the Health and Human Services Commission.

(c) [~~(b)~~] CHIP is a state-designed child health insurance plan authorized under Title XXI of the federal Social Security Act (42 U.S.C. §§1397aa, et seq.), and chapters 62 and 63, Health and Safety Code, which provides access to low-cost preventive and primary health and dental care to children, including children with special health care needs, in certain low-income families of this state.

(d) [~~(c)~~] CHIP is administered, in part, in accordance with the state plan for children's health insurance, filed by the Health and Human Services Commission with the federal Secretary of Health and Human Services, which describes the general conditions under which joint federal state child health insurance program funds will be administered in Texas.

(e) The rules in this chapter must be read in conjunction with:

(1) federal and state statutes;

(2) rules relating to CHIP; and

(3) except where otherwise indicated, Texas Department of Insurance rules regarding:

(A) regulation of health maintenance organizations at 28 TAC Chapter 11 (relating to Health Maintenance Organizations); and

(B) exclusive provider benefit plans at 28 TAC Chapter 3, Subchapter KK (relating to Exclusive Provider Benefit Plan).

(f) [~~(d)~~] Nothing in this chapter shall be construed as providing an individual with an entitlement to health or dental insurance benefits or health care or to assistance in obtaining health insurance or health benefits.

§370.4. Definitions.

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

(1) Action--

(A) In the context of an eligibility or disenrollment determination by the Health and Human Services Commission (HHSC) or its designee, action is defined as:

(i) [~~(A)~~] denial [~~Denial~~] of CHIP eligibility;

(ii) [~~(B)~~] disenrollment [~~Disenrollment~~] from CHIP; or [~~:~~]

(iii) [~~(C)~~] the [~~The~~] failure of HHSC [~~the Health and Human Services Commission (HHSC)~~] or its designee to act within 45 days on an applicant's [~~Applicant's~~] request for CHIP eligibility determination.

(B) [~~(D)~~] "Action" does not include expiration of a time-limited service.

(2) Acute care--Preventive care, primary care, and other medical or behavioral health care provided for a condition having a relatively short duration.

(3) Acute care hospital--A hospital that provides acute care services.

(4) Adverse determination--A determination by a managed care organization (MCO) that the health care services or dental services furnished, or proposed to be furnished, to a patient are not medically necessary or appropriate.

(5) Agreement or Contract--The formal, written, and legally enforceable contract and amendments thereto between HHSC and an MCO.

(6) [~~(2)~~] Alien--A person who is not a native born or naturalized citizen of the United States of America.

(7) Allowable revenue--All managed care revenue received by the MCO pursuant to the contract during the contract period, including retroactive adjustments made by HHSC. This would include any revenue earned on CHIP managed care funds such as investment income, earned interest, or third party administrator earnings from services to delegated networks.

(8) Appeal--The formal process by which a member or his or her representative requests a review of the MCO's action.

(9) [~~(3)~~] Applicant--An individual who lives with the child and applies for health and dental care coverage on behalf of the child. An applicant can only be:

(A) a child's parent, whether biological or adoptive;

(B) a child's grandparent, relative or other adult who provides care for the child;

(C) a minor not living with an adult relative applying for himself/herself; or

(D) a child's step-parent.

(10) [~~(4)~~] Application--The standardized, written document that an applicant must complete to apply for health and dental care coverage through CHIP.

(11) Behavioral health service--A covered service for the treatment of mental, emotional, or chemical dependency disorders.

(12) [~~(5)~~] Budget Group--The group of individuals who live in the home with the child for whom an application for health and dental care coverage is submitted and whose information is used to establish family size and calculate income. Individuals receiving Supplemental Security Income payments are not included in the Budget Group. Budget Group members include only:

(A) the child seeking health and dental care coverage;

(B) the child's siblings under age 19 who live with the child (biological, adopted, or step-siblings);

(C) the child's biological or adoptive parents;

(D) the child's step-parent;

(E) the child's spouse, if married, and they have children.

(13) Capitation rate--A fixed, predetermined fee paid by HHSC to the MCO each month, in accordance with the contract, for each enrolled member in exchange for which the MCO arranges for or provides a defined set of covered services to the member, regardless of the amount of covered services used by the enrolled member.

(14) [~~(6)~~] Child--An individual under the age of 19.

(15) [~~(7)~~] Children's Health Insurance Program or CHIP or Program--The Texas State Children's Health Insurance Program established under Title XXI of the federal Social Security Act (42 U.S.C. §§1397aa, et seq.) and chapters 62 and 63, Health and Safety Code.

(16) Claims processing entity--The MCO or its subcontractor that processes claims for CHIP.

(17) CMS--The Centers for Medicare and Medicaid Services, which is the federal agency responsible for administering Medicare and overseeing state administration of Medicaid and CHIP.

[~~(8) Children's Health Insurance Program Service Area or CSA--One of the designated areas in the state that is served by one or more of the CHIP Health Plans or the CHIP Exclusive Provider Organization.~~]

(18) [~~(9)~~] Commission or HHSC--The Texas Health and Human Services Commission.

(19) Complainant--A member, or a treating provider or other individual designated to act on behalf of the member, who files a complaint.

(20) Complaint--Any dissatisfaction, expressed by a complainant, orally or in writing, to the MCO, with any aspect of the MCO's operation, including dissatisfaction with plan administration; procedures related to review or appeal of an adverse determination, as set forth in Texas Insurance Code, Chapter 843, Subchapter G; the denial, reduction, or termination of a service for reasons not related to medical necessity; the way a service is provided; or disenrollment decisions. The term does not include misinformation that is resolved promptly by supplying the appropriate information or clearing up the misunderstanding to the satisfaction of the member.

(21) [~~(10)~~] Cost Sharing--Any enrollment fees or co-payments the member [~~enrollee~~] is responsible for paying.

(22) [~~(11)~~] Countable Income--For the month of receipt, any type of payment that is a regular and predictable gain or a benefit to a Budget Group that is not specifically exempted. In determining countable income, do not include income received by the child or sibling member of the Budget Group who is under age 18 and enrolled in school.

(23) [~~(12)~~] Countable Liquid Assets--Personal Property that is cash or that an applicant [~~Applicant~~] can readily convert to cash that is used in calculating a child's eligibility for CHIP.

(A) Countable liquid assets include the balances, less income received or deposited in the current month of the following:

(i) cash on hand;

(ii) cash in the bank;

(iii) cash in a Temporary Assistance to Needy Families (TANF) Electronic Benefit Transfer account;

(iv) money remaining from the sale of a homestead; and

(v) accessible trust funds.

(B) Countable Liquid Assets do not include:

(i) any resource exempted by federal law from consideration for purposes of determining eligibility or benefit levels for any federally funded needs-based program, such as TANF and Assets for Independence Act (AFIA) Individual Development Accounts; or

(ii) any financial instrument subject to rules limiting use of its proceeds, including penalties and/or tax liabilities incurred for early liquidation, such as individual retirement accounts and Keogh plans; or

(iii) the cash value of any insurance policy; or

(iv) Internal Revenue Code 529 qualified college savings program accounts, such as Texas Guaranteed Tuition Plan accounts; or

(v) funds received as educational grants or scholarships.

(24) Covered service--A health care service or a dental service or item that the MCO must arrange to provide and pay for on a member's behalf under the terms of the contract executed between the MCO and HHSC. This includes all covered services and benefits identified in the Texas CHIP State Plan, and all value-added services approved by HHSC.

(25) Cultural competency--The ability of individuals and systems to provide services effectively to people of various cultures, races, ethnic backgrounds, and religions in a manner that recognizes, values, affirms, and respects the worth of the individuals and protects and preserves their dignity.

(26) [~~(13)~~] Day--Calendar day, unless otherwise specified.

(27) Default enrollment--The process established by HHSC to assign a CHIP managed care enrollee to an MCO when the enrollee has not selected an MCO.

(28) Dental contractor--A dental MCO that is under contract with HHSC for the delivery of dental services.

(29) Dental home--A provider who has contracted with a dental MCO to serve as a dental home to a member and who is responsible for providing routine preventive, diagnostic, urgent, therapeutic, initial, and primary care to patients, maintaining the continuity of patient care, and initiating referral for care. Provider types that can serve as dental homes are general dentists and pediatric dentists.

(30) Dental managed care organization (dental MCO)--A dental indemnity insurance provider or dental health maintenance organization licensed or approved by the Texas Department of Insurance.

(31) Dental service--The routine preventive, diagnostic, urgent, therapeutic, initial, and primary care provided to a member and included within the scope of HHSC's agreement with a dental contractor. For purposes of this chapter, "dental service" does not include a device for a craniofacial anomaly or an emergency service provided in a hospital, urgent care center, or ambulatory surgical center setting involving dental trauma. These types of emergency services are treated as health care services in this chapter.

(32) [~~(14)~~] Designee--A contractor of HHSC authorized to act on behalf of HHSC under this chapter.

(33) Disability--A physical or mental impairment that substantially limits one or more of an individual's major life activities, such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, socializing, or working.

(34) Eligible provider--A network provider who provides medical services to a member or a non-network provider who agrees with an MCO to see a member for an agreed-upon rate on a case-by-case basis.

(35) [~~(15)~~] Enrollment--The process by which a child determined to be eligible for CHIP is enrolled in a CHIP MCO [~~health plan~~] serving the service area [~~CHIP Service Area~~] in which the child resides.

(36) Exclusive provider benefit plan (EPBP)--An MCO that complies with 28 TAC §§3.9201 - 3.9212, relating to the Texas Department of Insurance's requirements for EPBPs, and contracts with HHSC to provide CHIP coverage.

(37) [~~(16)~~] Exempt Income--Income received by the Budget Group that is not counted in determining income eligibility.

(38) Experience rebate--The portion of the MCO's net income before taxes that is returned to the State in accordance with the MCO's contract with HHSC.

(39) [~~(17)~~] FPL--Federal Poverty Level Income Guidelines.

(40) [~~(18)~~] Gross Budget Group Income--Monthly Countable Income before any payroll deductions.

(41) Health care managed care organization (health care MCO)--An entity that is licensed or approved by the Texas Department of Insurance to operate as a health maintenance organization or to issue an EPBP.

(42) Health care services-- The acute care, behavioral health care, and health-related services that an enrolled population might reasonably require in order to be maintained in good health, including, at a minimum, emergency services and inpatient and outpatient services.

(43) Health maintenance organization (HMO)--An organization that holds a certificate of authority from the Texas Department of Insurance to operate as an HMO under Chapter 843 of the Texas Insurance Code, or a certified Approved Non-Profit Health Corporation formed in compliance with Chapter 844 of the Texas Insurance Code.

(44) Hospital--A licensed public or private institution as defined in the Texas Health and Safety Code at Chapter 241, relating to hospitals, or Chapter 261, relating to municipal hospitals.

[~~(19) Health Plan--A licensed health maintenance organization, indemnity carrier, or authorized exclusive provider organization that contracts with the Commission to provide health benefits coverage to CHIP members.~~]

(45) [~~(20)~~] Household--The Budget Group plus any SSI recipient who is the child's:

(A) sibling who lives with the child (biological, adopted, or step-sibling);

(B) biological or adoptive parent; or

(C) step-parent.

(46) Main dental home provider-- See definition of "dental home" in this section.

(47) Main dentist--See definition of "dental home" in this section.

(48) Managed care--A health care delivery system or dental services delivery system in which the overall care of a patient is coordinated by or through a single provider or organization.

(49) Managed care organization (MCO)--A dental MCO or a health care MCO.

(50) Marketing--Any communication from an MCO to a client who is not enrolled with the MCO that can reasonably be interpreted as intended to influence the client's decision to enroll, not to enroll, or to disenroll from a particular MCO.

(51) Marketing materials--Materials that are produced in any medium by or on behalf of the MCO that can reasonably be interpreted as intending to market to potential members. Materials relating to the prevention, diagnosis or treatment of a medical or dental condition are not marketing materials.

(52) Medical home--A primary care provider (PCP) or specialty care provider who has accepted the responsibility for providing accessible, continuous, comprehensive, and coordinated care to members participating in an MCO contracted with HHSC.

(53) Medically necessary health care services--Means:

(A) Dental services and non-behavioral health services that are:

(i) reasonable and necessary to prevent illnesses or medical conditions, or provide early screening, interventions, or treatments for conditions that cause suffering or pain, cause physical deformity or limitations in function, threaten to cause or worsen a handicap, cause illness or infirmity of a member, or endanger life;

(ii) provided at appropriate facilities and at the appropriate levels of care for the treatment of a member's health conditions;

(iii) consistent with health care practice guidelines and standards that are endorsed by professionally recognized health care organizations or governmental agencies;

(iv) consistent with the member's diagnoses;

(v) no more intrusive or restrictive than necessary to provide a proper balance of safety, effectiveness, and efficiency;

(vi) not experimental or investigative; and

(vii) not primarily for the convenience of the member or provider.

(B) Behavioral health services that:

(i) are reasonable and necessary for the diagnosis or treatment of a mental health or chemical dependency disorder, or to improve, maintain, or prevent deterioration of functioning resulting from such a disorder;

(ii) are in accordance with professionally accepted clinical guidelines and standards of practice in behavioral health care;

(iii) are furnished in the most appropriate and least restrictive setting in which services can be safely provided;

(iv) are the most appropriate level or supply of service that can safely be provided;

(v) could not be omitted without adversely affecting the member's mental and/or physical health or the quality of care rendered;

(vi) are not experimental or investigative; and

(vii) are not primarily for the convenience of the member or provider.

(54) Member education program--A planned program of education:

(A) concerning access to health care services or dental services through the MCO and about specific health or dental topics;

(B) that is approved by HHSC; and

(C) that is provided to members through a variety of mechanisms that must include, at a minimum, written materials and face-to-face or audiovisual communications.

(55) Member materials--All written materials produced or authorized by the MCO and distributed to members or potential members containing information concerning the managed care program. Member materials include member ID cards, member handbooks, provider directories, and marketing materials.

(56) [~~(21)~~] Member--A child enrolled in a CHIP MCO [~~Health Plan~~].

(57) [~~(22)~~] Net Budget Group Income--Gross Monthly Countable Income minus any allowable deductions.

(58) Participating MCO--An MCO that has a contract with HHSC to provide services to members.

(59) Primary care provider (PCP)--A physician or other provider who has agreed with the MCO to provide a medical home to members and who is responsible for providing initial and primary care to patients, maintaining the continuity of patient care, and initiating referral for care.

(60) Provider--A credentialed and licensed individual, facility, agency, institution, organization or other entity, and its employees and subcontractors, that has a contract with the MCO for the delivery of covered services to the MCO's members.

(61) Provider education program--Program of education about the CHIP managed care program and about specific health or dental care issues presented by the MCO to its providers through written materials and training events.

(62) Provider network or network--All providers that have contracted with the MCO for the CHIP program.

(63) Quality improvement--A system to continuously examine, monitor, and revise processes and systems that support and improve administrative and clinical functions.

(64) Risk--The potential for loss as a result of expenses and costs of the MCO exceeding payments made by HHSC under the contract.

(65) Service area--The counties included in any HHSC-defined service area as applicable to each MCO.

(66) [~~(23)~~] Qualified Alien--An alien who, at the time of application, satisfies the criteria established under 8 U.S.C. §1641(b).

(67) Significant traditional provider (STP)--A provider identified by HHSC as having provided a significant level of care to the target population.

(68) [~~(24)~~] SSI--Supplemental Security Income.

(69) [~~(25)~~] State Fiscal Year--The 12-month period beginning September 1 of each calendar year and ending August 31 of the following calendar year.

(70) State Plan--The plan permitted under federal law and approved by CMS that allows the state to implement the CHIP program.

(71) Value-added service--A service provided by an MCO that is in addition to the covered services included within the scope of the CHIP State Plan and the MCO's contract with HHSC.

§370.10. Duties and Responsibilities of the Commission.

The Commission is the single state agency responsible for the CHIP Program. The responsibilities include, but are not limited to the following:

(1) maintaining a state-designed Program to obtain health care and dental coverage for children in low-income families in a manner that qualifies for federal funding under Title XXI of the Social Security Act;

(2) making policy, including policy related to covered benefits provided under the Program, a duty which the Commission may not delegate to another agency or entity;

(3) contracting with appropriate individuals and organizations to provide health care and dental coverage, and other services related to the implementation or operation of the Program;

(4) conducting a review of each entity that enters into a contract with the Commission to ensure that the entity is available, prepared, and able to fulfill the entity's obligations under the contract; and

(5) ensuring that amounts spent for CHIP administration do not exceed any limit on administrative expenditures imposed by 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.

Filed with the Office of the Secretary of State on December 12, 2011.

TRD-201105471
Steve Aragon
General Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: January 22, 2012
For further information, please call: (512) 424-6576

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SUBCHAPTER B. APPLICATION SCREENING, REFERRAL, PROCESSING, RENEWAL, AND DISENROLLMENT
DIVISION 1. APPLICATION PROCESSES

1 TAC §370.21

Legal Authority

The amendment is proposed under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; and §531.1131(e), which requires the Executive Commissioner of HHSC to adopt rules necessary to implement the law regarding payment recovery efforts, including procedures that must be followed by an MCO when engaging in payment recovery efforts; and Texas Health and Safety Code §62.051(d), which directs HHSC to adopt rules as necessary to implement the Children's Health Insurance Program.

The amendment affects Texas Government Code, Chapter 531, and Texas Health and Safety Code, Chapter 62. No other statutes, articles, or codes are affected by this proposal.

§370.21. Application Assistance.

An applicant applying for health care and dental coverage under this chapter may obtain assistance completing the application [~~Application~~] by telephone or in person from HHSC or its designee during hours that are posted on the websites of HHSC and its designee or published in applications, brochures, or other marketing media issued or approved by HHSC.

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 December 12, 2011.

TRD-201105472
Steve Aragon
General Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: January 22, 2012
For further information, please call: (512) 424-6576

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DIVISION 4. ELIGIBILITY CRITERIA

1 TAC §370.49

Legal Authority

The amendment is proposed under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; and §531.1131(e), which requires the Executive Commissioner of HHSC to adopt rules necessary to implement the law regarding payment recovery efforts, including procedures that must be followed by an MCO when engaging in payment recovery efforts; and Texas Health and Safety Code §62.051(d), which directs HHSC to adopt rules as necessary to implement the Children's Health Insurance Program.

The amendment affects Texas Government Code, Chapter 531, and Texas Health and Safety Code, Chapter 62. No other statutes, articles, or codes are affected by this proposal.

§370.49. Medicaid Referrals for Pregnant CHIP Members.

Pregnant CHIP members may be referred for a Medicaid eligibility determination. Those pregnant CHIP members who are determined to be Medicaid eligible will be disenrolled from CHIP. Medicaid coverage will be coordinated to begin when CHIP enrollment ends to avoid gaps in health care coverage. In the event HHSC or its designee remains unaware of a member's pregnancy until delivery, the delivery will be covered by CHIP. HHSC or its [~~it's~~] designee will set the mother's eligibility expiration date at the later of:

(1) the end of the second month following the month of the baby's birth or the pregnancy termination; or

(2) the date when the mother's eligibility would have expired.

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 December 12, 2011.

TRD-201105473
Steve Aragon
General Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: January 22, 2012
For further information, please call: (512) 424-6576

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SUBCHAPTER C. ENROLLMENT, RENEWAL, DISENROLLMENT, AND COST SHARING
DIVISION 1. ENROLLMENT AND DISENROLLMENT

1 TAC §§370.301, 370.303, 370.305, 370.307, 370.311

Legal Authority

The amendments and new rule are proposed under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; and §531.1131(e), which requires the Executive Commissioner of HHSC to adopt rules necessary to implement the law regarding payment recovery efforts, including procedures that must be followed by an MCO when engaging in payment recovery efforts; and Texas Health and Safety Code §62.051(d), which directs HHSC to adopt rules as necessary to implement the Children's Health Insurance Program.

The amendments and new rule affect Texas Government Code, Chapter 531, and Texas Health and Safety Code, Chapter 62. No other statutes, articles, or codes are affected by this proposal.

§370.301. CHIP Enrollment Packet.

(a) The Health and Human Services Commission (HHSC) or its designee will conduct enrollment and disenrollment activities.

(b) Within 5 business days of determining a child is CHIP eligible, HHSC's designee must send the applicant [~~Applicant~~] a CHIP enrollment packet containing:

(1) an explanation of CHIP benefits;

(2) information about the value-added services provided by MCOs [~~Health Plans in areas where there is a choice of Health Plans~~];

(3) an enrollment form and instructions for completing the form;

(4) a provider directory for each MCO [~~health plan~~] available in the applicant's service area [~~Applicant's CHIP Service Area (CSA)~~];

(5) a CHIP member guide;

(6) cost-sharing information specific to the Budget Group's percentage of Federal Poverty Level (FPL), which includes:

(A) the enrollment fee, if any;

(B) a schedule of co-payments, if any; and

(C) information about the cost-sharing cap;[~~.~~]

(7) the process for requesting review of an action; [~~and~~]

(8) information specifying the earliest date coverage can begin and the latest date the completed enrollment form must be received by HHSC or its designee to ensure enrollment on the first day of the appropriate month; and

(9) information summarizing the importance of appropriate MCO [~~Health Plan~~] and Primary Care Provider (PCP) choices for applicants [~~Applicants~~] who live in service areas [~~CSAs~~] covered by more than one MCO [~~Health Plan~~].

§370.303. Completion of Enrollment.

(a) To complete CHIP enrollment [~~in a CSA with a choice of health plans,~~] an applicant [~~Applicant~~] must:

(1) select and indicate on the enrollment form, a single health care managed care organization (MCO) and a single dental MCO [~~health plan~~] to cover all eligible children, regardless of the number of eligible children in the Budget Group;

(2) select a primary care provider (PCP) and place the name on the enrollment form;

(3) indicate if an eligible child has special health care needs based on criteria in the member guide; and

(4) sign and return the enrollment form.

[~~(b) To complete enrollment in a CSA without a choice of Health Plans, an Applicant must:~~]

[~~(1) select a PCP and place the name on the enrollment form;~~]

[~~(2) indicate if an eligible child has special health care needs based on criteria in the member guide; and~~]

[~~(3) sign and return the enrollment form.~~]

(b) [~~(c)~~] An applicant [~~Applicant~~] may select a PCP, health care MCO, and dental MCO [~~or Health Plan~~] by mail, telephone, or facsimile.

(c) [~~(d)~~] If an applicant [~~Applicant~~] fails to choose a PCP, or if the chosen PCP is not accepting new members, the health care MCO [~~Health Plan~~] must assign a PCP to each member in the Budget Group and inform the applicant [~~Applicant~~].

(d) [~~(e)~~] Members who fail to select a health care MCO or dental MCO [~~managed care plan or PCP~~] during the period established by the commission will have an MCO [~~a managed care plan~~] selected for them by HHSC or its designee using criteria determined by HHSC. HHSC will [~~shall~~] establish a default methodology. When possible, the default assignment methodology will take into consideration the beneficiary's history with a PCP or main dental provider. If this is not possible, HHSC will distribute beneficiaries among qualified MCOs.

§370.305. Enrollment of Children with Special Health Care Needs (CSHCN).

(a) HHSC or its designee will notify MCOs [~~health plans~~] of members identified through enrollment as having special health care needs;

(b) Each MCO [~~health plan~~] will contact each member identified on the enrollment form as having special health care needs to confirm his or her health care needs status; and

(c) Each MCO [~~health plan~~] will notify HHSC or its designee of members identified through enrollment as having special health care needs who are not confirmed as having special health care needs.

§370.307. Continuous Enrollment Period.

(a) CHIP enrollment always begins on the first calendar day of the month and continues for a period up to 12 consecutive months.

(b) Exceptions to continuous enrollment include, but are not limited to:

(1) a sibling member in the home has an earlier initial date of coverage, in which case the coverage period for the newly enrolled child will be the remaining period of coverage of the already enrolled sibling;

(2) aging out when the member turns 19;

(3) change in health or dental insurance status (parent acquires employer coverage);

(4) family moves out of state;

(5) death of the member;

(6) data match reveals member is enrolled in both CHIP and Medicaid;

(7) notification of member's pregnancy;

(8) failure to drop current health insurance if member was determined to be CHIP-eligible due to the 10 percent rule regarding the cost of the current insurance; or

(9) direction by HHSC based on evidence that the member's original eligibility determination was incorrect.

§370.311. Disenrollment.

(a) Disenrollment at a member's request.

(1) Members will be informed of disenrollment opportunities no less than annually.

(2) During the first 90 days of enrollment in a managed care organization (MCO), a member may request to move to another MCO

for any reason. After 90 days with an MCO, a member must show good cause to move to another MCO.

(3) Disenrollment will take place no later than the first day of the second month after the month in which the member has requested a change.

(b) Disenrollment at an MCO's request.

(1) An MCO may submit a request to the Health and Human Services Commission (HHSC) that a member be disenrolled without the member's consent in the following limited circumstances:

(A) the member misuses or loans his or her MCO membership card to another person to obtain services;

(B) the member is disruptive, unruly, threatening or uncooperative to the extent that the member's membership seriously impairs the MCO's or a provider's ability to provide services to the member or to obtain new members, and member's behavior is not caused by a physical or behavioral health condition; or

(C) the member steadfastly refuses to comply with managed care restrictions (such as repeatedly using the emergency room in combination with a refusal to allow treatment for the underlying medical condition).

(2) An MCO must take reasonable measures to correct a member's behavior prior to requesting disenrollment. Reasonable measures may include providing education and counseling regarding the offensive acts or behaviors.

(3) HHSC will review all requests for disenrollment. HHSC will grant a request if it determines that all reasonable measures taken by the MCO have failed to correct the member's behavior. If HHSC grants a request, it will notify the member of the disenrollment decision and the availability of HHSC's fair hearings process for an appeal of the disenrollment.

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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Steve Aragon
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DIVISION 2. COST-SHARING REQUIREMENTS

1 TAC §370.321, §370.325

Legal Authority

The amendments are proposed under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; and §531.1131(e), which requires the Executive Commissioner of HHSC to adopt rules necessary to implement the law regarding payment recovery efforts, including procedures that must be followed by an MCO when engaging in payment recovery efforts; and Texas Health and Safety Code §62.051(d), which directs HHSC to adopt rules as necessary to implement the Children's Health Insurance Program.

The amendments affect Texas Government Code, Chapter 531, and Texas Health and Safety Code, Chapter 62. No other statutes, articles, or codes are affected by this proposal.

§370.321. Requirements and Exemptions.

Cost-sharing requirements are based on a Budget Group's percentage of FPL. Except for costs associated with unauthorized, non-emergency services provided to a member by out-of-network providers, the co-payments identified in this section are the only amounts a provider may collect from an applicant [~~Applicant~~] in regard to services provided to a member.

(1) An applicant [~~Applicant~~] may be required to pay any of the following costs of CHIP coverage for a member:

(A) an enrollment fee; and

(B) co-payments.

(2) HHSC determines the cost sharing amounts for enrollment in and services provided through CHIP. When determining cost sharing charges, HHSC will solicit public input by publishing proposed cost-sharing amounts and requesting comments. Cost sharing may be determined based on the maximum levels authorized under federal law and applied to income levels so as to minimize administrative costs.

(3) A member who is an American Indian/Alaska Native, as defined in 42 C.F.R. §457.10, is exempt from cost-sharing.

(4) HHSC or its designee notifies each MCO [~~Health Plan~~] which of its members are exempt from cost-sharing.

(5) Co-payments do not apply, at any income level, to preventive health services, such as well-child or well-baby care visits and immunizations.

(6) A member's exemption from cost sharing is noted on the member's MCO [~~Health Plan~~] Member Identification Card.

§370.325. Cost-Sharing Cap.

(a) The aggregate annual Children's Health Insurance Program (CHIP) cost-sharing cap is based on a family's net Budget Group income, established at the time of eligibility determination, as a percentage of the [~~federal poverty level (~~]FPL[~~)~~]. The aggregate annual CHIP cost-sharing cap is established in the Texas CHIP State Plan and approved by the Centers for Medicare and Medicaid Services (CMS). The aggregate annual CHIP cost-sharing cap will not exceed 5 percent of a family's total annual income as required under federal law and federal regulations (see Social Security Act §2103(e)(3)(B) and §42 C.F.R. 457.560(a)). The applicant [~~Applicant~~] is responsible for tracking CHIP cost-sharing expenditures for the family on the form provided by the Texas Health and Human Services Commission (HHSC) or its designee and advising HHSC's designee when the CHIP cost-sharing cap is reached. HHSC or its designee is responsible for:

(1) computing the aggregate annual CHIP cost-sharing cap for the family and informing the applicant [~~Applicant~~] of the amount at enrollment;

(2) providing the applicant [~~Applicant~~] with a form for keeping track of each CHIP member's co-payments and enrollment fee payment;

(3) notifying the affected dental MCO and health care MCO [~~Health Plan~~] within two business days of receiving notice from the applicant [~~Applicant~~] that a family has reached the aggregate annual CHIP cost-sharing cap; and

(4) informing HHSC that an applicant [~~Applicant~~] is owed a refund in the form of a warrant issued by the State Comptroller's Office, if the applicant [~~Applicant~~] notifies HHSC's designee that the family has exceeded its aggregate annual CHIP cost-sharing cap and an enrollment fee has been received from the family that is in excess of the CHIP cost-sharing cap.

(b) On notification by HHSC's designee that a family has reached its aggregate annual CHIP cost-sharing cap, an MCO [~~a Health Plan~~] will issue a new MCO [~~Health Plan~~] Member Identification Card reflecting the absence of a co-payment requirement.

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 E. PROVIDER REQUIREMENTS

1 TAC §370.451

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

Legal Authority

The repeal is proposed under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; and §531.1131(e), which requires the Executive Commissioner of HHSC to adopt rules necessary to implement the law regarding payment recovery efforts, including procedures that must be followed by an MCO when engaging in payment recovery efforts; and Texas Health and Safety Code §62.051(d), which directs HHSC to adopt rules as necessary to implement the Children's Health Insurance Program.

The repeal affects Texas Government Code, Chapter 531, and Texas Health and Safety Code, Chapter 62. No other statutes, articles, or codes are affected by this proposal.

§370.451. Definitions.

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

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1 TAC §§370.452, 370.454, 370.455

Legal Authority

The amendments and new rule are proposed under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; and §531.1131(e), which requires the Executive Commissioner of HHSC to adopt rules necessary to implement the law regarding payment recovery efforts, including procedures that must be followed by an MCO when engaging in payment recovery efforts; and Texas Health and Safety Code §62.051(d), which directs HHSC to adopt rules as necessary to implement the Children's Health Insurance Program.

The amendments and new rule affect Texas Government Code, Chapter 531, and Texas Health and Safety Code, Chapter 62. No other statutes, articles, or codes are affected by this proposal.

§370.452. Significant Traditional Provider.

(a) The Health and Human Services Commission (HHSC) will determine whether a provider meets the definition of significant traditional provider (STP) at §370.4 [~~§370.451(7)~~] of this title (relating to Definitions [~~Significant Traditional Provider or STP~~]).

(b) If a provider is not initially determined to be an STP, the provider may appeal that determination by sending a written notice to the HHSC, Children's Health Insurance Program, P.O. Box 13247, Austin, Texas 78711-3247, stating that it wishes to appeal the STP determination. HHSC will then notify the provider of the appeal procedure to follow.

§370.454. Experience Rebate in the Children's Health Insurance Program.

Each MCO [~~HMO and EPBP~~] participating in CHIP must pay to the State an experience rebate calculated according to the graduated rebate method described in the MCO's [~~HMO's or EPBP's~~] contract with HHSC.

§370.455. Provider Complaints and Appeals Processes.

Provider complaints and claims payment appeals are subject to disposition consistent with the Texas Insurance Code and any applicable Texas Department of Insurance (TDI) regulations. Providers may report alleged violations to TDI.

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. SPECIAL INVESTIGATIVE UNITS

1 TAC §§370.501, 370.502, 370.504, 370.505

Legal Authority

The amendments are proposed under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; and §531.1131(e), which requires the Executive Commissioner of HHSC to adopt rules necessary to implement the law regarding payment recovery efforts, including procedures that must be followed by an MCO when engaging in payment recovery efforts; and Texas Health and Safety Code §62.051(d), which directs HHSC to adopt rules as necessary to implement the Children's Health Insurance Program.

The amendments affect Texas Government Code, Chapter 531, and Texas Health and Safety Code, Chapter 62. No other statutes, articles, or codes are affected by this proposal.

§370.501. Purpose.

(a) This subchapter implements the Health and Human Services Commission's (HHSC), Office of Inspector General (OIG) authority to approve annually, each managed care organization (MCO) plan to prevent and reduce waste, abuse, and fraud. This authority is granted by Chapter 531, Subchapter C, Government Code, [~~Section~~] §531.113.

(b) An MCO that provides or arranges for the provision of health care services or dental services to an individual under the children's health insurance program (CHIP), must arrange for a special investigative unit to investigate fraudulent claims and other types of program abuse by recipients and providers. An MCO may choose to:

(1) establish [~~Establish~~] and maintain the special investigative unit within the MCO [~~managed care organization~~]; or

(2) contract [~~Contract~~] with another entity for the investigation.

(c) An MCO must:

(1) develop a plan to prevent and reduce waste, abuse, and fraud;[~~.~~]

(2) submit the plan [~~The plan must be submitted~~] annually to the HHSC-OIG for approval each year the MCO is enrolled with the State of Texas; and[~~.~~]

(3) submit the plan 90 days before [~~The plan must be submitted 60 days prior to~~] the start of the State fiscal year.

(d) If HHSC-OIG does not approve the initial plan to prevent and reduce waste, abuse, and fraud [~~is not approved~~], the MCO must resubmit the plan to HHSC-OIG within 15 working days of receiving the denial letter, which will explain the deficiencies. If the plan is not resubmitted within the time allotted, the MCO will be in default and remedies or sanctions may be imposed.

(e) If the MCO elects to contract with another entity for the investigation of fraudulent claims and other types of program abuse as referenced in subsection [~~paragraph~~] (b)(2) of this section, the MCO must adhere to all requirements of Title [~~Chapter~~] 42, §438.230 of the Code of Federal Regulations.

§370.502. Managed Care Organization's Plans and Responsibilities in Preventing and Reducing Waste, Abuse, and Fraud.

(a) Each managed care organization (MCO) subject to this section must develop a plan to prevent and reduce waste, abuse, and fraud and submit that plan annually to the Health and Human Services Commission (HHSC), Office of Inspector General (OIG) for approval.

(b) The MCO is responsible for investigating possible acts of waste, abuse, or fraud for all services, including those that the MCO subcontracts to outside entities.

(c) The plan submitted to the HHSC-OIG must include the following information [~~below~~] to be considered for approval.

(1) A description of the MCO's procedures for detecting possible acts of waste, abuse, and [~~or~~] fraud by providers. The description must address each of the following requirements:

(A) use [~~Use~~] of audits to monitor compliance and assist in detecting and identifying CHIP program violations and possible waste, abuse, and fraud overpayments through data matching, analysis, trending, and statistical activities;

(B) monitoring [~~Monitoring~~] of service patterns for providers, subcontractors, and recipients;

(C) use [~~Use~~] of a hotline or another mechanism to report potential or suspected violations;

(D) use [~~Use~~] of random payment review of claims submitted by providers for reimbursement to detect potential waste, abuse, or fraud;

(E) use [~~Use~~] of edits or other evaluation techniques to prevent payment for fraudulent or abusive claims; [~~and~~]

(F) use [~~Use~~] of routine validation of MCO data; and[~~.~~]

(G) verification that MCO members actually received services that were billed.

(2) A description of the MCO's procedures for investigating possible acts of waste, abuse, and fraud by providers. The procedures must satisfy the requirements in subparagraphs (A) - (C) of this paragraph.

(A) The MCO must [~~MCOs are required to~~] conduct a preliminary investigation [~~preliminary investigations. The preliminary investigation must be conducted~~] within 15 working days of the identification or [~~and/or~~] reporting of suspected or [~~and/or~~] potential waste, abuse, or fraud.

(B) The [~~requirements for a~~] preliminary investigation must include [~~but are not limited to~~] the following:

(i) Determining if the MCO has received any previous reports of incidences of suspected waste, abuse, or fraud or conducted any previous investigations of the provider in question. If so, the investigation should include a review of all materials related to the previous investigations, the outcome of the previous investigations, and a determination of whether the new allegations are the same or relate to the previous investigation.

(ii) Determining if the service provider has received any educational training from the MCO in regard to the allegation.

(iii) Conducting a review of the provider's billing pattern to determine if there are any suspicious indicators.

(iv) Reviewing the provider's payment history for the past three years, if available, to determine if there are any suspicious indicators.

(v) Reviewing the policies and procedures for the program type in question to determine if what has been alleged is a violation.

(C) If it is determined that suspicious indicators of possible waste, abuse, or fraud exist, within 15 working days from the conclusion of subparagraphs (A) and (B) of this paragraph, the MCO must select a sample for further review. The sample must consist of a minimum of 50 recipients or 15% of a provider's claims related to the suspected waste, abuse, and fraud; provided, however, that if the MCO selects a sample based upon 15% of the claims, the sample must include claims relating to at least 50 recipients. The MCO must:[.]

(i) within [~~Within~~] 15 working days of the selection of the sample, request medical or dental records and encounter data for the sample recipients.

(ii) review [~~Review~~] the requested medical or dental records and encounter data within 45 working days of receipt of the records to:

(I) validate the sufficiency of service delivery data and to assess utilization and quality of care;[.]

(II) ensure that the encounter data submitted by the provider is accurate; and[.]

(III) evaluate if the review of other pertinent records is necessary to determine if waste, abuse, or fraud has occurred. If the review of additional records is necessary then conduct such review.

(3) A description of the MCO's procedures for detecting possible acts of waste, abuse, and fraud by recipients. The description must address the following:

(A) Review of claims when waste, abuse, or fraud is suspected or reported to determine if:

(i) Treatment(s) and/or medication(s) prescribed by more than one provider appears to be duplicative, excessive, or contraindicated; [~~and~~]

(ii) Recipients are using more than one provider [~~physician~~] to obtain similar treatments and/or medications; [~~and,~~]

(iii) Providers other than the assigned Primary Care Provider (PCP) are treating the recipient, and there is no evidence that the recipient was treated by the assigned PCP for a similar or related condition; and [,]

(iv) The recipient has a high volume of emergency room visits with a non-emergent diagnosis.

(B) Review medical or dental records for the recipients in question if claims review does not clearly determine if waste, abuse, or fraud has occurred.

(C) For health care MCOs, use [~~Use~~] of edits or other evaluation techniques to identify possible overuse or [~~and/or~~] abuse of psychotropic or [~~and/or~~] controlled medications by recipients who are allegedly treated at least monthly by two or more physicians. A physician includes [~~but is not limited to~~]: psychiatrists, pain management specialists, anesthesiologists, and physical medicine and rehabilitation specialists.

(4) A description of the MCO's procedures for investigating possible acts of waste, abuse, and fraud by recipients. The procedures must satisfy the requirements in subparagraphs (A) - (B) of this paragraph, as applicable.

(A) An MCO must [~~MCOs are required to~~] conduct a [~~preliminary investigations. The~~] preliminary investigation [~~must be conducted~~] within 15 working days of the identification or [~~and/or~~] reporting of suspected or [~~and/or~~] potential waste, abuse, or fraud.

(B) For a health care MCO, [~~The requirements for~~] a preliminary investigation must include [~~consist of but are not limited to~~] the following:

(i) Review of acute care and emergency room claims submitted by providers for the [~~suspected~~] recipient suspected of waste, abuse, or fraud.

(ii) Analysis of [~~Analyze~~] pharmacy claim data submitted by providers for the [~~suspected~~] recipient suspected of waste, abuse, or fraud to determine possible abuse of controlled or non-controlled medications. If the MCO does not have the data necessary to conduct the pharmacy claims review, the MCO must request the data within 15 working days of the initial identification or [~~and/or~~] reporting of the suspected or potential waste, abuse, or fraud.

(iii) Analysis of [~~Analyze~~] claims submitted by providers to determine if the diagnosis is appropriate for the medications prescribed.

(5) A description of the MCO's internal procedures for referring possible acts of waste, abuse, or fraud to the MCO's Special Investigative Unit (SIU) and the mandatory reporting of possible acts of waste, abuse, or fraud by providers or recipients to the HHSC-OIG. The procedures must satisfy the requirements in subparagraphs (A) - (E) of this paragraph.

(A) Assign an officer or director the responsibility and authority for reporting all investigations resulting in a finding of possible acts of waste, abuse, or fraud to the OIG. An officer could be but is not limited to a Compliance Officer, a Manager of Government Programs, or a Regulatory Compliance Analyst.

(B) Provide specific and detailed internal procedures for officers, directors, managers, and employees to report possible acts of waste, abuse, and fraud to the MCO's SIU. The procedures must include but are not limited to:

(i) Guidance regarding what information must be reported to the MCO's SIU.

(ii) A requirement that information must be reported to the MCO's SIU within 24 hours of identification or reporting of suspected waste, abuse, and fraud.

(C) Provide specific and detailed internal procedures for the SIU to report investigations resulting in a finding of waste, abuse, or fraud to the assigned officer or director. The procedures must include but are not limited to:

(i) Guidance regarding what information must be reported to the assigned officer or director.

(ii) A requirement that possible acts of waste, abuse, or fraud be reported to the assigned officer or director must occur within 15 working days of making the determination.

(D) Utilizing the HHSC-OIG fraud referral form, the assigned officer or director must report and refer all possible acts of waste, abuse or fraud to the HHSC-OIG within 30 working days of receiving the reports of possible acts of waste, abuse or fraud from the SIU. The report and referral must include an investigative report identifying the allegation, statutes/regulations violated or considered, and the results of the investigation; copies of program rules and regulations violated for the time period in question; the estimated overpayment identified; a summary of interviews conducted; the encounter data submitted by the provider for the time period in question; and all supporting documentation obtained as the result of the investigation. This requirement applies to all reports of possible acts of waste, abuse, and fraud with the exception of an expedited referral.

(E) An expedited referral is required when the MCO has reason to believe that a delay may result in:

(i) harm or death to patients;

(ii) the loss, destruction, or alteration of valuable evidence; [~~or~~]

(iii) a potential for significant monetary loss that may not be recoverable; or

(iv) hindrance of an investigation or criminal prosecution of the alleged offense.

(6) A description of the MCO's procedures for educating recipients and providers and training personnel to prevent waste, abuse, and fraud. The procedures must satisfy the requirements in subparagraphs (A) - (H) of this paragraph.

(A) On an annual basis, the MCO must ensure that [~~organization shall provide~~] waste, abuse and fraud training is provided to each employee and subcontractor who is directly involved in any aspect of CHIP. At a minimum, training is required for all individuals responsible for data collection, provider enrollment or disenrollment, encounter data, claims processing, utilization review, appeals or grievances, quality assurance, and marketing.

(B) The training must be specific to the area of responsibility for the MCO and subcontractor staff receiving the training and contain examples of waste, abuse or fraud in their particular area of interest.

(C) The MCO [~~organization~~] must ensure that [~~provide~~] general training is provided to all CHIP managed care staff of the MCO and its subcontractors that are [~~is~~] not directly involved with the areas listed in subparagraph (A) of this paragraph. The general training must provide information about the definition of waste, abuse, and fraud;[~~,~~] how to report suspected waste, abuse, and fraud and to whom the suspected waste, abuse, and fraud is reported.

(D) The organization must provide waste, abuse, and fraud training to all new MCO and subcontractor staff that will be directly involved with any aspect of CHIP within 90 days of the employee's employment date.

(E) Provide updates to all affected areas when changes to policy and/or procedure may affect their area(s). The updates must be provided within 20 working days of the changes occurring.

(F) Educate recipients, providers, and employees about their responsibilities, the responsibility of others, the definition of waste, abuse, and fraud and how and where to report it. Appropriate methods of educating recipients, providers, and employees may include but are not limited to newsletters, pamphlets, bulletins, and provider manuals.

(G) The MCOs will maintain a training log for all training pertaining to waste, abuse, and/or fraud in CHIP. The log must include the name and title of the trainer, names of all staff attending the training, and the date and length of the training. The log must be provided immediately upon request to the HHSC-OIG, Office of the Attorney General's (OAG)-Medicaid Fraud Control Unit (MFCU) and OAG-Civil Medicaid Fraud Division (CMFD), and the United States Health and Human Services-Office of Inspector General (HHS-OIG).

(H) Written standards of conduct, and written policies and procedures that include a clearly delineated commitment from the MCOs for detecting, preventing and investigating waste, abuse, and fraud.

(7) The name, title, address, telephone number, and fax number of the assigned officer or director responsible for carrying out the plan;

(A) The person carrying out the plan should be but is not limited to a Compliance Officer, a Manager of Government Programs, Regulatory Compliance Analyst, Director of Quality Integrity or a person in senior management.

(B) When the person that is responsible for carrying out the plan changes, the required information is to be reported to HHSC-OIG within 15 working days of the change.

(8) A description, process flow diagram, or chart outlining the organizational arrangement of the MCO's personnel responsible for investigating and reporting possible acts of waste, abuse, or fraud; and[~~,~~]

(9) Advertising and marketing materials utilized by the MCOs must be complete and accurately reflect the information about the MCO. Marketing materials includes any informational materials targeted to recipients.

(d) Each MCO must satisfy the requirements in paragraphs (1) - (3) of this subsection related to investigations of waste, abuse, and fraud conducted by the MCO's SIU.

(1) On a monthly [~~quarterly~~] basis, submit to the HHSC-OIG a report listing all investigations conducted that resulted in no findings of waste, abuse, or fraud. The report shall include the allegation, the investigated [~~suspected~~] recipient's or provider's CHIP number, the source, the time period in question, and the date of receipt of the identification and/or reporting of suspected and/or potential waste, abuse, or fraud.

(2) Maintain a log of all incidences of suspected waste, abuse and fraud[~~,~~] received by the MCO, regardless of the source. The log shall contain the subject of the complaint, the source, the allegation, the date the allegation was received, the recipient's or provider's [~~recipient or providers~~] CHIP number, and the status of the investigation.

(3) The log should be provided at the time of a reasonable request to the HHSC-OIG, OAG-MFCU, OAG-CMFD, and the HHS-OIG. A reasonable request means a request made during hours that the business or premises is open for business.

(e) MCOs must maintain the confidentiality of any patient information relevant to an investigation of waste, abuse, or fraud.

(f) MCOs must retain records obtained as the result of an investigation conducted by the SIU for a minimum period of five years or until all audit questions, appealed hearings, investigations, or court cases are resolved.

(g) Failure of the provider to supply the records requested by the MCO will result in the provider being reported to the HHSC-OIG as refusing to supply records upon request and the provider may be subject to sanction or immediate payment hold.

§370.504. Review of Managed Care Organization's Records.

(a) Immediately upon request, the Health and Human Services Commission, Office of Inspector General (HHSC-OIG), Office of the Attorney General-Medicaid Fraud Control Unit (OAG-MFCU) and OAG, Office of the Attorney General-Civil Medicaid Fraud Division (OAG-CMFD), and the United States Health and Human Services, Office of Inspector General (HHS-OIG) may review the records of a managed care organization [~~Managed Care Organization~~] (MCO) to determine compliance with this subchapter.

(b) Upon receipt of a record review request from any state or federal agency authorized to conduct compliance, regulatory, or program integrity functions, an [~~a~~] MCO must:

(1) At no charge to the entities identified in subsection (a) of this section, provide [~~Provide~~] the records requested by a properly identified agent of any state or federal agency authorized to conduct compliance, regulatory, or program integrity functions on the provider, person, MCO, or the services rendered by the provider or person within 24 hours of the request.

(2) An exception to the 24 hours stated in paragraph (1) of this subsection may be made when the OIG or another state or federal agency representative reasonably believes that the requested records are about to be altered or destroyed or that the request may be completed at the time of the request and/or in less than 24 hours.

(c) The request for record review may include [~~includes~~] but is not limited to:

(1) clinical medical or dental patient records;

(2) other records pertaining to the patient;

(3) any other records of services provided to CHIP or other health and human services program recipients and payments made for those services;

(4) documents related to diagnosis, treatment, service, lab results, charting;

(5) billing records, invoices, documentation of delivery items, equipment, or supplies;

(6) radiographs and study models related to orthodontia services;

(7) business and accounting records with backup support documentation;

(8) statistical documentation;

(9) computer records and data; and

(10) contracts with providers and subcontractors.

(d) Failure to produce the records or make the records available for the purpose of reviewing, examining, and securing custody of the records may result in HHSC imposing contractual remedies, HHSC-OIG imposing sanctions against the MCO as described in [~~1 TAC (Texas Administrative Code),~~] Chapter 371, Subchapter G of this title (relating to Legal Action Relating to Providers of Medical Assistance), or both contractual remedies and sanctions[~~, §371.1609, Grounds for Fraud Referral and Administrative Sanction~~].

§370.505. Recovery of Funds.

(a) If a managed care organization (MCO) suspects fraud or abuse in the Medicaid or CHIP program, based on information, data, or facts obtained by the MCO, it must:

(1) immediately notify the Health and Human Services Commission-Office of Inspector General (HHSC-OIG) and the Office of the Attorney General (OAG);

(2) following the completion of ordinary due diligence regarding a suspected overpayment, begin payment recovery efforts subject to subsection (b) of this section; and

(3) ensure that any payment recovery efforts in which the MCO engages are in accordance with this subchapter.

(b) If the amount to be recovered exceeds $100,000, the MCO may not engage in payment recovery efforts if it receives a notice from the HHSC-OIG or the OAG indicating that the MCO is not authorized to proceed with recovery effort. Such notice must be supplied no later than the tenth business day after the MCO notifies the HHSC-OIG and OAG of the suspected fraud or abuse.

(c) If the HHSC-OIG or the OAG has assumed responsibility for completion of the investigation and final disposition of any administrative, civil, or criminal action taken by the state or federal government, the HHSC-OIG or the OAG will determine and direct the collection of any overpayment.

(d) An MCO may retain any money recovered by the MCO.

(e) The HHSC-OIG will distribute any amounts collected to the MCO, less any costs of investigation and collection proceedings.

(f) An MCO must submit a quarterly report to the HHSC-OIG detailing the amount of money recovered.

[~~(a) Upon completion of the investigation and final disposition of any administrative, civil, or criminal action taken by the state or federal government, the Health and Human Service Commission-Office of Inspector General (HHSC-OIG) will determine and direct the collection of any overpayment.~~]

[~~(b) Overpayments collected as a result of an investigation will be distributed to the Managed Care Organization (MCO) unless HHSC-OIG determines that an alternative distribution is indicated.~~]

[~~(c) If the HHSC-OIG determines that an MCO is not entitled to all or any portion of the distribution of funds collected as a result of an overpayment then HHSC-OIG will provide the MCO with a written explanation indicating the rationale for the alternative distribution of funds.~~]

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 December 12, 2011.

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Steve Aragon
General Counsel
Texas Health and Human Services Commission
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For further information, please call: (512) 424-6576

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SUBCHAPTER G. STANDARDS FOR CHIP MANAGED CARE

1 TAC §370.601, §370.602

Legal Authority

The new rules are proposed under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; and §531.1131(e), which requires the Executive Commissioner of HHSC to adopt rules necessary to implement the law regarding payment recovery efforts, including procedures that must be followed by an MCO when engaging in payment recovery efforts; and Texas Health and Safety Code §62.051(d), which directs HHSC to adopt rules as necessary to implement the Children's Health Insurance Program.

The new rules affect Texas Government Code, Chapter 531, and Texas Health and Safety Code, Chapter 62. No other statutes, articles, or codes are affected by this proposal.

§370.601. Applicability of Medicaid Managed Care Standards to CHIP.

The following requirements of Chapter 353, Subchapter E of this title (relating to Standards for Medicaid Managed Care) apply to CHIP managed care, except that references to Medicaid are replaced with CHIP:

(1) Section 353.405 (relating to Marketing);

(2) Section 353.407 (relating to Requirements of Managed Care Plans);

(3) Section 353.409 (relating to Scope of Services);

(4) Section 353.411 (relating to Accessibility of Services);

(5) Section 353.417 (relating to Quality Assessment and Performance Improvement); and

(6) Section 353.419 (relating to Financial Standards).

§370.602. Member Complaints and Appeals.

(a) CHIP member complaints and appeals are subject to disposition consistent with the Texas Insurance Code and any applicable Texas Department of Insurance (TDI) regulations.

(b) Any person, including those dissatisfied with the MCO's resolution of a member complaint or appeal, may report an alleged violation to TDI.

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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Steve Aragon
General Counsel
Texas Health and Human Services Commission
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SUBCHAPTER H. OUTPATIENT PHARMACY SERVICES

1 TAC §370.701

Legal Authority

The new rule is proposed under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; and §531.1131(e), which requires the Executive Commissioner of HHSC to adopt rules necessary to implement the law regarding payment recovery efforts, including procedures that must be followed by an MCO when engaging in payment recovery efforts; and Texas Health and Safety Code §62.051(d), which directs HHSC to adopt rules as necessary to implement the Children's Health Insurance Program.

The new rule affects Texas Government Code, Chapter 531, and Texas Health and Safety Code, Chapter 62. No other statutes, articles, or codes are affected by this proposal.

§370.701. Applicability of Medicaid Managed Care Standards for Outpatient Pharmacy Services to CHIP.

Requirements of Chapter 353, Subchapter J of this title (relating to Outpatient Pharmacy Services) apply to the CHIP program, with the following exceptions:

(1) references to Medicaid are replaced with CHIP;

(2) the CHIP program does not have a preferred drug list; therefore, requirements relating to the preferred drug list do not apply to the CHIP program; and

(3) Section 353.913 of this title (relating to Managed Care Organization Requirements Concerning Out-of-network Outpatient Pharmacy Services) does not apply to the CHIP 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.

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Steve Aragon
General Counsel
Texas Health and Human Services Commission
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TITLE 16. ECONOMIC REGULATION

PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

CHAPTER 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS

The Public Utility Commission of Texas (commission) proposes amendments to §25.192, relating to Transmission Service Rates, and §25.501, relating to Wholesale Market Design for the Electric Reliability Council of Texas. The proposed amendments would provide that energy storage equipment or facilities would be settled at the node when charging, and that such transactions would be considered wholesale transactions and would generally not be subject to ancillary costs. Project Number 39917 is assigned to this proceeding.

Temujin Roach, Economist, Competitive Markets 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.

Temujin Roach has determined that for each year of the first five years the amendments are in effect, the public benefit anticipated as a result of the amendments will be to facilitate the deployment and use of energy storage facilities in the Electric Reliability Council of Texas. 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 are no economic costs to persons who are required to comply with the amendments.

Temujin Roach 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.

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 78701. The request for a public hearing must be received January 12, 2012.

Initial comments on the proposed 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, by January 12, 2012. Sixteen copies of comments on the proposed amendments are required to be filed pursuant to §22.71(c) of this title. Reply comments may be submitted by January 23, 2012. Comments should be organized in a manner consistent with the organization of the amended rules. All comments should refer to Project Number 39917.

The commission also requests comments on the following questions:

1. How should the amendments address the situation where there is retail load or other generation facilities behind the transmission system point of delivery at which energy storage equipment or facilities are located?

2. Does the proposed rule strike the appropriate balance between removing barriers to storage technologies and ensuring that storage technologies pay their share of ancillary services costs?

3. Should the rule require storage facilities to pay additional ancillary services costs? If so, which ancillary services costs should they be required to pay?

4. Should the rule allow ERCOT to establish pilot projects for storage facilities and other new technologies? If so, what safeguards should the rule include to ensure that pilot projects do not impose undue costs on other market participants?

SUBCHAPTER I. TRANSMISSION AND DISTRIBUTION

DIVISION 1. OPEN-ACCESS COMPARABLE TRANSMISSION SERVICE FOR ELECTRIC UTILITIES IN THE ELECTRIC RELIABILITY COUNCIL OF TEXAS

16 TAC §25.192

The amendments are proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (West 2007 and Supp. 2011) (PURA), which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, and specifically, PURA §§35.001 - 35.008, which grants the commission authority over wholesale transmission service and rates; and PURA §39.151, which grants the commission oversight and review authority over independent organizations such as ERCOT.

Cross Reference to Statutes: PURA §§14.002, 35.001 - 35.008, and 39.151.

§25.192. Transmission Service Rates.

(a) (No change.)

(b) Charges for transmission service delivered within ERCOT. DSPs shall incur transmission service charges pursuant to the tariffs of the TSP.

(1) A TSP's transmission rate shall be calculated as its commission-approved transmission cost of service divided by the average of ERCOT coincident peak demand for the months of June, July, August and September (4CP). A TSP's transmission rate shall remain in effect until the commission approves a new rate. The TSP's annual rate shall be converted to a monthly rate. The monthly transmission service charge to be paid by each DSP is the product of each TSP's monthly rate as specified in its tariff and the DSP's previous year's average of the 4CP demand that is coincident with the ERCOT 4CP. For an owner or operator of electric energy storage equipment or facilities described by §25.501(m) of this title (relating to Wholesale Market Design for the Electric Reliability Council of Texas), a TSP shall charge the owner or operator for transmission service in the same manner as a DSP.

(2) (No change.)

(c) - (h) (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-201105456
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
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For further information, please call: (512) 936-7223

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SUBCHAPTER S. WHOLESALE MARKETS

16 TAC §25.501

The amendments are proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (West 2007 and Supp. 2011) (PURA), which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, and specifically, PURA §§35.001 - 35.008, which grants the commission authority over wholesale transmission service and rates; and PURA §39.151, which grants the commission oversight and review authority over independent organizations such as ERCOT.

Cross Reference to Statutes: PURA §§14.002, 35.001 - 35.008, and 39.151.

§25.501. Wholesale Market Design for the Electric Reliability Council of Texas.

(a) - (l) (No change.)

(m) Energy Storage. The purchase of electricity by an owner or operator of electric energy storage equipment or facilities is a wholesale market transaction if the electricity is separately metered and converted to another form of energy and stored by electric energy storage equipment or facilities solely for later re-generation and re-sale as energy or ancillary services. For the settlement of such purchase, ERCOT shall use the nodal energy price at the electrical bus that connects the electric energy storage equipment or facility in accordance with subsection (f) of this section. Such purchase shall not be subject to retail

tariffs, rates, and charges or fees assessed in conjunction with the retail purchase of electricity. Such purchase shall be subject to ERCOT settlement but shall not be subject to ERCOT charges or credits associated with ancillary service obligations, except if such purchase occurs during a system emergency declared by ERCOT and ERCOT did not direct that such purchase occur.

[~~(m) Development and implementation. ERCOT shall use a stakeholder process to develop a wholesale market design that complies with this section. ERCOT shall also contract for an independent cost-benefit analysis of options. These options may include an option, or options, that would involve modification of the existing ERCOT wholesale market design. For each of the options, the cost-benefit analysis shall include the estimated net benefits of the option in comparison to the current market design. The cost-benefit analysis shall be prepared with sufficient detail to provide the stakeholders and the commission with the necessary information to modify or delete specific items or categories of expenses. The cost-benefit analysis shall be filed by ERCOT by December 31, 2004. ERCOT shall also file with the commission draft protocols that implement an option analyzed in the independent cost-benefit analysis and draft energy load zones that comply with subsection (h) of this section by March 18, 2005. ERCOT shall fully implement the requirements of this section by October 1, 2006.~~]

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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Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
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SUBCHAPTER I. TRANSMISSION AND DISTRIBUTION
DIVISION 2. TRANSMISSION AND DISTRIBUTION APPLICABLE TO ALL ELECTRIC UTILITIES

16 TAC §25.211, §25.217

The Public Utility Commission of Texas (commission) proposes amendments to §25.211, relating to Interconnection of On-Site Distributed Generation (DG), and §25.217, relating to Distributed Renewable Generation. The proposed amendments update these rules; streamline the registration of on-site distributed generation; address the interconnection of a distributed natural gas generation facility; and amend the definition of distributed renewable generation owner (DRGO) to include retail electric customers that contract with third parties, consistent with Senate Bills 365 and 981 of the 82nd Legislature, Regular Session in 2011 (SB 365 and SB 981). Project Number 39797 is assigned to this proceeding.

Katie Rich, Senior Infrastructure Policy Analyst, Infrastructure and Reliability Division, has determined that for each year of the first five-year period the proposed amendments are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amendments.

Ms. Rich has determined that for each year of the first five years the proposed amendments are in effect the public benefit anticipated as a result of enforcing the amendments will be reducing the filing requirements of on-site distributed generation owners and changing the commission's rules to reflect statutory changes resulting from SB 365 and SB 981. There will be no adverse economic effect on small businesses or micro-businesses as a result of enforcing these amendments. Therefore, no regulatory flexibility analysis is required. There are no economic costs to persons required to comply with the amendments.

Ms. Rich has also determined that for each year of the first five years the proposed 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.

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 78701. The request for a public hearing must be received within 20 days after publication.

Initial comments on the proposed 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 30 days after the date of publication. Sixteen copies of comments to the proposed amendment are required to be filed pursuant to §22.71(c) of this title. Reply comments may be submitted within 45 days after the date of publication. Comments should be organized in a manner consistent with the organization of the proposed rules. The commission invites specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the proposed amendments. The commission will consider the costs and benefits in deciding whether to adopt these amendments. All comments should refer to Project Number 39797.

The amendments are proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (West 2011) (PURA), which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; and specifically, PURA §31.002(4-a), which defines distributed natural gas generation facility; §31.002(20), which defines transmission service to include construction or enlargement of facilities and transmission over distribution facilities; §§35.001 - 35.007, which give the commission authority over the provision of wholesale transmission service by an electric utility, including an electric cooperative; §35.036, which addresses a distributed natural gas generation facility's interconnection to, and use of, the transmission and distribution facilities of an electric utility or electric cooperative; §39.101(b)(3), which entitles a customer to have access to on-site distributed generation; §39.203(b), which requires an electric utility or an electric cooperative that has not opted for customer choice to provide wholesale transmission service at distribution voltage when necessary to serve a wholesale customer; §39.351, which requires that a power generation company be registered with the commission; and §39.916, which addresses distributed renewable generation.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 31.002(20), 35.001 - 35.007, 35.036, 39.101(b)(3), 39.203(b), 39.351, and 39.916.

§25.211. Interconnection of On-Site Distributed Generation (DG).

(a) Application. Unless the context [~~clearly~~] indicates otherwise, [~~in~~] this section and §25.212 of this title (relating to Technical Requirements for Interconnection and Parallel Operation of On-Site Distributed Generation) apply to an electric utility for all purposes and to an electric cooperative only with respect a distributed natural gas generation facility. [~~the term "electric utility" applies to all electric utilities as defined in the Public Utility Regulatory Act (PURA) §31.002 that own and operate a distribution system in Texas. This section shall not apply to an electric utility subject to PURA §39.102(c) until the expiration of the utility's rate freeze period.~~]

(b) Purpose. The purpose of this section includes stating [~~is to clearly state~~] the terms and conditions that govern the interconnection and parallel operation of both on-site distributed generation in order to implement Public Utility Regulatory Act (PURA) [~~PURA~~] §39.101(b)(3) and a natural gas distributed generation facility in order to implement PURA §35.036.[~~, which entitles all Texas electric customers to access to on-site distributed generation, to provide cost savings and reliability benefits to customers, to establish technical requirements that will promote the safe and reliable parallel operation of on-site distributed generation resources, to enhance both the reliability of electric service and economic efficiency in the production and consumption of electricity, and to promote the use of distributed resources in order to provide electric system benefits during periods of capacity constraints.~~] Sales of power by on-site distributed generation and natural gas distributed generation [~~a distributed generator~~] in the intrastate wholesale market are subject to the provisions of this title relating to open-access comparable transmission service for electric utilities in the Electric Reliability Council of Texas (ERCOT).

(c) Definitions. The following words and terms when used in this section and §25.212 of this title shall have the following meanings, unless the context [~~clearly~~] indicates otherwise:

(1) (No change.)

[~~(2) Banking--A method of accounting for energy produced by a customer for export into the distribution system. The host control area accepts energy from the customer to meet its own energy needs during a five- to 30-day period, credits this energy to the customer's account, and subsequently produces and, in the five- to 30-day period immediately following acceptance of the energy, disburses the energy accrued under the customer's account to the receiving control area specified by the customer. Disbursement of the accrued energy shall follow a pre-arranged schedule mutually acceptable to the host control area, the receiving control area, and the DG customer. Such schedule shall attempt to keep the host control area neutral with respect to the market value of the energy transferred on behalf of the exporting customer.~~]

(2) [~~(3)~~] Company--An electric utility operating a distribution system.

(3) [~~(4)~~] Customer--Any entity interconnected to the company's utility system for the purpose of receiving or exporting electric power from or to the company's utility system.

(4) Distributed natural gas generation facility--A facility installed on the customer's side of the meter that uses natural gas to generate not more than 2,000 kilowatts of electricity.

(5) - (15) (No change.)

(16) Tariff for interconnection and parallel operation of distributed generation--The commission-approved tariff for interconnection and parallel operation of distributed generation including the application for interconnection and parallel operation of distributed generation [~~DG~~] and pre-interconnection study fee schedule.

(17) - (18) (No change.)

(d) Terms of Service.

[~~(1) Banking. A company operating in ERCOT shall make banking services available to any customer upon the customer's request. This obligation continues until the ERCOT Independent System Operator begins operating ERCOT as a single control area.~~]

(1) [~~(2)~~] Distribution line charge. No distribution line charge shall be assessed to a customer for exporting energy to the utility system.

(2) [~~(3)~~] Interconnection operations and maintenance costs. No charge for operation and maintenance of a utility system's facilities shall be assessed against a customer for exporting energy to the utility system.

[~~(4) Scheduling fees. A one-time scheduling fee for each banking period may be assessed for the disbursement of banked energy. No other scheduling fees may be assessed against an exporting DG customer.~~]

(3) [~~(5)~~] Transmission charges. No transmission charges shall be assessed to a customer for exporting energy. For purposes of this paragraph, the term transmission charges means transmission access and line charges, transformation charges, and transmission line loss charges.

(4) [~~(6)~~] Contract reformation. All interconnection contracts shall be conformed to meet the requirements of this section within 60 days of adoption.

(5) [~~(7)~~] Tariffs. No later than 30 days after the effective date of this section as amended, each electric utility shall file a tariff or tariffs for interconnection and parallel operation of distributed generation[~~, including tariffs for banking and scheduling fees,~~] in conformance with the provisions of this section. This provision does not require a utility that filed an interconnection study fee tariff prior to the effective date of this rule as amended to refile such tariff. The utility may file a new tariff or a modification of an existing tariff. Such tariffs shall ensure that back-up, supplemental, and maintenance power is available to all customers and customer classes that desire such service, if the electric utility sells electricity [~~until January 1, 2002~~]. Any modifications of existing tariffs or offerings of new tariffs relating to this subsection shall be consistent with the commission-approved form. Concurrent with the tariff filing in this section, each utility shall submit:

(A) a schedule detailing the charges of interconnection studies and all supporting cost data for the charges;

(B) a standard application for interconnection and parallel operation of distributed generation; and

(C) the interconnection agreement approved by the commission.

(e) (No change.)

(f) Incremental demand charges. During the term of an interconnection agreement a utility may require that a customer disconnect its distributed generation unit and/or take it off-line as a result of utility system conditions described in subsection (e)(3) and (4) of this section. Incremental demand charges arising from disconnecting the distributed

generator as directed by company during such periods shall not be assessed by company to the customer. [After January 1, 2002, the distribution utility shall not be responsible for the provision of generation services or their related charges.]

(g) Pre-interconnection studies for non-network interconnection of distributed generation. A utility may conduct a service study, coordination study or utility system impact study prior to interconnection of a distributed generation facility. In instances where such studies are deemed necessary, the scope of such studies shall be based on the characteristics of the particular distributed generation facility to be interconnected and the utility's system at the specific proposed location. By agreement between the utility and its customer, studies related to interconnection of on-site distributed generation [DG] on the customer's premises [premise] may be conducted by a qualified third party.

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

(h) - (m) (No change.)

(n) Reporting requirements. Each electric utility shall maintain records concerning applications received for interconnection and parallel operation of distributed generation. Such records will include the name of the applicant, the business address of the applicant, and the location of the proposed facility by county, the capacity rating of the facility in kilowatts, whether the facility is a renewable energy resource as defined in §25.173 of this title (relating to Goal for Renewable Energy), the date each application is received, documents generated in the course of processing each application, correspondence regarding each application, and the final disposition of each application. By March 30 of each year, every electric utility shall file with the commission a distributed generation interconnection report for the preceding calendar year that identifies each distributed generation facility interconnected with the utility's distribution system. The report shall list the new distributed generation facilities interconnected with the system since the previous year's report, any change in ownership or the cessation of operations of any distributed generation [distributed generation facilities no longer interconnected with the utility's system] since the previous report, the capacity of each facility and whether it is a renewable energy resource, and the feeder or other point on the company's utility system where the facility is connected. The annual report shall also identify all applications for interconnection received during the previous one-year period, and the disposition of such applications.

(o) Registration Requirements. The annual report outlined in subsection (n) of this section constitutes registration of the distributed generation facilities covered by the report. A power generation company is not required to directly register an on-site distributed generation facility with the commission.

(p) Interconnection of distributed natural gas generation. Subject to the provisions of PURA §35.036(e) and (f), at the request of the owner or operator of a distributed natural gas generation facility an electric utility or electric cooperative shall allow the owner or operator to interconnect with and use transmission and distribution facilities to transmit electricity to another entity. An electric cooperative is not required to transmit electricity to a retail point of delivery in the certificated service area of the electric cooperative if the electric cooperative has not adopted customer choice.

[(o) Interconnection disputes. Complaints relating to interconnection disputes under this section shall be handled in an expeditious manner pursuant to §22.242 (relating to Complaints). In instances where informal dispute resolution is sought, complaints shall be presented to the Electric Division. The Electric Division shall attempt to informally resolve complaints within 20 business days of the date of receipt of the complaint. Unresolved complaints shall be presented to the commission at the next available open meeting.]

§25.217. Distributed Renewable Generation.

(a) (No change.)

(b) Definitions. The following terms when used in this section have the following meanings, unless the context indicates otherwise:

(1) (No change).

(2) Distributed renewable generation owner (DRGO)--A person who owns DRG; a retail electric customer on whose side of the meter DRG is installed and operated, regardless of whether the customer takes ownership of the distributed renewable generation; or a person who by contract is assigned ownership rights to energy produced from DRG located at the premises of the customer on the customer's side of the meter.

(3) - (6) (No change).

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

(g) Transition provision. Electric utilities and REPs shall make reasonable efforts to inform existing and potential DRGOs and ISD-SG Owners of their rights and obligations pursuant to this chapter, and shall change existing metering and purchase arrangements to conform to this section [by June 30, 2009]. However, a metering or purchase arrangement that is required by a contract that exists on the effective date of this section shall be changed to conform to this section effective the date the contract expires. The expiration date of such a contract may be extended by the DRGO or ISD-SG Owner if the existing terms of the contract give the DRGO or ISD-SG Owner the unilateral right to extend the expiration date. Notwithstanding the foregoing provisions of this subsection, a roll-back meter must be replaced no later than the date customer choice is offered in the area in which the roll-back meter is located.

(h) (No change).

(i) Exemptions. Neither a retail electric customer that uses distributed renewable generation nor the owner of the distributed renewable generation that the retail electric customer uses is an electric utility, power generation company, or retail electric provider for the purposes of this chapter and is not required to register with or be certified by the commission if at the time distributed renewable generation is installed, the estimated annual amount of electricity to be produced by the distributed renewable generation is less than or equal to the retail electric customer's estimated annual electricity consumption.

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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Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
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For further information, please call: (512) 936-7223

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CHAPTER 26. SUBSTANTIVE RULES APPLICABLE TO TELECOMMUNICATIONS SERVICE PROVIDERS

The Public Utility Commission of Texas (commission) proposes amendments to §§26.5, 26.22, 26.23, 26.27, 26.29, 26.54, 26.73, 26.89, 26.124, 26.128, 26.134, 26.141, 26.171, 26.205, 26.208, 26.211, 26.217, 26.219, 26.226, 26.227, 26.229, 26.230, and 26.401. The amendments will amend commission substantive rules relating to telecommunications service to conform to 2011 legislation, which includes Senate Bills 773, 980, and 983, and House Bills 2295 and 2680 of the 82nd Legislature, Regular Session (Telecom Legislation). Project Number 39585 is assigned to this proceeding.

Liz Kayser, Market Economist, Competitive Markets Division, has determined that for each year of the first five-year period the proposed amendments are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the amendments.

Ms. Kayser has determined that for each year of the first five years the proposed amendments are in effect, the public benefit anticipated as a result of enforcing the amendments will be compliance with Senate Bills 773, 980, and 983, and House Bills 2295 and 2680. There will be no adverse economic effect on small businesses or micro-businesses as a result of enforcing these 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.

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

The commission staff will conduct a public hearing on this rulemaking if requested pursuant to the APA, Texas Government Code §2001.029, at the commission's offices located in the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701. The request for public hearing must be received within 20 days after publication.

Comments on the proposed 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, by Friday, January 6, 2012. Sixteen copies of comments to the proposed amendments are required to be filed pursuant to §22.71(c) of this title. Reply comments may be submitted by Monday, January 23, 2012. Comments should be organized in a manner consistent with the organization of the amended rule. All comments should refer to Project Number 39585.

SUBCHAPTER A. GENERAL PROVISIONS

16 TAC §26.5

The amendments are proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 2007 and Supp. 2011) (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 the amendments to PURA made by Senate Bills 773, 980, and 983, and House Bills 2295 and 2680 of the 82nd Legislature, Regular Session.

Cross Reference to Statutes: PURA §14.002 and the amendments to PURA made by Senate Bills 773, 980, and 983, and House Bills 2295 and 2680 of the 82nd Legislature, Regular Session.

§26.5. Definitions.

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

(1) - (66) (No change.)

(67) Deregulated company--An incumbent local exchange company (ILEC) for which all of the company's markets have been deregulated.

(68) [~~(67)~~] Direct-trunked transport--Transmission of traffic between the serving wire center and another CTU's office, without intermediate switching. It is charged on a flat-rate basis.

(69) [~~(68)~~] Disconnection of telephone service--The event after which a customer's telephone number is deleted from the central office switch and databases.

(70) [~~(69)~~] Discretionary services (DS)--Those services as defined in the Public Utility Regulatory Act §58.101, and any other service the commission subsequently categorizes as a discretionary service.

(71) [~~(70)~~] Distance learning---Instruction, learning, and training that is transmitted from one site to one or more sites by telecommunications services that are used by an educational institution predominantly for such instruction, learning, or training--including: video, data, voice, and electronic information.

(72) [~~(71)~~] Distribution lines--Those lines from which the end user may be provided direct service.

(73) [~~(72)~~] Dominant carrier--A provider of a communication service provided wholly or partly over a telephone system who the commission determines has sufficient market power in a telecommunications market to control prices for that service in that market in a manner adverse to the public interest. The term includes a provider who provided local exchange telephone service within certificated exchange areas on September 1, 1995, as to that service and as to any other service for which a competitive alternative is not available in a particular geographic market. In addition with respect to:

(A) intraLATA long distance message telecommunications service originated by dialing the access code "1-plus," the term includes a provider of local exchange telephone service in a certificated exchange area for whom the use of that access code for the origination of "1-plus" intraLATA calls in the exchange area is exclusive; and

(B) interexchange services, the term does not include an interexchange carrier that is not a certificated local exchange company.

(74) [~~(73)~~] Dominant certificated telecommunications utility (DCTU)--A CTU that is also a dominant carrier. Unless clearly indicated otherwise, the rules applicable to a DCTU apply specifically to only those services for which the DCTU is dominant.

(75) [~~(74)~~] Dual-party relay service--A service using oral and printed translations, by either a person or an automated device, between hearing- or speech-impaired individuals who use telecommunications devices for the deaf, computers, or similar automated devices, and others who do not have such equipment.

(76) [~~(75)~~] Educational institution--Accredited primary or secondary schools owned or operated by state and local government entities or by private entities; institutions of higher education as defined by the Texas Education Code, §61.003(13); the Texas Education Agency, its successors and assigns; regional education service centers established and operated pursuant to the Texas Education Code, Chapter 8; and the Texas Higher Education Coordinating Board, its successors and assigns.

(77) [~~(76)~~] Electing local exchange company (LEC)--A CTU electing to be regulated under the terms of the Public Utility Regulatory Act, Chapter 58.

(78) [~~(77)~~] Electric utility--Except as provided in Chapter 25, Subchapter I, Division 1 of this title (relating to Open-Access Comparable Transmission Service for Electrical Utilities in the Electric Reliability Council of Texas), an electric utility is: A person or river authority that owns or operates for compensation in this state equipment or facilities to produce, generate, transmit, distribute, sell, or furnish electricity in this state. The term includes a lessee, trustee, or receiver of an electric utility and a recreational vehicle park owner who does not comply with Texas Utilities Code, Chapter 184, Subchapter C, with regard to the metered sale of electricity at the recreational vehicle park. The term does not include:

(A) a municipal corporation;

(B) a qualifying facility;

(C) a power generation company;

(D) an exempt wholesale generator;

(E) a power marketer;

(F) a corporation described by Public Utility Regulatory Act §32.053 to the extent the corporation sells electricity exclusively at wholesale and not to the ultimate consumer;

(G) an electric cooperative;

(H) a retail electric provider;

(I) the state of Texas or an agency of the state; or

(J) a person not otherwise an electric utility who:

(i) furnishes an electric service or commodity only to itself, its employees, or its tenants as an incident of employment or tenancy, if that service or commodity is not resold to or used by others;

(ii) owns or operates in this state equipment or facilities to produce, generate, transmit, distribute, sell or furnish electric energy to an electric utility, if the equipment or facilities are used primarily to produce and generate electric energy for consumption by that person; or

(iii) owns or operates in this state a recreational vehicle park that provides metered electric service in accordance with Texas Utilities Code, Chapter 184, Subchapter C.

(79) [~~(78)~~] Element--Unbundled network elements, including: interconnection, physical-collocation, and virtual-collocation elements.

(80) [~~(79)~~] Eligible telecommunications provider (ETP) service area--The geographic area, determined by the commission, containing high cost rural areas which are eligible for Texas Universal Service Funds support under §26.403 or §26.404 of this title (relating to Texas High Cost Universal Service Plan (THCUSP) and Small and Rural Incumbent Local Exchange Company (ILEC) Universal Service Plan).

(81) [~~(80)~~] Embedded customer premises equipment--All customer premises equipment owned by a telecommunications utility, including inventory, which was tariffed or subject to the separations process of January 1, 1983.

(82) [~~(81)~~] Emergency service number (ESN)--A three to five digit number representing a unique combination of emergency service agencies designated to serve a specific range of addresses within a particular geographic area. The ESN facilitates any required selective routing and selective transfer to the appropriate public safety answering point and the dispatching of the proper service agencies.

(83) [~~(82)~~] Emergency service zone (ESZ)--A geographic area that has common law enforcement, fire, and emergency medical services personnel that respond to 9-1-1 calls.

(84) [~~(83)~~] End user choice--A system that allows the automatic routing of interexchange, operator-assisted calls to the billed party's chosen carrier without the use of access codes.

(85) [~~(84)~~] Enhanced service provider--A company that offers computer-based services over transmission facilities to provide the customer with value-added telephone services.

(86) [~~(85)~~] Entrance facilities--The transmission path between the access customer's (such as an interexchange carrier's) point of demarcation and the serving wire center.

(87) [~~(86)~~] Equal access--Access which is equal in type, quality and price to Feature Group C, and which has unbundled rates. From an end user's perspective, equal access is characterized by the availability of "1-plus" dialing with the end user's carrier of choice.

(88) [~~(87)~~] Exchange area--The geographic territory delineated as an exchange area by official commission boundary maps. An exchange area usually embraces a city or town and its environs. There is usually a uniform set of charges for telecommunications service within the exchange area. An exchange area may be served by more than one central office and/or one certificated telephone utility. An exchange area may also be referred to as an exchange.

(89) [~~(88)~~] Expenses--Costs incurred in the provision of services that are expensed, rather than capitalized, in accordance with the Uniform System of Accounts applicable to the carrier.

(90) [~~(89)~~] Experimental service--A new service that is proposed to be offered on a temporary basis for a specified period not to exceed one year from the date the service is first provided to any customer.

(91) [~~(90)~~] Extended area service (EAS)--A telephone switching and trunking arrangement which provides for optional calling service by DCTUs within a local access and transport area and between two contiguous exchanges or between an exchange and a contiguous metropolitan exchange local calling area. For purposes of this definition, a metropolitan exchange local calling area shall include all exchanges having local or mandatory EAS calling throughout all portions of any of the following exchanges: Austin metropolitan exchange, Corpus Christi metropolitan exchange, Dallas metropolitan exchange, Fort Worth metropolitan exchange, Houston metropolitan exchange, San Antonio metropolitan exchange, or Waco metropolitan exchange. EAS is provided at rate increments in addition to local exchange rates, rather than at toll message charges.

(92) [~~(91)~~] Extended local calling service (ELCS)--Service provided pursuant to §26.219 and §26.221 of this title (relating to Administration of Expanded Local Calling Requests; and Applications to Establish or Increase Expanded Local Calling Service Surcharges).

(93) [~~(92)~~] E911 or E9-1-1--9-1-1 service that is capable of providing automatic number identification, automatic location identification, selective routing, and selective transfer.

(94) [~~(93)~~] Facilities--All the plant and equipment of a public utility, including all tangible and intangible real and personal property without limitation, and any and all means and instrumentalities in any manner owned, operated, leased, licensed, used, controlled, furnished, or supplied for, by, or in connection with the business of any

public utility, including any construction work in progress allowed by the commission.

(95) [~~(94)~~] Facilities-based provider--A telecommunications provider that provides telecommunications services using facilities that it owns or leases or a combination of facilities that it owns and leases, including unbundled network elements.

(96) [~~(95)~~] Foreign exchange (FX)--Exchange service furnished by means of a circuit connecting a customer's station to a primary serving office of another exchange.

(97) [~~(96)~~] Foreign serving office (FSO)--Exchange service furnished by means of a circuit connecting a customer's station to a serving office of the same exchange but outside of the serving office area in which the station is located.

(98) [~~(97)~~] Forward-looking common costs--Economic costs efficiently incurred in providing a group of elements or services that cannot be attributed directly to individual elements or services.

(99) [~~(98)~~] Forward-looking economic cost--The sum of the total element long-run incremental cost of an element and a reasonable allocation of its forward-looking common costs.

(100) [~~(99)~~] Forward-looking economic cost per unit--The forward-looking economic cost of the element as defined in this section, divided by a reasonable projection of the sum of the total number of units of the element that the DCTU is likely to provide to requesting telecommunications carriers and the total number of units of the element that the DCTU is likely to use in offering its own services, during a reasonable time period.

(101) [~~(100)~~] Geographic scope--The geographic area in which the holder of a COA or of a SPCOA is authorized to provide service.

(102) [~~(101)~~] Grade of service--The number of customers a line is designated to serve.

(103) Health Center--A federally qualified health center service delivery site.

(104) [~~(102)~~] Hearing--Any proceeding at which evidence is taken on the merits of the matters at issue, not including prehearing conferences.

(105) [~~(103)~~] Hearing carryover--A technology that allows an individual who is speech-impaired to hear the other party in a telephone conversation and to use specialized telecommunications devices to send communications through the telecommunications relay service operator.

(106) [~~(104)~~] High cost area--A geographic area for which the costs established using a forward-looking economic cost methodology exceed the benchmark levels established by the commission.

(107) [~~(105)~~] High cost assistance (HCA)--A program administered by the commission in accordance with the provisions of §26.403 of this title.

(108) [~~(106)~~] Identity--The name, address, telephone number, and/or facsimile number of a person, whether natural, partnership, municipal corporation, cooperative corporation, corporation, association, governmental subdivision, or state agency and the relationship of the person to the entity being represented.

(109) [~~(107)~~] Impulse noise--Any momentary occurrence of the noise on a channel significantly exceeding the normal noise peaks. It is evaluated by counting the number of occurrences that exceed a threshold. This noise degrades voice and data transmission.

(110) [~~(108)~~] Incumbent local exchange company (ILEC)--A local exchange company that had a CCN on September 1, 1995.

(111) [~~(109)~~] Informational notice--That notice required to be filed in connection with nonbasic services, new service offerings, and pricing and packaging flexibility pursuant to Public Utility Regulatory Act Chapters 52, 58, or 59.

(112) [~~(110)~~] Information sharing program--Instruction, learning, and training that is transmitted from one site to one or more sites by telecommunications services that are used by a library predominantly for such instruction, learning, or training, including video, data, voice, and electronic information.

(113) [~~(111)~~] Integrated services digital network (ISDN)--A digital network architecture that provides a wide variety of communications services, a standard set of user-network messages, and integrated access to the network. Access methods to the ISDN are the Basic Rate Interface (BRI) and the Primary Rate Interface (PRI).

(114) [~~(112)~~] Interactive multimedia communications--Real-time, two-way, interactive voice, video, and data communications conducted over networks that link geographically dispersed locations. This definition includes interactive communications within or between buildings on the same campus or library site.

(115) [~~(113)~~] Intercept service--A service arrangement provided by the local exchange carrier whereby calls placed to a disconnected or discontinued telephone number are intercepted and the calling party is informed by an operator or by a recording that the called telephone number has been disconnected, discontinued, changed to another number, or otherwise is not in service.

(116) [~~(114)~~] Interconnection--Generally means: The point in a network where a customer's transmission facilities interface with the dominant carrier's network under the provisions of this section. More particularly it means: The termination of local traffic including basic telecommunications service as delineated in §26.403 of this title or integrated services digital network (ISDN) as defined in this section and/or EAS/ELCS traffic of a CTU using the local access lines of another CTU, as described in §26.272(d)(4)(A) of this title (relating to Interconnection). Interconnection shall include non-discriminatory access to signaling systems, databases, facilities and information as required to ensure interoperability of networks and efficient, timely provision of services to customers without permitting access to network proprietary information or customer proprietary network information, as defined in this section, unless otherwise permitted in §26.272 of this title.

(117) [~~(115)~~] Interconnector--A customer that interfaces with the dominant carrier's network under the provisions of §26.271 of this title (relating to Expanded Interconnection).

(118) [~~(116)~~] Interexchange carrier (IXC)--A carrier providing any means of transporting intrastate telecommunications messages between local exchanges, but not solely within local exchanges, in the State of Texas. The term may include a CTU or CTU affiliate to the extent that it is providing such service. An entity is not an IXC solely because of:

(A) the furnishing, or furnishing and maintenance of a private system;

(B) the manufacture, distribution, installation, or maintenance of customer premises equipment;

(C) the provision of services authorized under the FCC's Public Mobile Radio Service and Rural Radio Service rules; or

(D) the provision of shared tenant service.

(119) [~~(117)~~] Internet Protocol (IP)--A data communication protocol used in communicating data from one computer to another on the Internet or other networks.

(120) Internet Protocol enabled service--A service, capability, functionality, or application that uses Internet Protocol or a successor protocol to allow an end user to send or receive a data, video, or voice communication in Internet Protocol or a successor protocol.

(121) [~~(118)~~] Interoffice trunks--Those communications circuits which connect central offices.

(122) [~~(119)~~] IntraLATA equal access--The ability of a caller to complete a toll call in a local access and transport area (LATA) using his or her provider of choice by dialing "1" or "0" plus an area code and telephone number.

(123) [~~(120)~~] Intrastate--Refers to communications which both originate and terminate within Texas state boundaries.

(124) [~~(121)~~] Least cost technology--The technology or mix of technologies that would be chosen in the long run as the most economically efficient choice. The choice of least cost technologies, however, shall:

(A) be restricted to technologies that are currently available on the market and for which vendor prices can be obtained;

(B) be consistent with the level of output necessary to satisfy current demand levels for all services using the basic network function in question; and

(C) be consistent with overall network design and topology requirements.

(125) [~~(122)~~] License--The whole or part of any commission permit, certificate, approval, registration, or similar form of permission required by law.

(126) [~~(123)~~] Licensing--The commission process respecting the granting, denial, renewal, revocation, suspension, annulment, withdrawal, or amendment of a license.

(127) [~~(124)~~] Lifeline Service--A program certified by the Federal Communications Commission to provide for the reduction or waiver of the federal subscriber line charge for residential consumers.

(128) [~~(125)~~] Line--A circuit or channel extending from a central office to the customer's location to provide telecommunications service. One line may serve one customer, or all customers served by a multiparty line.

(129) [~~(126)~~] Local access and transport area (LATA)--A geographic area established for the provision and administration of communications service. It encompasses one or more designated exchanges, which are grouped to serve common social, economic and other purposes. For purposes of these rules, market areas, as used and defined in the Modified Final Judgment and the GTE Final Judgment, are encompassed in the term local access and transport area.

(130) [~~(127)~~] Local call--A call within the certificated telephone utility's toll-free calling area including calls which are made toll-free through a mandatory EAS or expanded local calling (ELC) proceeding.

(131) [~~(128)~~] Local calling area--The area within which telecommunications service is furnished to customers under a specific schedule of exchange rates. A local calling area may include more than one exchange area.

(132) [~~(129)~~] Local exchange carrier (LEC)--A telecommunications utility that has been granted either a certificate of convenience and necessity or a COA to provide local exchange telephone service, basic local telecommunications service, or switched access service within the state. A local exchange company is also referred to as a local exchange carrier.

(133) [~~(130)~~] Local exchange telephone service or local exchange service--A telecommunications service provided within an exchange to establish connections between customer premises within the exchange, including connections between a customer premises and a long distance provider serving the exchange. The term includes tone dialing service, service connection charges, and directory assistance services offered in connection with basic local telecommunications service and interconnection with other service providers. The term does not include the following services, whether offered on an intra-exchange or inter-exchange basis:

(A) central office based PBX-type services for systems of 75 stations or more;

(B) billing and collection services;

(C) high-speed private line services of 1.544 megabits or greater;

(D) customized services;

(E) private line or virtual private line services;

(F) resold or shared local exchange telephone services if permitted by tariff;

(G) dark fiber services;

(H) non-voice data transmission service offered as a separate service and not as a component of basic local telecommunications service;

(I) dedicated or virtually dedicated access services;

(J) a competitive exchange service; or

(K) any other service the commission determines is not a "local exchange telephone service."

(134) [~~(131)~~] Local message--A completed call between customer access lines located within the same local calling area.

(135) [~~(132)~~] Local message charge--The charge that applies for a completed telephone call that is made when the calling customer access line and the customer access line to which the connection is established are both within the same local calling area, and a local message charge is applicable.

(136) [~~(133)~~] Local service charge--The charge for furnishing facilities to enable a customer to send or receive telecommunications within the local calling area. This local calling area may include more than one exchange area.

(137) [~~(134)~~] Local telecommunications traffic--

(A) Telecommunications traffic between a DCTU and a telecommunications carrier other than a commercial mobile radio service (CMRS) provider that originates and terminates within the mandatory single or multi-exchange local calling area of a DCTU including the mandatory EAS areas served by the DCTU; or

(B) Telecommunications traffic between a DCTU and a CMRS provider that, at the beginning of the call, originates and terminates within the same major trading area.

(138) [~~(135)~~] Long distance telecommunications service--That part of the total communication service rendered by a telecommunications utility which is furnished between customers in different

local calling areas in accordance with the rates and regulations specified in the utility's tariff.

(139) [~~(136)~~] Long run--A time period long enough to be consistent with the assumption that the company is in the planning stage and all of its inputs are variable and avoidable.

(140) [~~(137)~~] Long run incremental cost (LRIC)--The change in total costs of the company of producing an increment of output in the long run when the company uses least cost technology. The LRIC should exclude any costs that, in the long run, are not brought into existence as a direct result of the increment of output.

(141) [~~(138)~~] Mandatory minimum standards--The standards established by the Federal Communications Commission, outlining basic mandatory telecommunication relay services.

(142) Market--An exchange in which an incumbent local exchange company provides residential local exchange telephone service.

(143) [~~(139)~~] Master street address guide (MSAG)--A database maintained by each 9-1-1 administrative entity of street names and house number ranges within their associated communities defining emergency service zones and their associated emergency service numbers to enable proper routing of 9-1-1 calls.

(144) [~~(140)~~] Meet point billing--An access billing arrangement for services to access customers when local transport is jointly provided by more than one CTU.

(145) [~~(141)~~] Message--A completed customer telephone call.

(146) [~~(142)~~] Message rate service--A form of local exchange service under which all originated local messages are measured and charged for in accordance with the utility's tariff.

(147) [~~(143)~~] Minor change--A change, including the restructuring of rates of existing services, that decreases the rates or revenues of the small local exchange company (SLEC) or that, together with any other rate or proposed or approved tariff changes in the 12 months preceding the date on which the proposed change will take effect, results in an increase of the SLEC's total regulated intrastate gross annual revenues by not more than 5.0%. Further, with regard to a change to a basic local access line rate, a minor change may not, together with any other change to that rate that went into effect during the 12 months preceding the proposed effective date of the proposed change, result in an increase of more than 50% [~~10%~~].

(148) [~~(144)~~] Municipality--A city, incorporated village, or town, existing, created, or organized under the general, home rule, or special laws of the state.

(149) [~~(145)~~] National integrated services digital network (ISDN)--The standards and services promulgated for integrated services digital network by Bellcore.

(150) [~~(146)~~] Negotiating party--A CTU or other entity with which a requesting CTU seeks to interconnect in order to complete all telephone calls made by or placed to a customer of the requesting CTU.

(151) [~~(147)~~] Next generation 9-1-1 system (NG9-1-1 system)--A system of securely managed IP-based 9-1-1 networks and elements that augment and are capable of interoperating with present-day E9-1-1 features and functions and add new capabilities. NG9-1-1 may replace or complement the present E9-1-1 system. NG9-1-1 is designed to provide access to emergency services from all sources, and to provide multimedia data capabilities for public safety answering positions and other emergency service organizations.

(152) [~~(148)~~] New service--Any service not offered on a tariffed basis prior to the date of the application relating to such service and specifically excludes basic local telecommunications service including local measured service. If a proposed service could serve as an alternative or replacement for a service offered prior to the date of the new-service application and does not provide significant improvements (other than price) over, or significant additional services not available under, a service offered prior to the date of such application, it shall not be considered a new service.

(153) [~~(149)~~] Nonbasic services--Those services identified in Public Utility Regulatory Act §58.151, including any service reclassified by the commission pursuant to Public Utility Regulatory Act §58.024.

(154) [~~(150)~~] Non-discriminatory--Type of treatment that is not less favorable than that an interconnecting CTU provides to itself or its affiliates or other CTUs.

(155) [~~(151)~~] Non-dominant certificated telecommunications utility (NCTU)--A CTU that is not a DCTU and has been granted a CCN (after September 1, 1995, in an area already certificated to a DCTU), a COA, or a SPCOA to provide local exchange service.

(156) [~~(152)~~] Nondominant carrier--

(A) An interexchange telecommunications carrier (including a reseller of interexchange telecommunications services).

(B) Any of the following that is not a dominant carrier:

(i) a specialized communications common carrier;

(ii) any other reseller of communications;

(iii) any other communications carrier that conveys, transmits, or receives communications in whole or in part over a telephone system; or

(iv) a provider of operator services that is not also a subscriber.

(157) [~~(153)~~] North American Numbering Plan (NANP)--Use of 10-digit dialing in the format of a 3-digit "NPA" followed by a 3-digit "NXX" and a 4-digit line number, NPA-NXX-XXX.

(158) [~~(154)~~] Numbering plan area (NPA)--The first three digits of a ten-digit North American Numbering Plan (NANP) local telephone number uniquely identifying a Numbering Plan area. Generally referred to as the area code of a NANP telephone number.

(159) [~~(155)~~] NXX--A 3-digit code in which N is any digit 2 through 9 and X is any digit 0 through 9. Typically used in describing the "Exchange Code" fields of a North American Numbering Plan telephone number.

(160) [~~(156)~~] Open network architecture--The overall design of an ILEC's network facilities and services to permit all users of the network, including the enhanced services operations of an ILEC and its competitors, to interconnect to specific basic network functions on an unbundled and non-discriminatory basis.

(161) [~~(157)~~] Operator service--Any service using live operator or automated operator functions for the handling of telephone service, such as local collect, toll calling via collect, third number billing, credit card, and calling card services. The transmission of "1-800" and "1-888" numbers, where the called party has arranged to be billed, is not operator service.

(162) [~~(158)~~] Operator service provider (OSP)--Any person or entity that provides operator services by using either live or automated operator functions. When more than one entity is involved

in processing an operator service call, the party setting the rates shall be considered to be the OSP. However, subscribers to customer-owned pay telephone service shall not be deemed to be OSPs.

(163) [~~(159)~~] Originating line screening (OLS)--A two digit code passed by the local switching system with the automatic number identification (ANI) at the beginning of a call that provides information about the originating line.

(164) [~~(160)~~] Out-of-service trouble report--An initial customer trouble report in which there is complete interruption of incoming or outgoing local exchange service. On multiple line services a failure of one central office line or a failure in common equipment affecting all lines is considered out of service. If an extension line failure does not result in the complete inability to receive or initiate calls, the report is not considered to be out of service.

(165) [~~(161)~~] P.01 grade of service--A standard of service quality intended to measure the probability (P), expressed as a decimal fraction, of a telephone call being blocked. P.01 is the grade of service reflecting the probability that one call out of one hundred during the average busy house will be blocked.[~~"~~]

(166) Packaged Service--The combination of any regulated service with any other regulated or unregulated service or with any service of an affiliate, offered to customers at a packaged rate.

(167) [~~(162)~~] Partial deregulation--The ability of a cooperative to offer new services on an optional basis and/or change its rates and tariffs under the provisions of the Public Utility Regulatory Act, §§53.351 - 53.359.

(168) [~~(163)~~] Pay-per-call-information services--Services that allow a caller to dial a specified 1-900-XXX-XXXX or 976-XXXX number. Such services routinely deliver, for a predetermined (sometimes time-sensitive) fee, a pre-recorded or live message or interactive program. Usually a telecommunications utility will transport the call and bill the end-user on behalf of the information provider.

(169) [~~(164)~~] Pay telephone access service (PTAS)--A service offered by a CTU which provides a two-way, or optionally, a one-way originating-only business access line composed of the serving central office line equipment, all outside plant facilities needed to connect the serving central office with the customer premises, and the network interface; this service is sold to pay telephone service providers.

(170) [~~(165)~~] Pay telephone service (PTS)--A telecommunications service utilizing any coin, coinless, credit card reader, or cordless instrument that can be used by members of the general public, or business patrons, employees, and/or visitors of the premises' owner, provided that the end user pays for local or toll calls from such instrument on a per call basis. Pay per call telephone service provided to inmates of confinement facilities is PTS. For purposes of this section, coinless telephones provided in guest rooms by a hotel/motel are not pay telephones. A telephone that is primarily used by business patrons, employees, and/or visitors of the premises' owner is not a pay telephone if all local calls and "1-800" and "1-888" type calls from such telephone are free to the end user.

(171) [~~(166)~~] Per-call blocking--A telecommunications service provided by a telecommunications provider that prevents the transmission of calling party information to a called party on a call-by-call basis.

(172) [~~(167)~~] Per-line blocking--A telecommunications service provided by a telecommunications utility that prevents the transmission of calling party information to a called party on every call, unless the calling party acts affirmatively to release calling party information.

(173) [~~(168)~~] Percent interstate usage (PIU)--An access customer-specific ratio or ratios determined by dividing interstate access minutes by total access minutes. The specific ratio shall be determined by the CTU unless the CTU's network is incapable of determining the jurisdiction of the access minutes. A PIU establishes the jurisdiction of switched access usage for determining rates charged to switched access customers and affects the allocation of switched access revenue and costs by CTUs between the interstate and intrastate jurisdictions.

(174) [~~(169)~~] Person--Any natural person, partnership, municipal corporation, cooperative corporation, corporation, association, governmental subdivision, or public or private organization of any character other than an agency.

(175) [~~(170)~~] Pleading--A written document submitted by a party, or a person seeking to participate in a proceeding, setting forth allegations of fact, claims, requests for relief, legal argument, and/or other matters relating to a proceeding.

(176) [~~(171)~~] Prepaid local telephone service (PLTS)--Prepaid local telephone service means:

(A) voice grade dial tone residential service consisting of flat rate service or local measured service, if chosen by the customer and offered by the DCTU;

(B) if applicable, mandatory services, including EAS, extended metropolitan service, or ELCS;

(C) tone dialing service;

(D) access to 911 service;

(E) access to dual party relay service;

(F) the ability to report service problems seven days a week;

(G) access to business office;

(H) primary directory listing;

(I) toll blocking service; and

(J) non-published service and non-listed service at the customer's option.

(177) [~~(172)~~] Premises--A tract of land or real estate including buildings and other appurtenances thereon.

(178) [~~(173)~~] Pricing flexibility--Discounts and other forms of pricing flexibility may not be preferential, prejudicial, or discriminatory. Pricing flexibility includes:

(A) customer specific contracts;

(B) volume, term, and discount pricing;

(C) zone density pricing;

(D) packaging of services; and

(E) other promotional pricing flexibility.

(179) [~~(174)~~] Primary interexchange carrier (PIC)--The provider chosen by a customer to carry that customer's toll calls.

(180) [~~(175)~~] Primary interexchange carrier (PIC) freeze indicator--An indicator that the end user has directed the CTU to make no changes in the end user's PIC.

(181) [~~(176)~~] Primary rate interface (PRI) integrated services digital network (ISDN)--One of the access methods to ISDN, the 1.544-Mbps PRI comprises either twenty-three 64 Kbps B-channels and one 64 Kbps D-channel (23B+D) or twenty-four 64 Kbps B-chan-

nels (24B) when the associated call signaling is provided by another PRI in the group.

(182) [~~(177)~~] Primary service--The initial provision of voice grade access between the customer's premises and the switched telecommunications network. This includes the initial connection to a new customer or the move of an existing customer to a new premises but does not include complex services.

(183) [~~(178)~~] Print translations--The temporary storage of a message in an operator's screen during the actual process of relaying a conversation.

(184) [~~(179)~~] Privacy issue--An issue that arises when a telecommunications provider proposes to offer a new telecommunications service or feature that would result in a change in the outflow of information about a customer. The term privacy issue is to be construed broadly. It includes, but is not limited to, changes in the following:

(A) the type of information about a customer that is released;

(B) the customers about whom information is released;

(C) the entity or entities to whom the information about a customer is released;

(D) the technology used to convey the information;

(E) the time at which the information is conveyed; and

(F) any other change in the collection, use, storage, or release of information.

(185) [~~(180)~~] Private line--A transmission path that is dedicated to a customer and that is not connected to a switching facility of a telecommunications utility, except that a dedicated transmission path between switching facilities of interexchange carriers shall be considered a private line.

(186) [~~(181)~~] Proceeding--A hearing, investigation, inquiry, or other procedure for finding facts or making a decision. The term includes a denial of relief or dismissal of a complaint. It may be rulemaking or non-rulemaking; rate setting or non-rate setting.

(187) [~~(182)~~] Promotional rate--A temporary tariff, fare, toll, rental or other compensation charged by a certificated telecommunications utility (CTU) to new or new and existing customers and designed to induce customers to test a service. A promotional rate shall incorporate a reduction or a waiver of some rate element in the tariffed rates of the service, or a reduction or waiver of the service's installation charge and/or service connection charges, and shall not incorporate any charge for discontinuance of the service by the customer. Such rates may not be offered for basic local telecommunications service, including local measured service.

(188) Promotional Service--A service offered to customers at a promotional rate.

(189) [~~(183)~~] Provider of pay telephone service--The entity that purchases PTAS from a CTU and registers with the Public Utility Commission as a provider of PTS to end users.

(190) [~~(184)~~] Public safety answering point (PSAP)--A continuously operated communications facility established or authorized by local government authorities that answers 9-1-1 calls originating within a given service area, as further defined in Texas Health and Safety Code Chapters 771 and 772.

(191) [~~(185)~~] Public utility or utility--A person or river authority that owns or operates for compensation in this state equipment or facilities to convey, transmit, or receive communications over a telephone system as a dominant carrier. The term includes a lessee, trustee, or receiver of any of those entities, or a combination of those entities. The term does not include a municipal corporation. A person is not a public utility solely because the person:

(A) furnishes or furnishes and maintains a private system;

(B) manufactures, distributes, installs, or maintains customer premises communications equipment and accessories; or

(C) furnishes a telecommunications service or commodity only to itself, its employees, or its tenants as an incident of employment or tenancy, if that service or commodity is not resold to or used by others.

(192) [~~(186)~~] Public Utility Regulatory Act (PURA)--The enabling statute for the Public Utility Commission of Texas, located in the Texas Utilities Code Annotated, §§11.001 - 66.016, (Vernon 2007, Supplement 2010).

(193) [~~(187)~~] Qualifying low-income consumer--A consumer that participates in one of the following programs: Medicaid, food stamps, Supplemental Security Income, federal public housing assistance, or Low-Income Home Energy Assistance Program.

(194) [~~(188)~~] Qualifying services--

(A) residential flat rate basic local exchange service;

(B) residential local exchange access service; and

(C) residential local area calling usage.

(195) [~~(189)~~] Rate--Includes:

(A) any compensation, tariff, charge, fare, toll, rental, or classification that is directly or indirectly demanded, observed, charged, or collected by a public utility for a service, product, or commodity, described in the definition of utility in the Public Utility Regulatory Act §31.002 or §51.002; and

(B) a rule, practice, or contract affecting the compensation, tariff, charge, fare, toll, rental, or classification.

(196) [~~(190)~~] Reciprocal compensation--An arrangement between two carriers in which each of the two carriers receives compensation from the other carrier for the transport and termination on each carrier's network facilities of local telecommunications traffic that originates on the network facilities of the other carrier.

(197) [~~(191)~~] Reclassification area--The geographic area within the electing ILEC's territory, consisting of one or more exchange areas, for which it seeks reclassification of a service.

(198) [~~(192)~~] Redirect the call--A procedure used by operator service providers (OSPs) that transmits a signal back to the originating telephone instrument that causes the instrument to disconnect the OSP's connection and to redial the digits originally dialed by the caller directly to the local exchange carrier's network.

(199) [~~(193)~~] Regional planning commission--The meaning established in Texas Health and Safety Code §771.001(10).

(200) [~~(194)~~] Regulatory authority--In accordance with the context where it is found, either the commission or the governing body of a municipality.

(201) [~~(195)~~] Relay Texas Advisory Committee (RTAC)--The committee authorized by the Public Utility Regulatory Act, §56.110 and 1997 Texas General Laws Chapter 149.

(202) [~~(196)~~] Relay Texas--The name by which telecommunications relay service in Texas is known.

(203) [~~(197)~~] Relay Texas administrator--The individual employed by the commission to oversee the administration of statewide telecommunications relay service.

(204) [~~(198)~~] Repeated trouble report--A customer trouble report regarding a specific line or circuit occurring within 30 days or one calendar month of a previously cleared trouble report on the same line or circuit.

(205) [~~(199)~~] Residual charge--The per-minute charge designed to account for historical contribution to joint and common costs made by switched transport services.

(206) [~~(200)~~] Retail service--A telecommunications service is considered a retail service when it is provided to residential or business end users and the use of the service is other than resale. Each tariffed or contract offering which a customer may purchase to the exclusion of other offerings shall be considered a service. For example: the various mileage bands for standard toll services are rate elements, not services; however, individual optional calling plans that can be purchased individually and which are offered as alternatives to each other are services, not rate elements.

(207) [~~(201)~~] Return-on-assets--After-tax net operating income divided by total assets.

(208) [~~(202)~~] Reversal of partial deregulation--The ability of a minimum of 10% of the members of a partially deregulated cooperative to request, in writing, that a vote be conducted to determine whether members prefer to reverse partial deregulation. Ten percent shall be calculated based upon the total number of members of record as of the calendar month preceding receipt of the request from members for reversal of partial deregulation.

(209) [~~(203)~~] Rule--A statement of general applicability that implements, interprets, or prescribes law or policy, or describes the procedure or practice requirements of the commission. The term includes the amendment or repeal of a prior rule but does not include statements concerning only the internal management or organization of the commission and not affecting private rights or procedures.

(210) [~~(204)~~] Rulemaking proceeding--A proceeding conducted pursuant to the Administrative Procedure Act, Texas Government Code, Chapter 2001, Subchapter B, to adopt, amend, or repeal a commission rule.

(211) [~~(205)~~] Rural incumbent local exchange company (ILEC)--An ILEC that qualifies as a "rural telephone company" as defined in 47 United States Code §3(37) and/or 47 United States Code §251(f)(2).

(212) [~~(206)~~] Selective routing--The feature provided with 9-1-1 or 311 service by which 9-1-1 or 311 calls are automatically directed to the appropriate answering point for serving the location from which the call originates.

(213) [~~(207)~~] Selective transfer--A public safety answering point initiating the routing of a 9-1-1 call to a response agency by operation of one of several buttons typically designated as police, fire, and emergency medical, based on the emergency service number of the caller.

(214) [~~(208)~~] Separation--The division of plant, revenues, expenses, taxes, and reserves applicable to exchange or local service if these items are used in common to provide public utility service to both local exchange telephone service and other service, such as interstate or intrastate toll service.

(215) [~~(209)~~] Service--Has its broadest and most inclusive meaning. The term includes any act performed, anything supplied, and any facilities used or supplied by a public utility in the performance of the utility's duties under the Public Utility Regulatory Act to its patrons, employees, other public utilities, and the public. The term also includes the interchange or facilities between two or more public utilities. The term does not include the printing, distribution, or sale of advertising in a telephone directory.

(216) [~~(210)~~] Service connection charge--A charge designed to recover the costs of non-recurring activities associated with connection of local exchange telephone service.

(217) [~~(211)~~] Service order system--The system used by a telecommunications provider that, among other functions, tracks customer service requests and billing data.

(218) [~~(212)~~] Service provider--Any entity that offers a product or service to a customer and that directly or indirectly charges to or collects from a customer's bill an amount for the product or service on a customer's bill received from a billing telecommunications utility.

(219) [~~(213)~~] Service provider certificate of operating authority (SPCOA) reseller--A holder of a service provider certificate of operating authority that uses only resold telecommunications services provided by an ILEC or by a COA holder or by a SPCOA holder.

(220) [~~(214)~~] Service restoral charge--A charge applied by the DCTU to restore service to a customer's telephone line after it has been suspended by the DCTU.

(221) [~~(215)~~] Serving wire center (SWC)--The CTU designated central office which serves the access customer's point of demarcation.

(222) [~~(216)~~] Signaling for tandem switching--The carrier identification code (CIC) and the OZZ code or equivalent information needed to perform tandem switching functions. The CIC identifies the interexchange carrier and the OZZ digits identify the call type and thus the interexchange carrier trunk to which traffic should be routed.

(223) [~~(217)~~] Small certificated telecommunications utility (CTU)--A CTU with fewer than 2.0% of the nation's subscriber lines installed in the aggregate nationwide.

(224) [~~(218)~~] Small local exchange company (SLEC)--Any incumbent CTU as of September 1, 1995, that has fewer than 31,000 access lines in service in this state, including the access lines of all affiliated incumbent local exchange companies within the state, or a telephone cooperative organized pursuant to the Telephone Cooperative Act, Texas Utilities Code Annotated, Chapter 162.

(225) [~~(219)~~] Small incumbent local exchange company (Small ILEC)--An ILEC that is a cooperative corporation or has, together with all affiliated ILECs, fewer than 31,000 access lines in service in Texas.

(226) [~~(220)~~] Spanish speaking person--A person who speaks any dialect of the Spanish language exclusively or as their primary language.

(227) [~~(221)~~] Special access--A transmission path connecting customer designated premises to each other either directly or through a hub or hubs where bridging, multiplexing or network reconfiguration service functions are performed and includes all exchange access not requiring switching performed by the dominant carrier's end office switches.

(228) [~~(222)~~] Specialized Telecommunications Assistance Program (STAP)--The program described in §26.415 of this title (relating to Specialized Telecommunications Assistance Program (STAP)).

(229) [~~(223)~~] Specialized Telecommunications Assistance Program (STAP) voucher--A voucher issued by the Texas Department of Assistive and Rehabilitative Services under the equipment distribution program, in accordance with its rules, that an eligible individual may use to acquire eligible specialized telecommunications devices from a vendor of such equipment.

(230) [~~(224)~~] Stand-alone costs--The stand-alone costs of an element or service are defined as the forward-looking costs that an efficient entrant would incur in providing only that element or service.

(231) [~~(225)~~] Station--A telephone instrument or other terminal device.

(232) [~~(226)~~] Study area--An incumbent local exchange company's (ILEC's) existing service area in a given state.

(233) [~~(227)~~] Supplemental services--Telecommunications features or services offered by a CTU for which analogous services or products may be available to the customer from a source other than a DCTU. Supplemental services shall not be construed to include optional extended area calling plans that a DCTU may offer pursuant to §26.217 of this title (relating to Administration of Extended Area Service (EAS) Requests), or pursuant to a final order of the commission in a proceeding pursuant to the Public Utility Regulatory Act, Chapter 53.

(234) [~~(228)~~] Suspension of service--That period during which the customer's telephone line does not have dial tone but the customer's telephone number is not deleted from the central office switch and databases.

(235) [~~(229)~~] Switched access--Access service that is provided by CTUs to access customers and that requires the use of CTU network switching or common line facilities generally, but not necessarily, for the origination or termination of interexchange calls. Switched access includes all forms of transport provided by the CTU over which switched access traffic is delivered.

(236) [~~(230)~~] Switched access demand--Switched access minutes of use, or other appropriate measure where not billed on a minute of use basis, for each switched access rate element, normalized for out of period billings. For the purposes of this section, switched access demand shall include minutes of use billed for the local switching rate element.

(237) [~~(231)~~] Switched access minutes--The measured or assumed duration of time that a CTU's network facilities are used by access customers. Access minutes are measured for the purpose of calculating access charges applicable to access customers.

(238) [~~(232)~~] Switched transport--Transmission between a CTU's central office (including tandem-switching offices) and an interexchange carrier's point of presence.

(239) [~~(233)~~] Tandem-switched transport--Transmission of traffic between the serving wire center and another CTU office that is switched at a tandem switch and charged on a usage basis.

(240) [~~(234)~~] Tariff--The schedule of a utility containing all rates, tolls, and charges stated separately by type or kind of service and the customer class, and the rules and regulations of the utility stated separately by type or kind of service and the customer class.

(241) [~~(235)~~] Telecommunications provider--As defined in the Public Utility Regulatory Act §51.002(10).

(242) [~~(236)~~] Telecommunications relay service (TRS)--A service using oral and print translations by either live or automated means between individuals who are hearing-impaired or speech-impaired who use specialized telecommunications devices and others who do not have such devices. Unless specified in the text, this term shall refer to intrastate telecommunications relay service only.

(243) [~~(237)~~] Telecommunications relay service (TRS) carrier--The telecommunications carrier selected by the commission to provide statewide telecommunications relay service.

(244) [~~(238)~~] Telecommunications utility--

(A) a public utility;

(B) an interexchange telecommunications carrier, including a reseller of interexchange telecommunications services;

(C) a specialized communications common carrier;

(D) a reseller of communications;

(E) a communications carrier who conveys, transmits, or receives communications wholly or partly over a telephone system;

(F) a provider of operator services as defined by §55.081, unless the provider is a subscriber to customer-owned PTS; and

(G) a separated affiliate or an electronic publishing joint venture as defined in the Public Utility Regulatory Act, Chapter 63.

(245) [~~(239)~~] Telephones intended to be utilized by the public--Telephones that are accessible to the public, including, but not limited to, pay telephones, telephones in guest rooms and common areas of hotels, motels, or other lodging locations, and telephones in hospital patient rooms.

(246) [~~(240)~~] Telephone solicitation--An unsolicited telephone call.

(247) [~~(241)~~] Telephone solicitor--A person who makes or causes to be made a consumer telephone call, including a call made by an automatic dialing/announcing device.

(248) [~~(242)~~] Test year--The most recent 12 months, beginning on the first day of a calendar or fiscal year quarter, for which operating data for a public utility are available.

(249) [~~(243)~~] Texas Universal Service Fund (TUSF)--The fund authorized by the Public Utility Regulatory Act, §56.021 and 1997 Texas General Laws Chapter 149.

(250) [~~(244)~~] Tier 1 local exchange company--A local exchange company with annual regulated operating revenues exceeding $100 million.

(251) [~~(245)~~] Title IV-D Agency--The office of the attorney general for the state of Texas.

(252) [~~(246)~~] Toll blocking--A service provided by telecommunications carriers that lets consumers elect not to allow the completion of outgoing toll calls from their telecommunications channel.

(253) [~~(247)~~] Toll control--A service provided by telecommunications carriers that allows consumers to specify a certain amount of toll usage that may be incurred on their telecommunications channel per month or per billing cycle.

(254) [~~(248)~~] Toll limitation--Denotes both toll blocking and toll control.

(255) [~~(249)~~] Total element long-run incremental cost (TELRIC)--The forward-looking cost over the long run of the total quantity of the facilities and functions that are directly attributable to, or reasonably identifiable as incremental to, such element, calculated taking as a given the CTU's provision of other elements.

(256) Transitioning company--An incumbent local exchange company for which at least one, but not all, of the company's markets has been deregulated.

(257) [~~(250)~~] Transport--The transmission and/or any necessary tandem and/or switching of local telecommunications traffic from the interconnection point between the two carriers to the terminating carrier's end office switch that directly serves the called party, or equivalent facility provided by a carrier other than a DCTU.

(258) [~~(251)~~] Trunk--A circuit facility connecting two switching systems.

(259) [~~(252)~~] Two-primary interexchange carrier (Two-PIC) equal access--A method that allows a telephone subscriber to select one carrier for all 1+ and 0+ interLATA calls and the same or a different carrier for all 1+ and 0+ intraLATA calls.

(260) [~~(253)~~] Unauthorized charge--Any charge on a customer's telephone bill that was not consented to or verified in compliance with §26.32 of this title (relating to Protection Against Unauthorized Billing Charges ("Cramming")).

(261) [~~(254)~~] Unbundling--The disaggregation of the ILEC's network/service to make available the individual network functions or features or rate elements used in providing an existing service.

(262) [~~(255)~~] Unit cost--A cost per unit of output calculated by dividing the total long run incremental cost of production by the total number of units.

(263) [~~(256)~~] Usage sensitive blocking--Blocking of a customer's access to services which are charged on a usage sensitive basis for completed calls. Such calls shall include, but not be limited to, call return, call trace, and auto redial.

(264) [~~(257)~~] Virtual private line--Circuits or bandwidths, between fixed locations, that are available on demand and that can be dynamically allocated.

(265) [~~(258)~~] Voice carryover--A technology that allows an individual who is hearing-impaired to speak directly to the other party in a telephone conversation and to use specialized telecommunications devices to receive communications through the telecommunications relay service operator.

(266) [~~(259)~~] Voice over Internet Protocol (VoIP)--The technology used to transmit voice communications using Internet Protocol.

(267) Voice over Internet Protocol service--A service that:

(A) uses Internet Protocol or a successor protocol to enable a real-time, two-way voice communication that originates from or terminates to the user's location in Internet Protocol or a successor protocol;

(B) requires a broadband connection from the user's location; and

(C) permits a user generally to receive a call that originates on the public switched telephone network and to terminate a call to the public switched telephone network.

(268) [~~(260)~~] Volume insensitive costs--The costs of providing a basic network function (BNF) that do not vary with the volume of output of the services that use the BNF.

(269) [~~(261)~~] Volume sensitive costs--The costs of providing a basic network function (BNF) that vary with the volume of output of the services that use the BNF.

(270) Wireless provider--A provider that:

(A) provides commercial mobile radio service as defined in paragraph (40) of this section; or

(B) utilizes fixed wireless technology to provide local exchange service.

(271) [~~(262)~~] Wholesale service--A telecommunications service is considered a wholesale service when it is provided to a telecommunications utility and the use of the service is to provide a retail service to residence or business end-user customers.

(272) [~~(263)~~] Working capital requirements--The additional capital required to fund the increased level of accounts receivable necessary to provide telecommunications service.

(273) [~~(264)~~] "0-" call--A call made by the caller dialing the digit "0" and no other digits within five seconds. A "0-" call may be made after a digit (or digits) to access the local network is (are) dialed.

(274) [~~(265)~~] "0+" call--A call made by the caller dialing the digit "0" followed by the terminating telephone number. On some automated call equipment, a digit or digits may be dialed between the "0" and the terminating telephone number.

(275) [~~(266)~~] 311 answering point--A communications facility that:

(A) is operated, at a minimum, during normal business hours;

(B) is assigned the responsibility to receive 311 calls and, as appropriate, to dispatch the non-emergency police or other governmental services, or to transfer or relay 311 calls to the governmental entity;

(C) is the first point of reception by a governmental entity of a 311 call; and

(D) serves the jurisdictions in which it is located or other participating jurisdictions.

(276) [~~(267)~~] 311 service--A telecommunications service provided by a certificated telecommunications provider through which the end user of a public telephone system has the ability to reach non-emergency police and other governmental services by dialing the digits 3-1-1. 311 service must contain the selective routing feature or other equivalent state-of-the-art feature.

(277) [~~(268)~~] 311 service request--A written request from a governmental entity to a CTU requesting the provision of 311 service. A 311 service request must:

(A) be in writing;

(B) contain an outline of the program the governmental entity will pursue to adequately educate the public on the 311 service;

(C) contain an outline from the governmental entity for implementation of 311 service;

(D) contain a description of the likely source of funding for the 311 service (i.e., from general revenues, special appropriations, etc.); and

(E) contain a listing of the specific departments or agencies of the governmental entity that will actually provide the non-emergency police and other governmental services.

(278) [~~(269)~~] 311 system--A system of processing 311 calls.

(279) [~~(270)~~] 9-1-1 administrative entity--A regional planning commission as defined in Texas Health and Safety Code §771.001(10) or an emergency communication district as defined in Texas Health and Safety Code §771.001(3).

(280) [~~(271)~~] 9-1-1 database management services provider--An entity designated by a 9-1-1 administrative entity to provide 9-1-1 database management services that support the provision of 9-1-1 services.

(281) [~~(272)~~] 9-1-1 database services--Services purchased by a 9-1-1 administrative entity that accepts, processes, and validates subscriber record information of telecommunications providers for purposes of selective routing and automatic location identification, and that may also provide statistical performance measures.

(282) [~~(273)~~] 9-1-1 network services--Services purchased by a 9-1-1 administrative entity that route 9-1-1 calls from an E9-1-1 selective router, 9-1-1 tandem, next generation 9-1-1 system, Internet Protocol-based 9-1-1 system or its equivalent to public safety answering points or a public safety answering point network.

(283) [~~(274)~~] 9-1-1 network services provider--A CTU designated by the appropriate 9-1-1 administrative entity to provide 9-1-1 network services in a designated area.

(284) [~~(275)~~] 911 system--A system of processing emergency 911 calls, as defined in Texas Health and Safety Code §772.001, as may be subsequently amended.

(285) [~~(276)~~] 9-1-1 selective routing tandem switch--A switch located in a telephone central office that is equipped to accept, process, and route 9-1-1 calls to a predetermined, specific location. Also known as E9-1-1 control office or E9-1-1 selective router.

(286) [~~(277)~~] 9-1-1 service--As defined in Texas Health and Safety Code §771.001(6) and §772.001(6).

(287) [~~(278)~~] 9-1-1 service agreement--A contract addressing the 9-1-1 service arrangements for a local area that the appropriate 9-1-1 administrative entity enters into.

(288) [~~(279)~~] 9-1-1 service arrangement--Each particular arrangement for 9-1-1 emergency service specified by the appropriate 9-1-1 administrative entity for the relevant rate centers within its jurisdictional area and that is subject to a 9-1-1 service 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.

Filed with the Office of the Secretary of State on December 9, 2011.

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Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
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For further information, please call: (512) 936-7223

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SUBCHAPTER B. CUSTOMER SERVICE AND PROTECTION

16 TAC §§26.22, 26.23, 26.27, 26.29

The amendments are proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 2007 and Supp. 2011) (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 the amendments to PURA made by Senate Bills 773, 980, and 983, and House Bills 2295 and 2680 of the 82nd Legislature, Regular Session.

Cross Reference to Statutes: PURA §14.002 and the amendments to PURA made by Senate Bills 773, 980, and 983, and House Bills 2295 and 2680 of the 82nd Legislature, Regular Session.

§26.22. Request for Service.

(a) Dominant certificated telecommunications utility (DCTU).

(1) Every DCTU shall provide local telecommunications service to each qualified applicant for service and to each of its customers within its certificated area in accordance with §26.54(c)(1) of this title (relating to Service Objectives and Performance Benchmarks). A deregulated company that holds a certificate of operating authority is not obligated to be provider of last resort. A transitioning company is not obligated to be provider of last resort in a deregulated market.

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

(b) (No change.)

§26.23. Refusal of Service.

(a) (No change.)

(b) Non-dominant certificated telecommunications utility (NCTU).

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

(3) Insufficient grounds for refusal to serve. The following are not sufficient grounds for refusal of basic local telecommunications service to an applicant by an NCTU:

(A) (No change.)

(B) failure to pay for any charges that are not provided in the DCTU's tariffs; [~~NCTU's tariffs, schedules, or lists on file with the commission in accordance with §26.89 of this title (relating to Information Regarding Rates and Services of Non-dominant Carriers), terms and conditions of service, or customer-specific contracts;~~]

(C) - (E) (No change.)

§26.27. Bill Payment and Adjustments.

(a) (No change).

(b) Nondominant certificated telecommunications utility (NCTU).

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

(3) Billing adjustments.

(A) Overbilling. If charges are higher than the NCTU's tariff, schedule, or list [~~on file with the commission in accordance with §26.89 of this title (relating to Information Regarding Rates and Services of Nondominant Carriers),~~] terms and conditions of service, or a customer-specific contract, an appropriate refund shall be made to the customer:[~~.~~]

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

(B) Underbilling. If charges are found to be lower than authorized by the NCTU's tariff, schedule, or list [~~on file with the commission in accordance with §26.89 of this title~~], terms and conditions of service, or a customer-specific contract, or if the NCTU failed to bill the customer for service, then:

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

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

(c) (No change.)

§26.29. Prepaid Local Telephone Service (PLTS).

(a) - (j) (No change.)

~~[(k) Tariff compliance. A DCTU subject to this section shall file tariffs in compliance with this section, and pursuant to §26.207 of this title (relating to Form and Filing of Tariffs) and §26.208 of this title (relating to General Tariff Procedures).]~~

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

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Rules Coordinator
Public Utility Commission of Texas
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SUBCHAPTER C. INFRASTRUCTURE AND RELIABILITY

16 TAC §26.54

The amendments are proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 2007 and Supp. 2011) (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 the amendments to PURA made by Senate Bills 773, 980, and 983, and House Bills 2295 and 2680 of the 82nd Legislature, Regular Session.

Cross Reference to Statutes: PURA §14.002 and the amendments to PURA made by Senate Bills 773, 980, and 983, and House Bills 2295 and 2680 of the 82nd Legislature, Regular Session.

§26.54. Service Objectives and Performance Benchmarks.

(a) This section establishes service objectives that should be provided by a dominant certificated telecommunications utility (DCTU), as applicable. A deregulated company that holds a certificate of operating authority and a transitioning company is exempt from complying with the retail quality of service standards and reporting requirements in this section in a market that is deregulated. The section outlines performance benchmark levels for each exchange. If service quality falls below the applicable performance benchmark for an exchange, that indicates a need for the utility to investigate, take appropriate corrective action, and provide a report of such activities to the commission. The objective service levels are based on monthly averages, except for dial service and transmission requirements, which are based on specific samples. DCTUs shall make measurements to determine the level of service quality for each item included in this section. Each DCTU shall provide the commission with the measurements and summaries for any of the items included herein on request of the commission. Records of these measurements and summaries shall be retained by the DCTU as specified by the commission.

(b) (No change.)

(c) The DCTU shall comply with the service quality objectives established below in providing the basic telecommunications service to its end-use customers. The DCTU shall file its service quality performance report on a quarterly basis. The report shall include its monthly performance for each category of performance objective and a summary of its corrective action plan for each exchange in which the performance falls below the benchmark. Additionally, the corrective action plan shall include, at a minimum, details outlining how the needed improvements will be implemented within three months and result in performance at or above the applicable benchmark.

(1) Installation of service. Unless otherwise provided by the commission:

(A) Ninety-five percent of the DCTU's service orders for installing primary service shall be completed within five working days, excluding those orders where a later date was specifically requested by the customer. Performance Benchmark Applicable for Corrective Action: If the performance is below 95% in any exchange area for a period of three consecutive months, the DCTU shall provide a detailed corrective action plan for such exchanges or wire centers [~~wirecenters~~].

(B) Ninety percent of the DCTU's service orders for regular service installations shall be completed within five working days, excluding those orders where a later date was specifically requested by the customer. This includes orders for primary and other services, installations, moves, or changes, but not complex services. Performance Benchmark for Corrective Action: If the performance is below 90% in any exchange area for a period of three consecutive months the DCTU shall provide a detailed corrective action plan for such exchanges or wire centers [~~wirecenters~~].

(C) Ninety-nine percent of the DCTU's service orders for service installations shall be completed within 30 days. Performance Benchmark for Corrective Action: If the performance is below 99% in any exchange area for a period of three consecutive months, the DCTU shall provide a detailed corrective action plan for such exchange or wire center [~~wirecenter~~].

(D) - (G) (No change.)

(H) Ninety percent of the DCTU's commitments to customers for the date of installation of service orders shall be met, excepting customer-caused delays. Performance Benchmark Applicable for Corrective Action: If the performance is below 90% in any exchange area for a period of three consecutive months, the DCTU shall submit a list of missed commitments to the commission and provide a detailed corrective action plan for such exchange or wire center [~~wirecenter~~].

(I) - (J) (No change.)

(2) Operator-handled calls. DCTUs shall maintain adequate personnel to provide an average operator answering performance as follows for each exchange on a monthly basis:

(A) (No change.)

(B) Ninety percent of repair service calls shall be answered within 20 seconds or average answer time shall not exceed 5.9 seconds. Benchmark for Corrective Action: If the performance is below 90% within 20 seconds or the average answer time exceeds 5.9 seconds at any answering location for a period of five days within any given month, the DCTU shall provide a detailed corrective action plan for such exchange or wire center [~~wirecenter~~].

(C) Eighty-five percent of directory assistance calls shall be answered within ten seconds or the average answer time shall

not exceed 5.9 seconds. Benchmark for Corrective Action: If the performance is either below 85% within ten seconds or if the average answer time exceeds 5.9 seconds at any answering location in any given month, the DCTU shall provide a detailed corrective action plan for such exchange or wire center [~~wirecenter~~].

(D) - (E) (No change.)

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

(6) Customer trouble reports.

(A) The DCTU that serves more than 10,000 access lines shall maintain its network service in a manner that it receives no more than three customer trouble reports on a company-wide basis, excluding customer premises equipment (CPE) reports, per 100 customer access lines per month (on average). Performance Benchmark Applicable for Corrective Action: If the customer trouble report exceeds 3.0% (three per 100 access lines) for a large exchange or 6.0% (six per 100 access lines) for a smaller exchange for three consecutive months, the DCTU shall provide a detailed corrective action plan for such exchange or wire center [~~wirecenter~~]. For purposes of this section, a large exchange is defined as serving 10,000 or more access lines and a small exchange is defined as serving less than 10,000 access lines.

(B) - (C) (No change.)

(D) At least 90% of out-of-service trouble reports on service provided by a DCTU shall be cleared within eight working hours, except where access to the customer's premises is required but not available or where interruptions are caused by unavoidable casualties and acts of God affecting large groups of customers. Performance Benchmark Applicable for Corrective Action: If the performance is below 90% in any exchange area for a period of three consecutive months, the DCTU shall provide a detailed corrective action plan for such exchange or wire center [~~wirecenter~~].

(E) Each DCTU shall establish procedures to insure the prompt investigation and correction of trouble reports so that the percentage of repeated trouble reports on residence and single line business lines does not exceed 22% of the total customer trouble reports on those lines. Performance Benchmark Applicable for Corrective Action: If repeat reports exceed 22% of the total customer trouble report in any exchange for three consecutive months, the DCTU shall provide a detailed corrective action plan for such exchange or wire center [~~wirecenter~~].

(7) (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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SUBCHAPTER D. RECORDS, REPORTS, AND OTHER REQUIRED INFORMATION

16 TAC §26.73, §26.89

The amendments are proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 2007 and Supp. 2011) (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 the amendments to PURA made by Senate Bills 773, 980, and 983, and House Bills 2295 and 2680 of the 82nd Legislature, Regular Session.

Cross Reference to Statutes: PURA §14.002 and the amendments to PURA made by Senate Bills 773, 980, and 983, and House Bills 2295 and 2680 of the 82nd Legislature, Regular Session.

§26.73. Annual Earnings Report.

Each utility shall file with the commission, on commission-prescribed forms available on the commission's website, an earnings report providing the information required to enable the commission to properly monitor public utilities within the state. A deregulated or transitioning company is not required to file an earnings report with the commission unless the company is receiving support from the Texas High Cost Universal Service Plan.

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

§26.89. Information Regarding Rates and Services of Nondominant Carriers.

(a) All nondominant carriers, including those holding a certificate of operating authority or a service provider certificate of operating authority, may, but are not required to [~~shall~~] file the information set forth in paragraphs (1) - (3) of this subsection. This information shall be updated and kept current at all times.

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

(b) By June 30 of each year, each nondominant carrier that during the previous 12 months has not filed changes to the information filed [~~required~~] pursuant to subsection (a) of this section shall file with the commission a letter informing the commission that no changes have occurred. An uncertificated nondominant carrier failing to file either this letter or the updates pursuant to [~~required by~~] subsection (a) of this section during the 12-month period ending June 30 may no longer be considered to be registered with the commission.

(c) (No change.)

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SUBCHAPTER F. REGULATION OF TELECOMMUNICATIONS SERVICE

16 TAC §§26.124, 26.128, 26.134

The amendments are proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 2007 and Supp. 2011) (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 the amendments to PURA made by Senate Bills 773, 980, and 983, and House Bills 2295 and 2680 of the 82nd Legislature, Regular Session.

Cross Reference to Statutes: PURA §14.002 and the amendments to PURA made by Senate Bills 773, 980, and 983, and House Bills 2295 and 2680 of the 82nd Legislature, Regular Session.

§26.124. Pay-Per-Call Information Services Call Blocking.

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

(e) Compliance. Each DCTU that is subject to rate of return regulation under Public Utility Regulatory Act, Chapter 53 [~~Within 45 days of being declared a DCTU, each DCTU~~] shall file tariffs in compliance with this section. The compliance tariffs will be reviewed by staff. Within 35 days of the date of filing of the tariffs, the tariffs will either be approved or the effective date of the tariff will be suspended for further review.

§26.128. Telephone Directories.

(a) (No change.)

(b) Telephone directory requirements for all providers. Any private for-profit publisher and any telecommunications utility or its affiliate that publishes a residential telephone directory shall comply with the following requirements:

(1) (No change.)

(2) The directory shall include the information required in paragraph (1) of this subsection from the most current edition of the State of Texas Telephone Directory prepared and issued by the Department of Information Services [~~General Services Commission of the State of Texas~~] and those modifications to the State of Texas Telephone Directory that are available upon request from the Department of Information Resources [~~General Services Commission of Texas~~].

(3) All publishers shall contact the Department of Information Resources [~~General Services Commission of Texas~~] in writing to determine which issue of the State of Texas Telephone Directory is most current and to obtain the modifications referred to in paragraph (2) of this subsection. The Department of Information Resources [~~General Services Commission~~] shall respond within 30 days of receiving the request.

(4) The listings required by paragraph (1) of this subsection:

(A) - (D) (No change.)

(E) shall be in compliance with the categorization developed by the Records Management Interagency Coordinating Council. The categorization shall be available upon request from the Department of Information Resources [~~General Services Commission~~]. The listings shall be arranged in two ways:

(i) alphabetically by subject matter of state agencies; and

(ii) alphabetically by agency and public service name;

(F) shall include the telephone number for state government information: (512) 463-4630.

(c) (No change.)

(d) Additional requirement for telecommunications utilities or affiliates that publish telephone directories.

(1) (No change.)

(2) A telecommunications utility or an affiliate of that utility that publishes and causes to be distributed to the public a residential or business telephone directory shall prominently list in the directory the following information: "The Specialized Telecommunications Assistance Program (STAP) provides financial assistance to help Texas residents with disabilities purchase basic specialized equipment or services needed to access the telephone network. For more information, contact the Texas Department of Assistive and Rehabilitative Services, the Office for Deaf and Hard of Hearing Services [~~Texas Commission for the Deaf and Hard of Hearing~~] at 512-407-3250 (Voice) or 512-407-3251 (TTY) or www.dars.state.tx.us/dhhs [~~www.tcdhh.state.tx.us~~]. This program is open to all individuals who are residents of Texas and have a disability."

(e) Requirements for telecommunications utilities found to be dominant. This subsection applies to any telecommunications utility found to be dominant as to local exchange telephone service or its affiliate that publishes a directory on behalf of such telecommunications utility.

(1) (No change.)

(2) Distribution. Upon issuance, a copy of each directory shall be distributed at no charge for each customer access line served by the telecommunications utility in the geographic area covered by that directory and, if requested, one extra copy per customer access line shall be provided at no charge. Notwithstanding any other law, a telecommunications provider or telecommunications utility may publish on its website a telephone directory or directory listing instead of providing for general distribution to the public of printed directories or listings. A provider or utility that publishes a telephone directory or directory listing electronically shall provide a print or digital copy of the directory or listing to a customer on request. If a provider or utility chooses to publish its telephone directory or directory listings electronically, it shall notify its customers that the first print or digital copy requested by a customer in each calendar year will be provided at no charge to the customer. A printed or digital copy of each directory shall be furnished to the commission. A telecommunications utility shall also distribute copies of directories pursuant to any agreement reached with another CTU. [~~A copy of each directory shall be furnished to the commission.~~]

(3) - (6) (No change.)

(f) References to other sections relating to directory notification. The requirements of this section are in addition to the requirements referenced in paragraphs (1) - (4) [~~(1) through (6)~~] of this subsection, or any other applicable section in this title. The applicability of each of the sections referenced in paragraphs (1) - (4) [~~(1) through (6)~~]of this subsection is unaffected by the inclusion of the reference in this subsection.

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

[~~(4) Section 26.122 of this title (relating to Customer Proprietary Network Information) concerning notification;~~]

[~~(5) Section 26.126 of this title (relating to Telephone Solicitation) concerning responsibility of LECs;~~]

(4) [~~(6)~~] Section 26.130 of this title (relating to Selection of Telecommunications Utilities) concerning notice of customer rights.

(g) (No change.)

§26.134. Market Test to be Applied in Determining if Markets with Populations Less than 100,000 [30,000] Should Remain Regulated [on or After January 1, 2007].

(a) Purpose. The purpose of this section is to establish the market tests to be applied in determining if markets with populations less than 100,000 [30,000] should remain regulated [after January 1, 2007].

(b) (No change.)

(c) Market Test. Markets as defined in PURA §65.002 [of PURA] with a population of less than 100,000 [30,000] shall be deregulated only if the ILEC providing services to such a market submits evidence demonstrating that the population in the market is less than 100,000 [30,000] and in addition to the ILEC there are at least two [three separate] competitors operating in all or part of the market that:

(1) are unaffiliated with the ILEC; and [of which at least one competitor is an entity providing residential telephone service in the market using facilities that the entity or its affiliate owns; and]

(2) provide voice communications service without regard to the delivery technology, including through [of which at least two competitors must be from two different categories of the following]:

(A) Internet Protocol or a successor protocol [a telecommunications provider that holds a certificate of operating authority or service provider certificate of operating authority and provides residential local exchange telephone service in the market];

(B) satellite; or [a provider in that market of commercial mobile service as defined by Section 332(d), Communications Act of 1934 (47 U.S.C. Section 151 et. Seq.), Federal Communications Commission rules, and the Omnibus Budget Reconciliation Act of 1993 (Pub. L. No. 103-66), that is not affiliated with the incumbent local exchange company; and]

(C) a technology used by a wireless provider or a commercial mobile service provider, as that term is defined by PURA §64.201. [a satellite telecommunications provider certified as an eligible telecommunications carrier for the entire market pursuant to §26.418 of this title (relating to Designation of Common Carriers as Eligible Telecommunications Carriers to Receive Federal Universal Service Funds).]

(d) Market Test Procedures.

(1) An ILEC may petition the commission to deregulate a market of the ILEC that the commission previously determined should remain regulated.

(2) Only the ILEC may initiate a proceeding to deregulate one of its markets. Not later than the 90th day after the date the commission receives the petition, the commission shall:

(A) determine whether the regulated market should remain regulated; and

(B) issue a final order classifying the market in accordance with this section.

(3) If the commission deregulates a market that results in a regulated or transitioning company no longer meeting the definition of a regulated or transitioning company, the commission shall issue an order reclassifying the company as a transitioning company or deregulated company, as those terms are defined by PURA §65.002.

(e) [(d)] Rural Exemption Waiver. In the event that an ILEC seeking deregulation of a market area with a population of less than 100,000 [30,000] has a rural exemption as provided for in 47 U.S.C. §251(f)(1) [Section 251(f)(1)] "Exemption For Certain Rural Telephone Companies" of the Communications Act of 1934, a petition for the removal of that rural exemption for that market must be approved by the commission in order for the market in question not to remain regulated. In addition, any such market must meet the conditions of the market test set forth in subsection (c) of this section.

(f) [(e)] Timing.

[(1) Markets shall be deregulated on January 1, 2007 only if the ILEC providing service to such a market(s) submits evidence on or before August 1, 2006 in compliance with subsection (c) of this section and, if applicable, subsection (d) of this section.]

(1) [(2)] After September 1, 2011, [July 1, 2007] an ILEC petitioning for deregulation of a market with a population of less than 100,000 [30,000] shall submit with its petition the evidence in compliance with subsection (c) of this section and, if applicable, subsection (e) [(d)] of this section.

(2) A market deregulated as of September 1, 2011, shall remain deregulated.

(3) The commission may not reregulate a market or company that has been deregulated.

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 G. ADVANCED SERVICES

16 TAC §26.141

The amendments are proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 2007 and Supp. 2011) (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 the amendments to PURA made by Senate Bills 773, 980, and 983, and House Bills 2295 and 2680 of the 82nd Legislature, Regular Session.

Cross Reference to Statutes: PURA §14.002 and the amendments to PURA made by Senate Bills 773, 980, and 983, and House Bills 2295 and 2680 of the 82nd Legislature, Regular Session.

§26.141. Distance Learning, Information Sharing Programs, and Interactive Multimedia Communications.

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

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

(3) Health center--A federally qualified health center service delivery site.

(4) [~~(3)~~] Information sharing program--Instruction, learning, and training that is transmitted from one site to one or more sites by telecommunications services that are used by a library predominantly for such instruction, learning, or training, including video, data, voice, and electronic information.

(5) [~~(4)~~] Interactive multimedia communications--Real-time, two-way, interactive voice, video, and data communications conducted over networks that link geographically dispersed locations. This definition includes interactive communications within or between buildings on the same campus or library site.

(6) [~~(5)~~] Library--Public library or regional library system as defined by Government Code, §441.122, or a library operated by an institution of higher education or a school district.

(b) (No change.)

(c) Coordination with federal discounts.

(1) For any discount received pursuant to §26.216 [~~§23.107~~] of this title (relating to Educational Percentage Discount Rates (E-Rates)), an eligible school, library or consortia may apply such discount prior to any discount received under subsection (d) or (e) of this section. Any subsequent discount received under this section shall apply to the discounted E-Rate and not the tariffed rate.

(2) Any discount received under §26.216 [~~§23.107~~] of this title will be applied subsequent to the rate obtained for services offered pursuant to subsection (f) of this section. For purposes of determining the rate to which a discount pursuant to §26.216 [~~§23.107~~] of this title will apply, the rates offered under subsection (f) of this section qualify as the lowest corresponding price.

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

(f) Customer-specific contracts. When a service is provided to an educational institution or library pursuant to §26.211 of this title (relating to Rate-Setting Flexibility for Services Subject to Significant Competitive Challenges), the dominant certificated telecommunications utility shall price those components of the service used predominantly for distance learning or an information sharing program [~~no less than 105%, and~~] no greater than 110%, including installation, of the customer-specific long-run incremental cost.

(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.

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SUBCHAPTER I. ALTERNATIVE REGULATION

16 TAC §26.171

The amendments are proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 2007 and Supp. 2011) (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 the amendments to PURA made by Senate Bills 773, 980, and 983, and House Bills 2295 and 2680 of the 82nd Legislature, Regular Session.

Cross Reference to Statutes: PURA §14.002 and the amendments to PURA made by Senate Bills 773, 980, and 983, and House Bills 2295 and 2680 of the 82nd Legislature, Regular Session.

§26.171. Small Incumbent Local Exchange Company Regulatory Flexibility.

(a) Purpose and application.

(1) (No change.)

(2) Application. This section applies to any small ILEC as that term is defined in §26.5 of this title (relating to Definitions), except that this section does not apply to a cooperative corporation partially deregulated under PURA, Chapter 53, Subchapter H. Nothing in this section precludes a small ILEC from offering a packaged service, new service, or promotional service or proposing a change in rates under other applicable sections of the PURA. Nothing in this section prohibits the commission from conducting a review in accordance with PURA, Chapter 53, Subchapter D. Notwithstanding limitations contained within §26.121 of this title (relating to Privacy Issues), §26.121 of this title applies to notices to the commission (commission notices) [~~statements of intent~~] filed under this section.

(b) (No change.)

(c) Filing. By following procedures outlined in this section, a small ILEC may offer extended local calling service, a packaged service, a promotional service, or a new service on an optional basis or make a minor change in its rates or tariffs.

(1) Notice [~~Statement of Intent~~]. At least 10 [~~91~~] calendar days before the effective date of the proposed change, the small ILEC shall file six copies of a commission notice [~~statement of intent~~] with the commission's Filing Clerk and shall serve a copy upon the Office of Public Utility Counsel. Such notice shall include:

(A) a copy of the customer notice required by subsection (d) of this section;

(B) a sufficient description of how notice will be provided to the customers to allow the presiding officer to rule on the sufficiency of the notice;

(C) - (L) (No change.)

(2) Response to the commission notice [~~statement of intent~~]. No later than ten calendar days after the small ILEC files the commission notice [~~statement of intent~~], the presiding officer assigned to the project shall notify the small ILEC of any deficiencies in the commission notice [~~statement of intent~~], whether the proposed notice to the customers is approved, and whether a waiver request, if any, is granted.

(d) Notice. A small ILEC satisfies the notice requirements in paragraphs (1) - (5) of this subsection by completing notice to the affected customers no later than 10 [~~61~~] days before the proposed effective date of the tariff sheets. If notice is not completed as required, the proposed effective date shall be postponed for as many days as completion of notice is delayed. [~~Newspaper notice required in paragraphs (1) and (2) of this subsection shall be provided in a newspaper of general circulation in the particular area(s) affected by the proposed change if a newspaper with general circulation in the entire county does not exist.~~]

(1) Extended local calling service, packaged service, promotional service or new service. For extended local calling service, a packaged service, promotional service or a new service, notice shall be provided to each affected customer. [~~or for a new service, either two weeks published notice in a newspaper of general circulation in each county affected by the statement of intent or direct mail notice to each affected customer shall be required or, in the case of a cooperative, publication of notice in the cooperative's newsletter and direct mail notice to affected nonmember customers shall be required.~~]

[~~(2) Rate increases. For a rate increase, notice shall be published for four weeks in a newspaper of general circulation in each county affected by the rate increase and direct mail notice shall be provided to each affected customer.~~]

(2) [~~(3)~~] Good cause exceptions. The presiding officer may require for good cause that notice be provided in addition to notice proposed by the small ILEC for a proposed new service or may waive for good cause the [~~publication of~~] notice requirement prescribed by this section [~~for a proposed new service~~].

(3) [~~(4)~~] Contents of notice. Each notice must include:

(A) a description of the service(s) affected by the proposed change;

(B) a list of rates affected by the commission notice [~~statement of intent~~] and how the rates affect each category of affected customers;

(C) the proposed effective date of the change;

(D) an explanation of the affected customer's right to petition the commission for review under subsection (g)(2) of this section, including the number of affected persons required to petition before commission review will occur and the date by which the petition must be received by the commission, which date must be 30 calendar days following the completion of notice;

(E) an explanation of the affected customer's right to obtain from the small ILEC a copy of the proposed tariff and instructions on how to do so; and

(F) the amount by which the small ILEC's total regulated intrastate gross annual revenues will increase as a result of the proposed change.

(4) [~~(5)~~] Proof of customer notice. Within seven calendar days following completion of notice, the small ILEC or a representative of the small ILEC shall file one or more affidavits establishing proof of notice to customers as required by this subsection [~~direct mail notice and published notice required by this subsection and shall file a copy of each published notice~~].

[~~(6) Texas Register notice. Following approval of the notice by the presiding officer, the commission shall submit notice of the small ILEC's filing of the statement of intent to the Texas Register for publication.~~]

(e) New service availability. If the commission notice [~~statement of intent~~] concerns a new service, as defined in §26.5 of this title, that will not be offered system-wide [~~systemwide~~], the small ILEC shall explain separately for each telephone exchange why the new service cannot be offered system-wide [~~systemwide~~].

(f) Rates and revenues. The following requirements apply to a commission notice [~~statement of intent~~] filed under this section:

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

(g) Review.

(1) Effective date. A proposed tariff filed [~~considered~~] under this section shall be effective on the date proposed by the small ILEC, unless the effective date is suspended.

(2) Suspension of tariff. The [~~effective date of a~~] proposed tariff may be suspended up to 150 calendar days to provide the commission an opportunity to review the commission notice. Additionally the presiding officer shall suspend the tariff if within 30 calendar days following the completion of the customer notice [~~statement of intent. Additionally, within 35 calendar days of the filing of the proof of completion of notice, the presiding officer shall suspend the effective date if within 30 calendar days following completion of notice~~]:

(A) - (E) (No change.)

(h) Docketing. Following suspension of the effective date of the proposed tariff, the presiding officer shall provide a small ILEC a reasonable opportunity to modify its commission notice [~~statement of intent~~] to address conditions that exist, if any, under subsection (g)(2) of this section. If conditions under subsection (g)(2) of this section are not resolved during the suspension period, the presiding officer may docket the project. If the project is docketed, the effective date of the proposed tariff shall be automatically suspended and the commission shall review the commission notice [~~statement of intent~~] in accordance with the commission's procedural rules applicable to docketed cases.

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SUBCHAPTER J. COSTS, RATES AND TARIFFS

16 TAC §§26.205, 26.208, 26.211, 26.217, 26.219, 26.226, 26.227, 26.229, 26.230

The amendments are proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 2007 and Supp. 2011) (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 the amendments to PURA made by Senate Bills 773, 980, and 983, and House Bills 2295 and 2680 of the 82nd Legislature, Regular Session.

Cross Reference to Statutes: PURA §14.002 and the amendments to PURA made by Senate Bills 773, 980, and 983, and House Bills 2295 and 2680 of the 82nd Legislature, Regular Session.

§26.205. Rates for Intrastate Access Services.

(a) (No change.)

(b) Access services. Each DCTU's tariff must include the recurring and nonrecurring charges for all access services offered by the DCTU. A DCTU may cross-reference its federal tariff in its state tar-

iff if its intrastate switched access rates are the same as its interstate switched access rates. A DCTU is not required to include in its access tariff any access service that its network is technologically incapable of providing. A DCTU must include in its access tariff any access service which is provided on a special assembly basis if the service is provided to more than three customers or if the service is provided at more than three locations. DCTUs are prohibited from charging intrastate end user common line charges, intrastate subscriber line charges, or similar intrastate end user charges.

(c) Access rates. The structure and rates for all DCTUs' intrastate switched access services shall be established in accordance with the following requirements.

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

(4) Local transport rate structure and pricing. Local transport rates shall not contain unreasonable distance sensitivity. Each DCTU shall comply with subparagraphs (A) - (I) of this paragraph, unless indicated otherwise.

(A) - (H) (No change.)

(I) Tariff provisions.

(i) Tariffs shall not contain resale or sharing restrictions for switched transport services.

(ii) Initial tariffs filed in compliance with this section may [~~shall~~] be filed pursuant to §26.209 [~~§23.26~~] of this title (relating to New and Experimental Services). [~~Tariff revisions filed pursuant to this subparagraph shall not be combined in a single application with any other tariff revision.~~] Initial tariff amendments shall not be permitted to become effective before expanded interconnection for switched transport services becomes available from the DCTU for those DCTUs subject to substantive rule §26.271 [~~§23.92~~] of this title (relating to Expanded Interconnection).

(iii) DCTUs not subject to substantive rule §26.215 [~~§23.91~~] of this title (relating to Long Run Incremental Cost Methodology for Dominant Certificated Telecommunications Utility (DCTU) Services) may propose charges that are the same as the charges in effect for the carrier's interstate provision of the same service or adopt the switched transport rates of another DCTU that are developed pursuant to the requirements of this section.

(iv) Within 120 days after the completion of LRIC cost studies required by substantive rule §26.215 [~~§23.91~~] of this title, any DCTU subject to that rule shall file tariff amendments in order to revise its local transport rates in conformity with this section based upon the new LRIC cost studies.

(5) - (6) (No change.)

(d) (No change.)

§26.208. General Tariff Procedures.

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

(e) Administrative review. An application filed pursuant to §§26.207 of this title (relating to Form and Filing of Tariffs), 26.209 of this title (relating to New and Experimental Services), 26.210 of this title (relating to Promotional Rates for Local Exchange Company Services), or 26.211 of this title (relating to Rate Setting Flexibility for Services Subject to Significant Competitive Challenges)[~~, or 26.212 of this title (relating to Procedures Applicable to Chapter 58 Electing Incumbent Local Exchange Companies)~~] shall be reviewed administratively unless the presiding officer, for good cause, determines at any point during the review that the application should be docketed. The operation of the proposed rate schedule may be suspended for 35 days after the effective date of the application. The effective date shall be no earlier than 30 days after the filing date of the application or 30 days after public notice is completed, whichever is later. The application shall be examined for sufficiency. If the presiding officer concludes that material deficiencies exist in the application, the applicant shall be notified within ten working days of the filing date of the specific deficiency in its application, and the earliest possible effective date of the application shall be no less than 30 days after the filing of a sufficient application with substantially complete information as required by the presiding officer. Thereafter, any time deadlines shall be determined from the 30th day after the filing of the sufficient application and information or from the effective date if the presiding officer extends that date. While the application is being administratively reviewed, the commission staff and the staff of the Office of Public Utility Counsel may submit requests for information to the DCTU. Three copies of all answers to such requests for information shall be provided to the commission staff and the Office of Public Utility Counsel within ten days after receipt of the request by the DCTU. No later than 20 days after the filing date of the application, interested persons may provide to the commission staff written comments or recommendations concerning the application. The commission staff shall and the Office of Public Utility Counsel may file with the presiding officer written comments or recommendations concerning the application. No later than 35 days after the effective date of the application, the presiding officer shall complete an administrative review to determine whether the DCTU's application meets the following requirements:

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

(f) - (h) (No change.)

(i) A DCTU that is not subject to rate-of-return regulation under Public Utility Regulatory Act, Chapter 53:

(1) may, but is not required to maintain on file with the commission tariffs, price lists, or customer service agreements governing the terms of providing service;

(2) may cross-reference its federal tariff in its state tariff if its intrastate switched access rates are the same as its interstate switched access rate;

(3) may withdraw a tariff, price list, or customer service agreement not required to be filed or maintained with the commission under this section if it:

(A) files written notice of the withdrawal with the commission; and

(B) notifies its customers of the withdrawal and posts the current tariffs, price lists, or generic customer service agreements on its Internet website.

§26.211. Rate-Setting Flexibility for Services Subject to Significant Competitive Challenges.

(a) (No change.)

(b) Purpose. The purpose of this section is to establish procedures for pricing flexibility for services subject to competition and a process for the review of pricing flexibility applications [~~and customer specific contracts~~].

(c) Pricing flexibility.

(1) The types of pricing flexibility that an incumbent local exchange company (ILEC) may request are set forth in subparagraphs (A) - (C) [~~(D)~~] of this paragraph.

(A) (No change.)

[~~(B) Customer-specific contracts. If an ILEC is granted the authority to enter into customer-specific contracts, the contract shall~~

be filed and approved pursuant to subsection (d) of this section. Customer-specific contracts filed pursuant to subsection (d) of this section may include services in addition to the service for which the ILEC has been granted authority to price on a flexible basis only if each such adjunct service is clearly specified in the contract and provided pursuant to a tariff approved by the commission.]

(B) [(C)] Detariffing. If an ILEC is granted the authority to detariff a service, the ILEC shall maintain at the commission a current price list for the service, and the commission shall retain authority to regulate the quality, terms and conditions of the detariffed service, other than rates. The commission may determine the appropriate ratemaking treatment of any revenues from or costs of providing a detariffed service in a proceeding under the Public Utility Regulatory Act, Chapter 53, Subchapters C and D, or G.

(C) [(D)] Other types of pricing flexibility. If an ILEC is granted the authority to engage in a type of pricing flexibility that the commission finds to be in the public interest other than those specified in subparagraphs (A) - (C) of this paragraph, that pricing flexibility shall be offered under such terms and conditions as the commission orders.

(2) (No change.)

(3) An application for pricing flexibility filed under this paragraph shall:

(A) (No change.)

(B) specify the type of pricing flexibility requested and, if the type of pricing flexibility requested is either banded rates or some other type of pricing flexibility pursuant to paragraph (1)(C) [(D)] of this subsection that involves rate-setting:

(i) - (v) (No change.)

(C) - (O) (No change.)

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

(7) An application for pricing flexibility shall be approved if, after an evidentiary hearing, the commission finds, based on the evidence, that:

(A) (No change.)

(B) no service for which the ILEC requests detariffing of rates [or authority to enter into customer-specific contracts] is message telecommunications service, switched access service, or wide area telecommunications service;

(C) - (E) (No change.)

(8) (No change.)

(d) Customer-specific contracts.

[(1)] An ILEC shall have the authority to enter into customer-specific contracts for:

(1) [(A)] central office based PBX-type services for systems of 200 stations or more, as those services compete with customer premises equipment provided by PBX vendors;

(2) [(B)] billing and collection services;

(3) [(C)] high-speed private line services of 1.544 megabits or greater;

(4) [(D)] customized services that are unique because of size or configuration, provided that such customized services shall not include basic local telecommunications service, including local measured service, or message telecommunications services, switched access services, or wide area telecommunications service; and

(5) [(E)] any other service for which the commission has authorized the ILEC to enter into customer-specific contracts pursuant to this section.

[(2) An ILEC will file quarterly reports to the commission, and at the same time, serve a copy of those reports on the Office of Public Utility Counsel. The reports will provide the following information regarding all customer specific contracts for services pursuant to paragraph (1)(A) - (E) of this subsection:]

[(A) customer name, location and contact;]

[(B) type of services, exchange location and quantities;]

[(C) terms and rates for services;]

[(D) affidavit of the customer attesting to the fact that the customer was aware of the possibility of purchasing of such services from other providers; and]

[(E) affidavit of the ILEC attesting that the rates:]

[(i) are set at 105% or more of the long run incremental costs of the services;]

[(ii) are not unreasonably preferential, prejudicial or discriminatory;]

[(iii) are such that the contracted services will not be subsidized directly or indirectly by regulated monopoly services; and]

[(iv) are not predatory or anticompetitive.]

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

§26.217. Administration of Extended Area Service (EAS) Requests.

(a) Purpose. This section establishes procedures for processing requests for extended area service (EAS) pursuant to the Public Utility Regulatory Act (PURA), Chapter 55, Subchapter B. On or after September 1, 2011, the commission may not require a telecommunications provider to provide mandatory or optional extended area service to additional metropolitan areas or calling areas.

(b) (No change.)

§26.219. Administration of Expanded Local Calling Service Requests.

(a) Purpose. The purpose of this section is to describe the process used to administer requests from telephone service subscribers for two-way toll-free expanded local calling service (ELCS) pursuant to the Public Utility Regulatory Act (PURA), Chapter 55, Subchapter C. Only incumbent local exchange companies (ILECs) are subject to the provisions of PURA, Chapter 55, Subchapter C. On or after September 1, 2011, the commission may not require a telecommunications provider to provide mandatory or optional extended area service to additional metropolitan areas or calling areas.

(b) (No change.)

(c) ELCS requests, notice and intervention.

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

(3) Notice to affected ILECs. Within five working days of receipt by the commission [Office of Regulatory Affairs] of a filed request for ELCS, the commission [Office of Regulatory Affairs] shall send a copy of the request by certified mail to each ILEC serving either a petitioning or a petitioned telephone exchange.

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

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

(f) Balloting. If all applicable requirements contained in subsections (c) and (d) of this section are met and no exemption requests are outstanding, the presiding officer shall issue an order directing the ILEC serving the petitioning exchange to begin balloting subscribers in that exchange, and the presiding officer shall notify the designated contact person for the petitioning exchange that balloting will take place.

(1) (No change.)

(2) Ballot format. No later than 30 days after the presiding officer's order directing the ILEC serving the petitioning exchange to begin balloting, that ILEC shall distribute a ballot, written in English and Spanish, to each subscriber in the petitioning exchange. The ballot shall require a separate vote from each subscriber for each petitioned exchange. The ballot must be in a standard form approved by the commission [~~Office of Regulatory Affairs~~] and each ballot shall include:

(A) - (I) (No change.)

(3) Master list of subscribers. No later than 35 days after the presiding officer's order to the ILEC serving the petitioning exchange to begin balloting, that ILEC shall submit to the commission [~~Office of Regulatory Affairs~~] a master list of all subscribers within the petitioning exchange in an electronic spreadsheet format prescribed by the commission [~~Office of Regulatory Affairs~~]. The ILEC shall classify the master list as confidential, and the list shall be treated as such under the provisions of the Government Code, Title 5, Chapter 552. The master list shall be arranged sequentially by billing number and shall include for each subscriber in the petitioning exchange:

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

(4) Response to balloting. The commission [~~Office of Regulatory Affairs~~] shall, no later than 15 days after the date stated on the ballot for return of the ballot, notify the presiding officer, the contact person, and affected ILEC(s) of the results of the ballot by filing a ballot report. The ballot report shall specify the results of the ballot for each petitioned exchange.

(A) Affirmative vote.

(i) If at least 70% of petitioning subscribers responding vote affirmatively as to any petitioned exchange, the ILEC serving the petitioning exchange shall file with the commission, within 30 days after the filing of the commission's [~~Office of Regulatory Affairs'~~] ballot report, an application to establish ELCS fees pursuant to PURA §55.048(b). The ILEC's application shall include the ILEC's proposed implementation schedule and proposed schedule of fees as well as other information described in §26.221(e)(1) - (9) of this title (relating to Applications to Establish or Increase Expanded Local Calling Service Surcharges).

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

(B) Negative vote. If less than 70% of those responding vote in favor of ELCS to a petitioned exchange, the presiding officer shall, within 10 days after the filing of the commission's [~~Office of Regulatory Affairs'~~] ballot report, deny the request for ELCS to that specific petitioned exchange.

(g) (No change.)

(h) Docketing. Within 30 days of the issuance of an order under subsection (f)(4)(A)(iii) of this section granting interim approval of fees to be billed by the ILEC serving the petitioning exchange, any intervenor or the commission [~~Office of Regulatory Affairs~~] may request that the presiding officer docket the project. Docketing may be requested in order to allow further investigation of the ILEC's application or, for good cause shown, any other reason. Upon receipt of a request for docketing, the presiding officer shall docket the project and shall establish a procedural schedule. Upon docketing, discovery may commence in accordance with the commission's Procedural Rules, Chapter 22, Subchapter H of this title (relating to Discovery Procedures).

(i) (No change.)

§26.226. Requirements Applicable to Pricing Flexibility for Chapter 58 Electing Companies.

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

(e) Requirements for customer-specific contracts. Consistent with PURA §58.003, an electing ILEC may enter into customer-specific contracts for certain basic network services and certain nonbasic services as provided in this subsection. An electing ILEC may but is not required to file customer-specific contracts with the commission. [~~Additionally, for services listed in PURA §52.057(a), an electing ILEC may enter into customer-specific contracts pursuant to §26.211 of this title only if such customer-specific contracts are not inconsistent with the requirements of PURA, Chapter 58.~~]

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

§26.227. Procedures Applicable to Nonbasic Services and Pricing Flexibility for Basic and Nonbasic Services for Chapter 58 Electing Companies.

(a) (No change.)

(b) Purpose. The purpose of this section is to establish procedures for an electing company that chooses to provide an informational notice to introduce nonbasic services, including new services, and/or to exercise pricing flexibility for basic and nonbasic services, and for complaints regarding service offerings introduced through informational notice filings.

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

(g) A telecommunications provider that is not subject to rate-of-return regulation under Public Utility Regulatory Act, Chapter 53:

(1) may, but is not required to, maintain on file with the commission tariffs, price lists, or customer service agreements in relation to services that are not subject to regulation without commission approval;

(2) may make changes in its tariffs, price lists, and customer service agreements in relation to services that are not subject to regulation without commission approval; and

(3) may cross-reference its federal tariff in its state tariff if its intrastate switched access rates are the same as its interstate switched access rates.

(h) A telecommunications provider may withdraw a tariff, price list, or customer service agreement not required to be filed or maintained with the commission under this section if the provider:

(1) files written notice of the withdrawal with the commission; and

(2) notifies its customers of the withdrawal and posts the current tariffs, price lists, or generic customer service agreements on its Internet website.

§26.229. Requirements Applicable to Chapter 59 Electing Companies.

(a) (No change.)

(b) Purpose. The purpose of this section is to establish the substantive and procedural requirements for an electing company that chooses to provide an informational notice to introduce new services

and/or to exercise pricing and packaging flexibility, including customer promotional offerings, and for complaints regarding service offerings introduced by informational notice offerings.

(c) - (g) (No change.)

(h) A telecommunications provider that is not subject to rate-of-return regulation under Public Utility Regulatory Act, Chapter 53:

(1) may, but is not required to, maintain on file with the commission tariffs, price lists, or customer service agreements in relation to services that are not subject to regulation without commission approval;

(2) may make changes in its tariffs, price lists, and customer service agreements in relation to services that are not subject to regulation without commission approval; and

(3) may cross-reference its federal tariff in its state tariff if its intrastate switched access rates are the same as its interstate switched access rates.

(i) A telecommunications provider may withdraw a tariff, price list, or customer service agreement not required to be filed or maintained with the commission under this section if the provider:

(1) files written notice of the withdrawal with the commission; and

(2) notifies its customers of the withdrawal and posts the current tariffs, price lists, or generic customer service agreements on its Internet website.

§26.230. Requirements Applicable to Chapter 65 One-day Informational Notice Filings.

(a) (No change.)

(b) Purpose. The purpose of this section is to establish the requirements for a transitioning ILEC that chooses to provide an informational notice to introduce new services, and/or to exercise pricing flexibility for basic and non-basic retail telecommunications services, and to outline the procedures for processing complaints regarding service offerings introduced by such informational notice filings.

(c) Pricing standards.

(1) (No change.)

(2) In a deregulated market, the transitioning ILEC shall price its retail services as follows:

(A) for all services, other than residential [~~basic local telecommunications~~] service, at a price equal to or higher than the service's long run incremental costs (LRIC); and

(B) for non-residential [~~basic local telecommunications~~] service, at any price equal to or higher than the lesser of the service's LRIC or the tariffed price on the date the market was deregulated[~~, provided that the company does not increase rates for stand-alone residential local exchange voice service as defined in PURA §65.002(4) before the date that the commission revises, or declines to revise, monthly per line support under the Texas High Cost Universal Service Plan pursuant to PURA §56.031, regardless of whether the company is an electing company under PURA Chapter 58~~].

(3) Notwithstanding any other long-run incremental cost filing requirements in this subchapter, a transitioning company, upon written notice to the commission, is not required to file with the commission a long-run incremental cost study for any service. [~~In each deregulated market, a transitioning company shall make available to all residential customers throughout that market the same price, terms, and conditions for all basic and non-basic retail telecommunications services, consistent with any pricing flexibility available to the company on or before August 31, 2005.~~]

(4) Notwithstanding paragraphs (2) and (3) of this subsection, a transitioning company may not: [~~In any market, regulated or deregulated, the transitioning ILEC may not:~~]

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

(C) engage in predatory pricing or attempt to engage in predatory pricing. A rate or price for a basic local telecommunications service is not anticompetitive, predatory, or unreasonably preferential, prejudicial, or discriminatory if the rate or price is equal to or greater than the rate or price in the transitioning company's tariff, or price list, for that service in effect on the date the transitioning company submits notice to the commission under paragraph (3) of this subsection.

(5) In each deregulated market, a transitioning company shall make available to all residential customers throughout that market the same price, terms, and conditions for all basic and non-basic retail telecommunications services, consistent with any pricing flexibility available to the company on or before August 31, 2005.

(6) [~~(5)~~] A rate that meets the pricing requirements of paragraph (2) of this subsection is deemed compliant with paragraph (4)(B) of this subsection.

(7) A deregulated or transitioning company may offer to an individual residential customer a promotional offer that is not available uniformly throughout the market if the company makes the offer through a medium other than direct mail or mass electronic media and the offer is intended to retain or obtain a customer.

(d) Procedures related to the filing of one-day informational notices and associated tariffs. The provisions of this subsection apply to ILECs choosing to introduce new services and/or exercise pricing and packaging flexibility through one-day informational notice filings.

(1) (No change.)

(2) Filing requirements.

(A) (No change.)

(B) Format of filing. An informational notice under this section must include the same elements as set forth in §26.227(c)(2)(D) of this title (relating to Procedures Applicable to Nonbasic Services and Pricing Flexibility for Basic and Nonbasic Services for Chapter 58 Electing Companies) and the following:

(i) (No change.)

(ii) For retail services offered in deregulated markets, the transitioning company must demonstrate that the rates, terms, and conditions comply [~~with the requirements of subsection (c) (2) of this section and affirm that the said rates, terms and conditions comply~~] with requirements in subsection (c)(2), and (4) - (7) [~~subsection (c)(3) - (4)~~] of this section.

(C) - (D) (No change.)

(e) (No change.)

(f) Complaints. [~~Complaints filed by an affected person, OPC or commission staff regarding service offerings introduced by one-day informational notice filings shall be subject to the provisions of §26.227(e) of this title.~~]

(1) An affected person may file a complaint at the commission challenging whether a transitioning company is complying with subsection (c) of this section.

(2) Notwithstanding subsection (c)(3) of this section, the commission may require a transitioning company to submit a long-run incremental cost study for a business service that is the subject of a complaint submitted under paragraph (1) of this subsection.

(g) A telecommunications provider that is not subject to rate-of-return regulation under Public Utility Regulatory Act, Chapter 53:

(1) may, but is not required to, maintain on file with the commission tariffs, price lists, or customer service agreements in relation to services that are not subject to regulation without commission approval;

(2) may make changes in its tariffs, price lists, and customer service agreements in relation to services that are not subject to regulation without commission approval; and

(3) may cross-reference its federal tariff in its state tariff if the provider's intrastate switched access rates are the same as the provider's interstate switched access rates.

(h) A telecommunications provider may withdraw a tariff, price list, or customer service agreement not required to be filed or maintained with the commission under this section if the provider:

(1) files written notice of the withdrawal with the commission; and

(2) notifies its customers of the withdrawal and posts the current tariffs, price lists, or generic customer service agreements on its Internet website.

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 December 9, 2011.

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Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
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For further information, please call: (512) 936-7223

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SUBCHAPTER P. TEXAS UNIVERSAL SERVICE FUND

16 TAC §26.401

The amendments are proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 2007 and Supp. 2011) (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 the amendments to PURA made by Senate Bills 773, 980, and 983, and House Bills 2295 and 2680 of the 82nd Legislature, Regular Session.

Cross Reference to Statutes: PURA §14.002 and the amendments to PURA made by Senate Bills 773, 980, and 983, and House Bills 2295 and 2680 of the 82nd Legislature, Regular Session.

§26.401. Texas Universal Service Fund (TUSF).

(a) Purpose. The purpose of the Texas Universal Service Fund (TUSF) is to implement a competitively neutral mechanism that enables all residents of the state to obtain the basic telecommunications services needed to communicate with other residents, businesses, and governmental entities. Because targeted financial support may be needed in order to provide and price basic telecommunications services in a manner to allow accessibility by consumers, the TUSF will assist telecommunications providers in providing basic local telecommunications service at reasonable rates in high cost rural areas. In addition, the TUSF will reimburse qualifying entities for revenues lost as a result of providing Lifeline services to qualifying low-income consumers under the Public Utility Regulatory Act (PURA); reimburse telecommunications carriers providing statewide telecommunications relay access service and qualified vendors providing specialized telecommunications devices and services for the disabled; and reimburse the Texas Health and Human Services Commission [~~Texas Department of Human Services~~], the Texas Department of Housing and Community Affairs, the Texas Department of Assistive and Rehabilitative Services, the Office for Deaf and Hard of Hearing Services [~~the Texas Department for the Deaf and Hard of Hearing~~], the TUSF administrator, and the Public Utility Commission for costs incurred in implementing the provisions of PURA Chapter 56 (relating to Telecommunications Assistance and Universal Service Fund).

(b) Programs included in the TUSF.

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

(6) Section 26.412 of this title (relating to Lifeline Service Program [~~and Link Up Service Programs~~]);

(7) - (14) (No change.)

(15) Section 26.424 of this title (relating to Audio Newspaper Assistance Program).

(c) Support available to deregulated markets.

(1) An incumbent local exchange company may not receive support from the universal service fund for a deregulated market that has a population of at least 30,000.

(2) An incumbent local exchange company may receive support from the universal service fund for a deregulated market that has a population of less than 30,000 only if the company demonstrates to the commission that the company needs the support to provide basic local telecommunications service at reasonable rates in the affected market. A company may use evidence from outside the affected market to make the demonstration.

(3) An incumbent local exchange company may make the demonstration described by paragraph (2) of this subsection in relation to a market before submitting a petition to deregulate the market.

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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Public Utility Commission of Texas
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TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 129. STUDENT ATTENDANCE
SUBCHAPTER AA. COMMISSIONER'S RULES

19 TAC §129.1025

The Texas Education Agency (TEA) proposes an amendment to §129.1025, concerning student attendance accounting. The section adopts by reference the annual student attendance accounting handbook. The handbook provides student attendance accounting rules for school districts and charter schools. The proposed amendment would adopt by reference the *2011-2012 Student Attendance Accounting Handbook Version 2.*

Legal counsel with the TEA has recommended that the procedures contained in each annual student attendance accounting handbook be adopted as part of the Texas Administrative Code. This decision was made in 2000 as a result of a court decision challenging state agency decision making via administrative letters and publications. Given the statewide application of the attendance accounting rules and the existence of sufficient statutory authority for the commissioner of education to adopt by reference the student attendance accounting handbook, staff proceeded with formal adoption of rules in this area. The intention is to annually update the rule to refer to the most recently published student attendance accounting handbook. Data from previous school years will continue to be subject to the student attendance accounting handbook as the handbook existed in those years.

Each annual student attendance accounting handbook provides school districts and charter schools with the Foundation School Program (FSP) eligibility requirements of all students, prescribes the minimum requirements of all student attendance accounting systems, lists the documentation requirements for attendance audit purposes, specifies the minimum standards for systems that are entirely functional without the use of paper, and details the responsibilities of all district personnel involved in student attendance accounting. The TEA distributes FSP resources under the procedures specified in each current student attendance accounting handbook. The final version of the student attendance accounting handbook is published on the TEA website each July or August. A supplement, if necessary, is also published on the TEA website.

The proposed amendment to 19 TAC §129.1025 would adopt by reference the student attendance accounting handbook for the 2011-2012 school year. The release of a second version of the handbook, *2011-2012 Student Attendance Accounting Handbook Version 2,* was necessary to incorporate newly developed attendance accounting provisions related to the Texas Virtual School Network (TxVSN), required by the Texas Education Code (TEC), §30A.153, as added by Senate Bill (SB) 1, 82nd Texas Legislature, First Called Session, 2011. Significant changes to the *2011-2012 Student Attendance Accounting Handbook Version 2* from the *2010-2011 Student Attendance Accounting Handbook Version 2* include the following.

Throughout the handbook

General references to the Texas Assessment of Knowledge and Skills would be changed to be references to required state assessments.

Section 1

An erroneous statement that FSP attendance reports must be made a part of a school's permanent records would be corrected to state that information for all FSP attendance reports must be available for audit purposes for five years from the completion of the school year.

Section 2

The amount of FSP funding the TEA could retain for failure to provide attendance records requested as part of an audit would be changed from 30 percent of the district's FSP allotment for the school year for which records were requested to 100 percent of the district's FSP allotment for the undocumented attendance for the school year for which records were requested.

In addition, technical edits would be made to provide clarity and remove redundant language.

Section 3

A subsection on whether time spent in a repeated course qualifies as instructional time would be added.

Requirements related to counting time spent in self-paced courses as instructional time would be added.

In the subsection related to enrollment procedures and requirements, a correction would be made to change a reference to 10 calendar days to be a reference to 10 working days. A clarification of what constitutes a working day would be added.

Enrollment procedures and requirements would be updated and revised.

Information on students' auditing classes would be revised to prohibit a school district or charter school from allowing a student to audit classes without being enrolled in the district or school.

In the subsection related to withdrawal procedures, a correction would be made to change a reference to 10 days to be a reference to 10 working days. A clarification of what constitutes a working day would be added.

Information related to compulsory attendance would be updated to reflect statutory changes.

The agency's policy on adoption of alternate attendance-taking times would be clarified, and information on when local policies on alternate attendance-taking times may be adopted would be added.

Information on absences related to participation in dual credit courses and the TxVSN would be added.

An explanation that school districts are responsible for determining what constitutes a religious holy day for purposes of excusing absences for FSP purposes would be added. Guidance on determining what constitutes a religious holy day would be added.

Clarification would be added that, for an appointment with a health care professional to be excused for FSP purposes, the health care professional must be licensed to practice in the United States.

An explanation that school districts must keep documentation related to any absence excused for FSP purposes would be added.

Clarification of the agency's policy on makeup days and missed instructional day waivers would be made. A table with information on what actions to take in situations related to school closure for issues of health or safety would be added.

Data submission dates would be updated.

Section 4

Information on the instructional arrangement/setting code to use for certain special education students receiving services in child-care facilities would be revised.

Information on the qualifications teachers providing special education homebound services must have would be clarified.

Information in the subsections related to special education homebound services and Pregnancy Related Services would be replaced with a note to see the applicable subsection of newly updated Section 9.

Section 5

The description of the number of career and technical education (CTE) programs of study that a district must offer to be eligible for CTE contact hour funding would be changed to specify that a district must offer at least one program of study in at least three different clusters, instead of at least three programs of study in at least three different clusters.

Information on the CTE state allotment would be updated to state that districts must spend their allotment funding in accordance with 19 TAC §105.11, Maximum Allowable Indirect Cost.

Section 5 would be reorganized so that all the information on Career Preparation courses would appear in one subsection.

Information on CTE Career Preparation and Practicum courses would be revised.

Section 6

The subsection on the effective date of withdrawal from a bilingual or English as a second language (ESL) education program would be revised for clarity.

The chart containing bilingual or ESL education program exit criteria would be updated.

Information on evaluation of a student who has been transferred out of the bilingual or ESL education program would be clarified.

Information on the eligibility of a bilingual or ESL education program for funding would be updated.

Information on teacher certification requirements for bilingual and ESL education programs would be clarified.

Information on documentation related to Language Proficiency and Assessment Committee recommendations and parental approval requirements would be revised.

Section 7

Information on which districts must offer prekindergarten (PK) would be moved from the end of Section 7 to the beginning of the section.

One of the definitions of "homeless" for PK eligibility purposes would be updated to reflect statutory changes.

A statement about where to find more information about the new PK program type codes would be added.

Information on the PK Early Start Grant Program would be updated to reflect that the program will not be funded for the 2011-2012 school year.

Section 9

Provisions related to length of eligibility for break-in-service Compensatory Education Homebound Instruction would be revised.

Pregnancy Related Services (PRS) documentation requirements would be revised.

Provisions related to PRS and returning to campus during periods of confinement would be revised.

Provisions related to PRS and special education services would be revised.

In addition, technical edits would be made to provide clarity and remove redundant language.

Section 10

Descriptions of at-risk student populations would be revised to reflect statutory language.

Information on Alternative Education Campuses of Choice and residential facilities evaluated under alternative education accountability procedures would be revised to reflect changes to the accountability system.

Information on disciplinary alternative education programs, expulsion, and juvenile justice alternative education programs would be updated to reflect statutory changes.

Information on disciplinary removals of students with disabilities would be updated and consolidated into one section.

Information on out-of-school suspension would be updated to reflect statutory changes.

Section 11

The chart showing minimum passing standards to demonstrate college readiness would be updated. Text that described requirements shown in the updated chart would be deleted.

Information about whether time spent in developmental courses is considered instructional time for FSP purposes would be clarified.

Information on the Optional Extended Year Program would be updated to reflect that the program will not be funded for the 2011-2012 school year.

Clarification would be made that a student's attendance program could be changed from the regular program to the Optional Flexible School Day Program (OFSDP) in the middle of a six-week reporting period if the change was a result of the student's initial enrollment in the OFSDP.

Information on adopting an OFSDP withdrawal policy would be added.

An explanation would be added that an Optional Flexible Year Program (OFYP) day may not be scheduled on a day that falls before the fourth Monday in August, unless the entity operating the OFYP is a charter school, and may not be scheduled on a planned makeup day.

Clarification on recording attendance for OFYP students would be added, as would additional information on administering an OFYP.

The section on the TxVSN would be updated to reflect statutory changes and to include newly developed attendance accounting provisions.

Information on Interstate Compact on Educational Opportunity for Military Children provisions related to excused absences would be added.

Section 13

Glossary definitions would be updated, and obsolete definitions would be deleted.

The proposed amendment would place the specific procedures contained in the *2011-2012 Student Attendance Accounting Handbook Version 2* in the Texas Administrative Code. The TEA distributes FSP funds according to the procedures specified in each annual student attendance accounting handbook. Data reporting requirements are addressed through the Public Education Information Management System.

The handbook has long stated that school districts and open-enrollment charter schools must keep all student attendance documentation for five years from the end of the school year. Any new student attendance documentation required to be kept would correspond with the student attendance accounting requirement changes described previously.

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 state or local government as a result of enforcing or administering the amendment.

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 would be to continue to inform the public of the existence of annual publications specifying attendance accounting procedures for school districts and charter schools. 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 December 23, 2011, and ends January 23, 2012. 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) 463-5337. 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 December 23, 2011.

The amendment is proposed under the TEC, §30A.153, as added by SB 1, 82nd Texas Legislature, First Called Session, 2011, which requires the commissioner to adopt rules for the implementation of Foundation School Program funding for the state virtual school network, including rules regarding attendance accounting; and the TEC, §42.004, which authorizes the commissioner of education, in accordance with rules of the State Board of Education, to take such action and require such reports consistent with TEC, Chapter 42, as may be necessary to implement and administer the Foundation School Program.

The amendment implements the TEC, §30A.153 and §42.004.

§129.1025. Adoption by Reference: Student Attendance Accounting Handbook.

(a) The standard procedures that school districts and charter schools must use to maintain records and make reports on student attendance and student participation in special programs for school year 2011-2012 [~~2010-2011~~] are described in the official Texas Education Agency (TEA) publication *2011-2012* [~~*2010-2011*~~] *Student Attendance Accounting Handbook Version 2*, which is adopted by this reference as the agency's official rule. A copy of the *2011-2012* [~~*2010-2011*~~] *Student Attendance Accounting Handbook Version 2* is available for examination during regular office hours, 8:00 a.m. to 5:00 p.m., except holidays, Saturdays, and Sundays, at the Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701. In addition, the publication can be accessed from the TEA official website. The commissioner of education will amend the *2011-2012* [~~*2010-2011*~~] *Student Attendance Accounting Handbook Version 2* and this subsection adopting it by reference, as needed.

(b) Data from previous school years will continue to be subject to the student attendance accounting handbook as the handbook existed in those years.

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 December 8, 2011.

TRD-201105408
Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
Earliest possible date of adoption: January 22, 2012
For further information, please call: (512) 475-1497

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PART 8. WINDHAM SCHOOL DISTRICT

CHAPTER 300. GENERAL PROVISIONS

19 TAC §300.3

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

The Windham School District (WSD) Board of Trustees proposes the repeal of §300.3, concerning Employment Referral Services for Offenders--Memorandum of Understanding.

The purpose of this repeal is to rescind the memorandum of understanding between the Texas Department of Criminal Justice, the Texas Workforce Commission, and the Texas Youth Commission as WSD was removed as the responsible managing entity and there was no funding appropriated for Project Reintegration of Offenders by the 82nd Legislature.

Linda Goerdel, WSD Chief Financial Officer, has determined that for the first five years after the repeal, there will be no fiscal implications for state or local government.

Ms. Goerdel has also determined that for the first five years after the repeal, there will not be an economic impact on the public because of the repeal. There will be no anticipated effect on small or micro businesses. The anticipated public benefit will be to ensure that general revenue is no longer used for this purpose.

Comments on the proposed repeal should be directed to Michael P. Mondville, General Counsel, Windham School District, P.O. Box 40, Huntsville, Texas 77342, Michael.Mondville@wsdtx.org. Written comments from the general public will be accepted for 30 days following publication of the proposal in the *Texas Register.*

The repeal is proposed under the General Appropriations Act.

Cross Reference to Statutes: Texas Education Code §19.011 and Texas Government Code §§771.001, et seq.

§300.3. Employment Referral Services for Offenders--Memorandum of Understanding.

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 December 12, 2011.

TRD-201105514
Michael Mondville
General Counsel
Windham School District
Earliest possible date of adoption: January 22, 2012
For further information, please call: (512) 463-9693

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TITLE 22. EXAMINING BOARDS

PART 22. TEXAS STATE BOARD OF PUBLIC ACCOUNTANCY

CHAPTER 519. PRACTICE AND PROCEDURE

SUBCHAPTER A. GENERAL PROVISIONS

22 TAC §519.8

The Texas State Board of Public Accountancy (Board) proposes an amendment to §519.8, concerning Administrative Penalties.

The amendment to §519.8 will add the term "or certificate holder" after licensee, delete unnecessary words, add reference to the Act and replace accounting terms with acronyms that have been defined in §501.55.

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed amendment will be in effect:

A. the additional estimated cost to the state expected as a result of enforcing or administering the amendment will be none.

B. the estimated reduction in costs to the state and to local governments as a result of enforcing or administering the amendment will be none.

C. the estimated loss or increase in revenue to the state as a result of enforcing or administering the amendment will be none.

Mr. Treacy has determined that for the first five-year period the amendment is in effect the public benefits expected as a result of adoption of the proposed amendment will be to streamline the rules.

The probable economic cost to persons required to comply with the amendment will be insignificant.

Mr. Treacy has determined that a Local Employment Impact Statement is not required because the proposed amendment will not affect a local economy.

Mr. Treacy has determined that the proposed amendment will not have an adverse economic effect on small businesses because the amendment does not impose any duties or obligations upon small businesses.

Mr. Treacy has determined that an Economic Impact Statement and a Regulatory Flexibility Analysis are not required because the proposed amendment will not adversely affect small or micro businesses.

The Board requests comments on the substance and effect of the proposed rule from any interested person. Comments must be received at the Board no later than noon on January 23, 2012. Comments should be addressed to J. Randel (Jerry) Hill, General Counsel, Texas State Board of Public Accountancy, 333 Guadalupe, Tower 3, Suite 900, Austin, Texas 78701 or faxed to his attention at (512) 305-7854.

The Board specifically invites comments from the public on the issues of whether or not the proposed amendment will have an adverse economic effect on small businesses; if the proposed rule is believed to have an adverse effect on small businesses, estimate the number of small businesses believed to be impacted by the rule, describe and estimate the economic impact of the rule on small businesses, offer alternative methods of achieving the purpose of the rule; then explain how the Board may legally and feasibly reduce that adverse effect on small businesses considering the purpose of the statute under which the proposed rule is to be adopted, finally describe how the health, safety, environmental and economic welfare of the state will be impacted by the various proposed methods. See Texas Government Code, §2006.002(c).

The amendment is proposed under the Public Accountancy Act ("Act"), Texas Occupations Code, §901.151 which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by this proposed amendment.

§519.8. Administrative Penalties.

(a) The board may impose an administrative penalty alone or in addition to other sanctions permitted under the Act. Board committees and the executive director are delegated the authority to determine that any alleged violation warrants an administrative penalty under Subchapter L of the [~~Public Accountancy~~] Act.

(b) The report of any such determination may be included in a notice of hearing.

(c) A request for a hearing under §901.554 of the [~~Public Accountancy~~] Act (relating to Penalty to be Paid or Hearing Requested) shall clearly notify the staff that the hearing must address issues relevant to the assessment of an administrative penalty by including the language "RESPONDENT SPECIFICALLY REQUESTS A HEARING ON ADMINISTRATIVE PENALTIES" in capital letters. Failure to include such language shall be a waiver of the right to a hearing within the meaning of §901.554 of the [~~Public Accountancy~~] Act.

(d) Pursuant to §901.551 of the [~~Public Accountancy~~] Act (relating to Imposition of Administrative Penalty):

(1) the board imposes an administrative penalty on licensees or certificate holders who, in violation of §901.411 of the

[~~Public Accountancy~~] Act (relating to Continuing Professional Education):

(A) do not complete at least 120 hours of CPE [~~continuing professional education~~] in each three-year license period;

(B) do not complete at least 20 hours in each one-year license period;

(C) do not comply with board rules for the reporting of CPE [~~continuing professional education~~]; or

(D) fail to complete or report sufficient ethics hours as required by §523.112 [~~board §523.63~~] of this title (relating to Mandatory CPE [~~Continuing Professional Education~~] Attendance);[~~.~~]

(2) considering the seriousness of violation of §901.411 of the [~~Public Accountancy~~] Act, the hazard and potential hazard to the public from CPAs who are not trained in current accounting standards and practices, the amount necessary to deter future violations, and such other matters as the board considers justice may require, the board sets the administrative penalty for the violations described in paragraph (1) of this subsection [~~§519.7(d)(1) of this title (relating to Administrative Penalties)~~] at a minimum of $100 per licensees or certificate holders per license period;

(3) the penalty may be assessed only on licensees or certificate holders against whom a final board order is issued.

(e) Administrative penalties collected by the board for disciplinary actions taken against licensees for any violation of the board's Rules of Professional Conduct, excluding §501.94 of this title (relating to Mandatory Continuing Professional Education), shall be transferred to the Scholarship Trust Fund for Fifth-Year Accounting Students to provide financial assistance to students intending to take the CPA exam.

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

Filed with the Office of the Secretary of State on December 7, 2011.

TRD-201105378
J. Randel (Jerry) Hill
General Counsel
Texas State Board of Public Accountancy
Earliest possible date of adoption: January 22, 2012
For further information, please call: (512) 305-7842

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 80. CONTESTED CASE HEARINGS
SUBCHAPTER C. HEARING PROCEDURES

30 TAC §80.110

The Texas Commission on Environmental Quality (TCEQ or commission) proposes new §80.110.

Background and Summary of the Factual Basis for the Proposed Rule

In 2011, the 82nd Legislature passed House Bill (HB) 2694, relating to the continuation and functions of the TCEQ and abolishing the On-site Wastewater Treatment Research Council. HB 2694, §3.04 amended Texas Water Code (TWC), Chapter 5, Subchapter G, by adding §5.276 which requires the commission to establish by rule factors the public interest counsel must consider before deciding to represent the public interest as a party to a commission proceeding. Rules adopted pursuant to TWC, §5.276, must include factors to determine the nature and extent of the public interest and factors to consider in prioritizing the workload of the office of public interest counsel. In recommending that this rulemaking be required, the Texas Sunset Advisory Commission Final Report concerning the TCEQ recognized the need for flexibility because the public interest may change depending on the facts of an individual case (Issue 2; Recommendation 2.3). Consistent with the Texas Sunset Advisory Commission recommendation, this rule is not intended to define the public interest, but rather to identify guidelines the public interest counsel must use in determining the public interest on a case-by-case basis.

Section Discussion

The commission proposes new §80.110 to implement TWC, §5.276.

New §80.110(a) proposes factors the public interest counsel must consider in determining the nature and extent of the public interest before deciding to participate as a party to a commission proceeding. The proposed factors include the extent to which the action may impact human health, environmental quality, and the use and enjoyment of property. The proposed factors also include the extent to which the commission action under consideration may impact the general populace as a whole and the extent and significance of interest expressed to the agency in public comment. The proposed rule would further require consideration of whether the proposed agency action promotes the economic growth and interests of citizens in the affected area, whether the action promotes conservation or judicious use of the state's natural resources, and whether the action promotes commission regionalization policies.

The proposed factors are consistent with the commission's mission statement to protect the state's human and natural resources consistent with sustainable economic development. The proposed factors are also consistent with findings of the Texas Sunset Advisory Commission Final Report which noted that in any particular case the public interest could be a community's need for a facility, a community's need to limit environmental harm that may result from a facility's activities, or a community's need for jobs created by a facility.

New §80.110(b) proposes factors the public interest counsel must consider in prioritizing workload. These factors include the number and complexity of the issues to be considered in a contested case hearing; any discrepancy in the financial, technical or legal resources of the other parties; the need for public interest counsel participation in order to fully develop the evidentiary record; and resource limitations of the office of public interest counsel.

Fiscal Note: Costs to State and Local Government

Jeff Horvath, Analyst in the Strategic Planning and Assessment Section, has determined that for the first five-year period the proposed rule is in effect, no significant fiscal implications are anticipated for the commission and no fiscal implications are anticipated for other units of state or local government as a result of administration or enforcement of the proposed rule. The

proposed rulemaking implements certain provisions in HB 2694 which require the commission to establish factors the public interest counsel must consider before deciding to represent the public interest as a party to a commission proceeding.

The proposed rulemaking would provide factors that the public interest counsel must consider before deciding to participate as a party to a commission proceeding. The proposed factors would include the extent to which the commission action may impact human health, environmental quality, and the use and enjoyment of property. The proposed factors also include the extent to which the commission action may impact the general populace as a whole and the extent and significance of interest expressed to the agency through public comment. The proposed rule would further require consideration of whether the proposed agency action promotes the economic growth and interests of citizens in the affected area, whether the action promotes conservation or judicious use of the state's natural resources, and whether the action promotes commission regionalization policies.

The proposed rulemaking also proposes factors the public interest counsel must consider in prioritizing its workload. These factors include the number and complexity of the issues to be considered in any contested case hearing; any discrepancy in the financial, technical or legal resources of the other parties; the need for public interest counsel participation in order to fully develop the evidentiary record; and resource limitations of the office of public interest counsel.

The proposed rulemaking requires the commission to establish these factors in order to provide transparency regarding the decision-making functions of the public interest counsel. The proposed rule does not require any action that would result in fiscal implications for commission enforcement activities or public interest counsel administrative functions.

Public Benefits and Costs

Mr. Horvath has also determined that for each year of the first five years the proposed rule is in effect, the public benefit anticipated from the changes seen in the proposed rule will be transparency and public awareness of the factors the public interest counsel considers when deciding whether to participate in any particular case. Furthermore, as a result of this rulemaking process, the public will be able to provide input on what factors should be included in the public interest counsel decision-making functions.

No fiscal implications are anticipated for industry, businesses, or individuals as a result of the implementation or administration of the proposed rule. The proposed rule does not affect regulatory requirements on businesses or individuals.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the implementation of the proposed rule. The proposed rule does not increase or decrease regulatory requirements for small or micro-businesses.

Small Business Regulatory Flexibility Analysis

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the rule does not adversely affect small or micro-businesses and is proposed in order to comply with the legislative requirements of HB 2694.

Local Employment Impact Statement

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rule does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect.

Draft Regulatory Impact Analysis Determination

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined the rule does not meet the definition of a "major environmental rule." Under Texas Government Code, §2001.0225(g), "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.

Furthermore, the proposed rule does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225 applies only to a major environmental rule which: 1) exceeds a standard set by federal law, unless the rule is specifically required by state law; 2) exceeds an express requirement of state law, unless the rule is specifically required by federal law; 3) exceeds a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopts a rule solely under the general powers of the agency instead of under a specific state law.

This rulemaking enumerates the factors the public interest must consider before deciding to represent the public interest as a party to a commission proceeding. The proposed rule is not specifically intended to protect the environment or reduce risks to human health from environmental exposure, but rather its intent is to provide guidelines for the operations of the office of public interest counsel. Additionally, the proposed rule should not adversely affect in a material way the economy, a sector of the economy, productivity, competition, or jobs because it reflects only a statement of policy and does not result in any new rights or regulations; therefore, this rulemaking is not a major environmental rule. The commission invites public comment regarding this draft regulatory impact analysis determination.

Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Takings Impact Assessment

The commission's preliminary assessment indicates that Texas Government Code, Chapter 2007, does not apply to the proposed rulemaking because the proposed rulemaking is not a taking as defined in Chapter 2007, nor is it a constitutional taking of private real property. The purpose of the rule is to establish factors the public interest counsel must consider before deciding to represent the public interest as a party to a commission proceeding.

Promulgation and enforcement of the proposed rule will not affect private real property, which is the subject of the rule, because the proposed rulemaking will neither restrict or limit the owner's right to the property, nor cause a reduction of 25% or more in the market value of the property. The proposed rule only applies to the participation of the public interest counsel in commission

proceedings. Property values will not be decreased, because the proposed rulemaking will not limit the use of real property. Thus, the proposed rule will not constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the proposed rule and found that it is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will it affect any action or authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the proposed rule is not subject to the Texas Coastal Management Program.

Written comments on the consistency of this rulemaking with the Coastal Management Program may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Announcement of Hearing

The commission will hold a public hearing on January 24, 2012, at 10:00 a.m. in Room 201S, Building E at the commission's central office located at 12100 Park 35 Circle, Austin, Texas. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services, at (512) 239-1802. Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Patricia Duron, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. Electronic comments may be submitted at: *http://www5.tceq.texas.gov/rules/ecomments/.* File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2011-035-080-AD. The comment period closes January 30, 2012. Copies of the proposed rulemaking can be obtained from the commission's Web site at *http://www.tceq.texas.gov/nav/rules/propose_adopt.html.* For further information, please contact Vic McWherter, TCEQ Office of Public Interest Counsel, (512) 239-6363.

Statutory Authority

The rule is proposed under Texas Water Code (TWC), §5.013, concerning General Jurisdiction of the commission, which establishes the commission's general authority to carry out its jurisdiction; TWC, §5.102, concerning the commission's General Powers, including calling and holding hearings and issuing orders; TWC, §5.103, concerning Rules, which requires the commission to adopt rules when amending any statement of general applicability that describes the procedure or practice requirements of an agency; TWC, §5.105, concerning General Policy, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; and TWC, §5.276, which requires the commission by rule to establish factors the public interest counsel must consider before deciding to represent the public interest as a party to a commission proceeding.

The proposed rule implements TWC, §5.276.

§80.110. Public Interest Factors.

(a) In order to determine the nature and extent of the public interest, the public interest counsel must consider the following factors before deciding to represent the public interest as a party to a commission proceeding on a proposed agency action:

(1) the extent to which the action may impact human health;

(2) the extent to which the action may impact environmental quality;

(3) the extent to which the action may impact the use and enjoyment of property;

(4) the extent to which the action may impact the general populace as a whole, rather than impact an individual private interest;

(5) the extent and significance of interest expressed in public comment received by the commission regarding the action;

(6) the extent to which the action promotes economic growth and the interests of citizens in the vicinity most likely to be affected by the action;

(7) the extent to which the action promotes the conservation or judicious use of the state's natural resources; and

(8) the extent to which the action serves commission policies regarding regionalization or other relevant considerations regarding the need for facilities or services to be authorized by the action.

(b) In prioritizing the public interest counsel's workload, the public interest counsel must consider the following factors:

(1) the number and complexity of the issues to be considered in any contested case hearing on the action;

(2) the extent to which there is a known disparity in the financial, legal, and technical resources of the potential parties to the action, including consideration of whether the parties are represented by counsel;

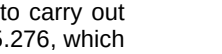
(3) the extent to which the public interest counsel's participation will further the development of the evidentiary record on relevant environmental or consumer-related issues to be considered by the commission; and

(4) staffing and other resource limitations of the office of public interest counsel.

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 December 9, 2011.

TRD-201105428
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: January 22, 2012
For further information, please call: (512) 239-6087



CHAPTER 336. RADIOACTIVE SUBSTANCE RULES

SUBCHAPTER H. LICENSING REQUIREMENTS FOR NEAR-SURFACE LAND DISPOSAL OF LOW-LEVEL RADIOACTIVE WASTE

30 TAC §§336.702, 336.745, 336.747

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes an amendment to §336.702 and proposes new §336.745 and §336.747.

Background and Summary of the Factual Basis for the Proposed Rules

The changes proposed to this chapter will revise the commission's radiation control rules to implement certain provisions of Senate Bill (SB) 1504 (82nd Legislature, 2011) and its amendments to Texas Health and Safety Code (THSC), Chapter 401, also known as the Texas Radiation Control Act (TRCA). This proposed rulemaking establishes provisions for incidental commingling of low-level radioactive waste (LLRW) accepted for disposal at the Texas Compact LLRW disposal facility. This proposed rulemaking also adds new definitions and implements the statutory prohibition on the acceptance of waste of international origin. An additional rulemaking is anticipated to implement other provisions of SB 1504 and THSC at a later date.

The commission recognizes that the revisions in THSC, §401.207(k) address the legislature's attempt to reconcile the goal to assure that there is adequate capacity in the compact waste disposal facility for party state compact waste and accommodate current commercial waste processing techniques that may result in the incidental commingling of party state compact waste with some waste from other sources. THSC, §401.207(k) requires the commission, in coordination with the Texas Low-Level Radioactive Waste Disposal Compact Commission, to adopt rules establishing criteria and thresholds by which incidental commingling of party state compact waste and waste from other sources at a commercial processing facility is considered and reasonably limited. The criteria and thresholds for commingling established by the commission are binding on any criteria and thresholds that may be established by the Texas Low-Level Radioactive Waste Disposal Compact Commission.

Section by Section Discussion

Subchapter H, Licensing Requirements for Near-Surface Land Disposal of Low-Level Radioactive Waste

§336.702, Definitions

The commission proposes additional definitions to §336.702. The definition of "Commercial processing" is proposed to implement THSC, §401.207(k). The definition of processing is consistent with the definition of processing in §336.1203 and would include processing activities that occur outside the State of Texas. The commission proposes the definition of "Commingling" which was not defined in SB 1504. The commission proposes the definition of "Incidental" which was not defined in SB 1504. Because new THSC, §401.207(k) only applies to incidental commingling of party state compact waste with waste from other sources, the commission intends to define what makes commingling incidental. The proposed definition excludes intentional actions where wastes from different generators are purposefully combined. The proposed definition is based on some risk to occupational or public health and safety or the environment that prevents the party state compact waste from being kept separate from waste from other sources. The commission requests comments on the definition of "Incidental." The commission proposes the definition of "Party state compact waste" consistent with new THSC, §401.2005(8). The commission proposes the definition of "Waste from other sources" as LLRW that is not party state compact waste. The commission proposes the definition of "Waste of international origin" to be consistent with new THSC, §401.2005(9).

§336.745, Incidental Commingling of Waste

The commission proposes new §336.745 to establish criteria and thresholds by which incidental commingling of party state compact waste and waste from other sources at a commercial processing facility is considered and reasonably limited. Section 336.745(a) prohibits the disposal of LLRW that contains party state compact waste that has been commingled at a commercial processing facility with waste from other sources except as authorized in §336.745. Subsection (b) limits the radioactivity content of waste from other sources to 5% of the total activity of the commingled waste. The 5% limitation corresponds to the Texas Low-Level Radioactive Waste Disposal Compact Commission's limitation in 31 TAC §675.22(c)(2). The commission invites comments on the establishment of this 5% limitation. Subsection (c) prohibits the disposal of LLRW that contains party state compact waste that has been commingled with waste from other sources if the commingling was not incidental to the processing. Because the statute allows only incidental commingling, the intentional commingling of waste from different generators is not authorized. Subsection (d) requires the licensee's submission of a report to the executive director to ensure that commercially processed waste comports to the commingling requirements. If the licensee intends to dispose of waste that has been commercially processed, the licensee must submit a report identifying the generator; the waste processor; the waste processing methods; and the volume, physical form and radioactivity of the processed waste. If waste is not commingled, the report must certify that party state compact waste has not been commingled with waste from other sources. If the waste contains party state compact waste that has been commingled at a commercial processing facility with waste from other sources, the report must provide additional information, including: the identity of each generator; certification that the radioactivity content of waste from other sources does not exceed 5% of the total activity and documentation of the methodology for determining the radioactivity content; and certification that the commingling was incidental to the processing of the waste. The licensee may not dispose LLRW that has been commercially processed without submitting the report required in §336.745(d). The proposed rule requires that the report must be provided ten days prior to the receipt of the waste. The commission invites comment on the timing of the report's submission. The criteria and thresholds for commingling under this section are binding on any criteria and thresholds that may be established by the Texas Low-Level Radioactive Waste Disposal Compact Commission.

§336.747, Waste of International Origin

The commission proposes new §336.747 to implement new THSC, §401.207(c) which prohibits the acceptance and disposal of waste of international origin.

Fiscal Note: Costs to State and Local Government

Jeffrey Horvath, Analyst in Strategic Planning and Assessment, has determined that for the first five-year period the proposed rules are in effect, no significant fiscal implications are antici-

pated for the agency and no fiscal implications are anticipated for other units of state or local government as a result of administration or enforcement of the proposed rules.

The proposed rulemaking implements a portion of SB 1504 and revises the commission's radiation control rules by providing criteria for the incidental commingling of LLRW. In order to implement the SB 1504 requirements, the agency would adopt rules, implement any necessary reporting requirements, and ensure compliance. Any administrative costs associated with these activities are not expected to be significant.

Public Benefits and Costs

Mr. Horvath has also determined that for each year of the first five years the proposed rulemaking is in effect, the public benefit anticipated from the changes seen in the proposed rulemaking will be compliance with state law and a potential limitation of liability to the state due to a prohibition on acceptance of unauthorized waste streams.

The proposed rulemaking is not expected to have fiscal implications for any individuals. One licensee currently authorized for commercial LLRW disposal issued under Chapter 336 must comply with the proposed rules. There may be fiscal implications for this particular licensee due to increased reporting requirements, but these fiscal implications are not expected to be significant.

The proposed rulemaking establishes criteria and thresholds for the incidental commingling of party state compact waste and waste from other sources at a commercial processing facility. In general, intentional commingling of LLRW from more than one generator is prohibited in order to attribute each waste shipment to a specific generator. Incidental commingling of LLRW as a result of commercial processing would be permissible under certain circumstances and within certain limits. The proposed rulemaking may result in some fiscal implications due to the potential of increased reporting requirements for one licensee authorized for commercial disposal of LLRW, but any costs are not expected to be significant.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rules. No small or micro-businesses are authorized for the commercial disposal of LLRW.

Small Business Regulatory Flexibility Analysis

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rulemaking is required to comply with state law and does not adversely affect a small or micro-business in a material way for the first five years that the proposed rulemaking is in effect.

Local Employment Impact Statement

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

Draft Regulatory Impact Analysis Determination

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the Texas Government Code. "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 proposed rulemaking 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 there are no significant requirements imposed on radioactive material licensees. The commission proposes this rulemaking for the purpose of implementing state legislation that requires the commission to adopt rules addressing the incidental commingling of party state compact waste with waste from other sources. The proposed rules also add definitions and implement a statutory prohibition on the receipt and disposal of waste of international origin.

Furthermore, the proposed rulemaking does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. The proposed rulemaking does not exceed a standard set by federal law, an express requirement of state law, a requirement of a delegation agreement, nor adopt a rule solely under the general powers of the agency.

The TRCA, THSC, Chapter 401, authorizes the commission to regulate the disposal of LLRW in Texas. THSC, §§401.051, 401.103, and 401.104 authorize the commission to adopt rules for the control of sources or radiation and the licensing of the disposal of radioactive materials. New THSC, §401.207(k) specifically requires the commission to adopt rules establishing criteria and thresholds for the incidental commingling of party state compact waste with waste from other sources. In addition, the State of Texas is an Agreement State, authorized by the Nuclear Regulatory Commission (NRC) to administer a radiation control program under the Atomic Energy Act. The proposed rulemaking does not exceed the standards set by federal law. The proposed rulemaking implements new requirements in state statutes enacted in SB 1504.

The proposed rulemaking does not exceed an express requirement of state law. The TRCA, THSC, Chapter 401 establishes general requirements for the licensing and disposal of radioactive materials. The TRCA in THSC, §401.207(k) specifically requires the commission to establish criteria and thresholds relating to the commingling of waste.

The commission has also determined that the proposed rulemaking does not exceed a requirement of a delegation agreement or contract between the state and an agency of the federal government. The State of Texas has been designated as an Agreement State by the NRC under the authority of the Atomic Energy Act. The Atomic Energy Act requires that the NRC find that the state radiation control program is compatible with the NRC's requirements for the regulation of radioactive materials and is adequate to protect health and safety. The commission

determined that the proposed rules do not exceed the NRC's requirements nor exceed the requirements for retaining status as an Agreement State.

The commission also determined that the rulemaking is proposed under specific authority of the TRCA, THSC, Chapter 401. THSC, §§401.051, 401.103, and 401.104 authorize the commission to adopt rules for the control of sources or radiation and the licensing of the disposal of radioactive materials. New THSC, §401.207(k) specifically requires the commission to adopt rules establishing criteria and thresholds relating to the commingling of waste.

The commission invites public comment of the draft regulatory impact analysis determination.

Takings Impact Assessment

The commission evaluated these proposed rules and performed a preliminary assessment of whether the proposed rules constitute a taking under Texas Government Code, Chapter 2007. The specific purpose of the rules is to implement statutory requirements establishing criteria and thresholds for the disposal of LLRW that contains party state compact waste that has been commingled with waste from other sources. The proposed rules also add definitions and implement a statutory prohibition of the acceptance and disposal of waste of international origin.

Promulgation and enforcement of the proposed rules would be neither a statutory nor a constitutional taking of private real property because the proposed rules do not affect real property. Because the proposed rules do not affect real property, the rules do not burden, restrict or limit an owner's right to real property or reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulation. The proposed rules establish criteria and thresholds relating to the commingling of party state compact waste with waste from other sources and implement a prohibition already established in state statute. Therefore, the proposed rules will not constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed this proposed rulemaking action and determined that the proposed rule is neither identified in, nor will it affect, any action/authorization identified in Coastal Coordination Act Implementation Rules in 31 TAC §505.11, relating to Actions and Rules Subject to the Texas Coastal Management Program (CMP). Therefore, the proposed rulemaking action is not subject to the CMP.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Announcement of Hearing

The commission will hold a public hearing on this proposal in Austin on January 12, 2012, at 2:00 p.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services, at (512) 239-1802. Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Bruce McAnally, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: *http://www5.tceq.texas.gov/rules/ecomments/.* File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2011-036-336-WS. The comment period closes January 23, 2012. Copies of the proposed rulemaking can be obtained from the commission's Web site at *http://www.tceq.texas.gov/nav/rules/propose_adopt.html.* For further information, please contact Susan Jablonski, Radioactive Materials Division, (512) 239-6731.

Statutory Authority

The amendment and new rules are proposed under the Texas Radiation Control Act, Texas Health and Safety Code (THSC), Chapter 401; THSC, §401.011, which provides the commission authority to regulate and license the disposal of radioactive substances, the commercial processing and storage of radioactive substances, and the recovery and processing of source material; §401.051, which authorizes the commission to adopt rules and guidelines relating to control of sources of radiation; §401.103, which authorizes the commission to adopt rules and guidelines that provide for licensing and registration for the control of sources of radiation; §401.104, which requires the commission to provide rules for licensing for the disposal of radioactive substances; §401.201, which provides authority to the commission to regulate the disposal of low-level radioactive waste; §401.207, which authorizes the commission to adopt rules establishing criteria and thresholds; and §401.412, which provides authority to the commission to regulate licenses for the disposal of radioactive substances. The proposed amendment and new rules are also authorized by Texas Water Code, §5.103, which provides the commission with the authority to adopt rules necessary to carry out its powers and duties under the water code and other laws of the state.

The proposed amendment and new rules implement THSC, Chapter 401, including §§401.011, 401.051, 401.057, 401.059, 401.103, 401.104, 401.151, 401.201, 401.2005, 401.207, 401.301, and 401.412.

§336.702. Definitions.

Terms used in this subchapter are defined in §336.2 of this title (relating to Definitions). Additional terms used in this subchapter have the following definitions.

(1) Active maintenance--Any significant remedial activity needed during the period of institutional control to maintain a reasonable assurance that the performance objectives in §336.724 of this title (relating to Protection of the General Population from Releases of Radioactivity) and §336.725 of this title (relating to Protection of Individuals from Inadvertent Intrusion) are met. Active maintenance includes ongoing activities such as the pumping and treatment of water from a disposal unit or one-time measures such as replacement of a disposal unit cover. Active maintenance does not include custodial activities such as repair of fencing, repair or replacement of monitoring equipment, revegetation, minor additions to soil cover, minor repair of disposal unit covers, and general disposal site upkeep such as mowing grass.

(2) Buffer zone--A portion of the disposal site that is controlled by the licensee and that lies under the disposal units and between the disposal units and the boundary of the disposal site.

(3) Chelating agent--A chemical or complex which causes an ion, usually a metal, to be joined in the same molecule by relatively stable bonding, e.g., amine polycarboxylic acids (e.g., EDTA, DTPA), hydroxycarboxylic acids, and polycarboxylic acids (e.g., citric acid, carbolic acid, and gluconic acid).

(4) Commencement of major construction--Any clearing of land, excavation, or other substantial action that would adversely affect the environment of a land disposal facility. The term does not mean disposal site exploration, necessary roads for disposal site exploration, borings to determine foundation conditions, or other preconstruction monitoring or testing to establish background information related to the suitability of the disposal site or the protection of environmental values.

(5) Commercial processing--The storage, extraction of materials, transfer, volume reduction, compaction, incineration, solidification, or other separation and preparation of radioactive substances from other persons for reuse or disposal, including any treatment or activity that renders the waste less hazardous, safer for transport, or amenable to recovery, storage, or disposal.

(6) Commingling--Any mixing, blending, down-blending, diluting, or other processing that combines radioactive substances from two or more generators resulting from the commercial processing of radioactive substances.

(7) [~~(5)~~] Containerized Class A waste--Class A low-level radioactive waste which presents a hazard because of high radiation levels. High radiation levels are radiation levels from an unshielded container that could result in an individual receiving a dose equivalent in excess of 0.1 rem (1 millisievert) in one hour at 30 centimeters from any surface of the container that the radiation penetrates.

(8) [~~(6)~~] Custodial agency--A government agency designated to act on behalf of the government owner of the disposal site.

(9) [~~(7)~~] Disposal site--That portion of a land disposal facility which is used for disposal of waste. It consists of disposal units and a buffer zone.

(10) [~~(8)~~] Disposal unit--A discrete portion of the disposal site into which waste is placed for disposal. For near-surface disposal, the disposal unit is usually a trench.

(11) [~~(9)~~] Engineered barrier--A man-made structure or device that is intended to improve the land disposal facility's ability to meet the performance objectives in this subchapter.

(12) [~~(10)~~] Explosive material--Any chemical compound, mixture, or device which produces a substantial instantaneous release of gas and heat spontaneously or by contact with sparks or flame.

(13) [~~(11)~~] Government agency--Any executive department, commission, independent establishment, or corporation, wholly or partly owned by the United States of America or the State of Texas and which is an instrumentality of the United States or the State of Texas; or any board, bureau, division, service, office, officer, authority, administration, or other establishment in the executive branch of the government.

(14) [~~(12)~~] Hydrogeologic unit--Any soil or rock unit or zone which by virtue of its porosity or permeability, or lack thereof, has a distinct influence on the storage or movement of groundwater.

(15) [~~(13)~~] Inadvertent intruder--A person who might occupy the disposal site after closure and engage in normal activities, such as agriculture, dwelling construction, or other pursuits in which the person might be unknowingly exposed to radiation from the waste.

(16) Incidental--Unintentional actions that, with respect to commingling of waste, prevent party state compact waste from being kept separate from waste from other sources without undue risk to occupational or public health and safety or the environment.

(17) [~~(14)~~] Intruder barrier--A sufficient depth of cover over the waste that inhibits contact with waste and helps to ensure that radiation exposures to an inadvertent intruder meet the performance objectives set forth in this subchapter, or engineered structures that provide equivalent protection to the inadvertent intruder.

(18) [~~(15)~~] Monitoring--Observing and making measurements to provide data to evaluate the performance and characteristics of the disposal site.

(19) Party state compact waste--Low-level radioactive waste generated in a party state of the Texas Low-Level Radioactive Waste Disposal Compact.

(20) [~~(16)~~] Pyrophoric material--

(A) Any liquid that ignites spontaneously in dry or moist air at or below 130 degrees Fahrenheit (54.5 degrees Celsius); or

(B) Any solid material, other than one classed as an explosive, which under normal conditions is liable to cause fires through friction, retained heat from manufacturing or processing, or which can be ignited readily and when ignited burns so vigorously and persistently as to create a serious transportation, handling, or disposal hazard. Included are spontaneously combustible and water-reactive materials.

(21) [~~(17)~~] Reconnaissance-level information--Any information or analysis that can be retrieved or generated without the performance of new comprehensive site-specific investigations. Reconnaissance-level information includes, but is not limited to, relevant published scientific literature; drilling records required by the commission or other state agencies, such as the Railroad Commission of Texas and the Texas Natural Resources Information System; and reports of governmental agencies.

(22) [~~(18)~~] Site--The contiguous land area where any land disposal facility or activity is physically located or conducted including adjacent land used in connection with the land disposal facility or activity, and includes soils and groundwater contaminated by radioactive material. Activity includes the receipt, storage, processing, or handling of radioactive material for purposes of disposal at a land disposal facility.

(23) [~~(19)~~] Site closure and stabilization--Those actions that are taken upon completion of operations that prepare the disposal site for custodial care and that assure that the disposal site remain stable and not need ongoing active maintenance.

(24) [~~(20)~~] Stability--Structural stability.

(25) [~~(21)~~] Surveillance--Observation of the disposal site for purposes of visual detection of need for maintenance, custodial care, evidence of intrusion, and compliance with other license and regulatory requirements.

(26) [~~(22)~~] Waste--See "low-level radioactive waste" as defined in §336.2 of this title (relating to Definitions).

(27) Waste from other sources--Any low-level radioactive waste that is not party state compact waste.

(28) Waste of international origin--Low-level radioactive waste that originates outside of the United States or territory of the

United States, including waste subsequently stored or processed in the United States.

§336.745. Incidental Commingling of Waste.

(a) A licensee authorized to dispose of waste from other persons may not dispose low-level radioactive waste that contains party state compact waste that has been commingled at a commercial processing facility with waste from other sources except as provided in this section.

(b) A licensee may not dispose low-level radioactive waste that contains party state compact waste that has been commingled at a commercial processing facility with waste from other sources if the radioactivity of the waste from other sources exceeds 5% of the total activity of the commingled waste.

(c) A licensee may not dispose low-level radioactive waste that contains party state compact waste that has been commingled at a commercial processing facility with waste from other sources unless the commingling was incidental to the processing of the waste.

(d) Ten days prior to the receipt of low-level radioactive waste that has been commercially processed:

(1) The licensee shall submit a report to the executive director that identifies the generator of the low-level radioactive waste by name, address, and license number; the processor of the low-level radioactive waste by name, address, and license number; the methods used to process the waste; and the volume, physical form and activity of the processed waste received for disposal at the compact waste disposal facility;

(2) If the waste does not contain party state compact waste that has been commingled at a commercial processing facility with waste from other sources, the licensee and the processor shall certify that party state compact waste has not been commingled with low-level radioactive waste from other sources; and

(3) If the waste contains party state compact waste that has been commingled at a commercial processing facility with waste from other sources, the report submitted under paragraph (1) of this subsection must:

(A) identify each generator of the waste from other sources by name, address, and license number;

(B) certify that the radioactivity content of waste from other sources does not exceed 5% of the total activity of the commingled waste and provide documentation of how the radioactivity content was determined; and

(C) certify that the commingling of the waste was incidental to the processing of the waste and that the commingled waste could not have been kept separate without undue risk to occupational or public health and safety or the environment.

(e) The licensee may not dispose of low-level radioactive waste that has been commercially processed without submitting the report required in subsection (d) of this section.

§336.747. Waste of International Origin.

The licensee may not receive or dispose of waste of international origin at a land disposal facility licensed under this chapter.

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 December 9, 2011.

TRD-201105423
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: January 22, 2012
For further information, please call: (512) 239-2141

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 2. TEXAS PARKS AND WILDLIFE DEPARTMENT

CHAPTER 51. EXECUTIVE

SUBCHAPTER P. OFFICIAL CORPORATE PARTNERS

31 TAC §§51.700 - 51.704

The Texas Parks and Wildlife Department proposes new §§51.700 - 51.704, concerning Official Corporate Partners. House Bill 1300 (HB 1300), enacted by the 82nd Texas Legislature, amended Parks and Wildlife Code, Chapter 11, by adding Subchapter J-1 to address the use of private contributions, partnerships, licensing and commercial advertising to provide additional funding for department programs, projects, and sites. Parks and Wildlife Code, §11.225, as added by HB 1300 requires the Texas Parks and Wildlife Commission (commission) to adopt rules to implement the provisions of Subchapter J-1, including rules that establish guidelines or best practices for official corporate partners.

Proposed new §51.700, concerning Definitions, would set forth the meanings of words and phrases used in the proposed new rules, and is necessary to prevent misinterpretations and misunderstandings with respect to terminology.

Proposed new §51.700(a)(1) would define the word "department" to mean the Texas Parks and Wildlife Department.

Proposed new §51.700(a)(2) would define "department brands" as "the department's trademarks, logos, name, seal, and other intellectual property." Parks and Wildlife Code, §13.0155, as added by HB 1300, authorizes the department to contract with "any entity the department considers appropriate to use the Parks and Wildlife Department brand in exchange for licensing fees paid by the entity to the department." The proposed new rules address the use and licensing of the department brands. Therefore, a definition of "department brands" is needed for clarity.

Proposed new §51.700(a)(3) would define "department site (or site)" as "a wildlife management area, fish hatchery, state park, state natural area, or state historic site under the jurisdiction of the department, or other property or facility owned or operated by the department." HB 1300 authorizes the department to work with for-profit entities to raise funds for state site operations and management, and defines "state site" as "a state park, natural area, wildlife management area, fish hatchery or historic site under jurisdiction of the department." Parks and Wildlife Code, §13.001 requires the commission to establish a classification system for department sites. To account for possible changes in classification of department sites, the proposed new definition

clarifies that the definition of "department site" includes all properties or facilities owned or operated by the department. This definition is intended to ensure that all department sites are eligible to benefit from fundraising activities by for-profit entities.

Proposed new §51.700(a)(4) would define "department-wide Official Corporate Partner (OCP-D)" as "an official corporate partner whose financial support of the department is intended to be broad in nature and not tied or restricted to a specific program, project or site." The proposed new rules make a distinction between those relationships intended to benefit a specific program, project or site and those relationships intended to provide broader benefits to the department. Therefore, the proposal provides definitions to clearly delineate that distinction and provide an acronym for ease of reference.

Proposed new §51.700(a)(5) would define "license" as "a written authorization allowing a person or entity to use one or more department brands for the purpose of selling products or services branded with one more department brands, and includes the act of granting a license." This definition is intended to include the use of the word "license" as a noun and as a verb. This definition is necessary to ensure clarity in references to "license" in the proposed rules.

Proposed new §51.700(a)(6) would define "Local Official Corporate Partner (OCP-L)" as "an Official Corporate Partner whose financial support of the department is intended to be limited to a specific program, project or site and is not broad in nature." As noted previously, the proposed new rules make a distinction between those relationships intended to benefit a specific program, project or site and those relationships intended to provide broader benefits to the department. Thus, a definition is necessary to clearly delineate that distinction and to provide an acronym for ease of reference.

Proposed new §51.700(a)(7) would define "for-profit entity" as "a corporation, organization, business trust, estate, trust, partnership, association, or any other legal entity, that exists for the purpose of generating profits." The definition is intended to encompass the various types of entities that are established to generate a profit.

Proposed new §51.700(a)(8) would define "Official Corporate Partner" as "a for-profit entity that is designated as an official corporate partner by the department; works with the department to raise funds for state site operations and maintenance or other priority projects or programs; and is selected as provided in this subchapter." The proposed definition is taken from Parks and Wildlife Code, §11.221(1) as added by HB 1300. The definition is included in the proposed rules for ease of reference.

Proposed new §51.700(b) would stipulate that unless clearly identified as being applicable only to an OCP-D and/or OCP-L, the use of the acronym OCP shall apply to both an OCP-D and OCP-L.

Proposed new §51.701, concerning Designation of OCPs, would set forth the process used by the department to select a for-profit entity as an OCP. Under Parks and Wildlife Code, §11.223(b) as added by HB 1300, the department is authorized to contract with one or more OCPs to conduct joint promotional campaigns or other fundraising efforts.

Proposed new §51.701(a) would stipulate that all OCP-Ds be selected through a fair and competitive process that takes into consideration the amount of support being offered and the needs of the department. The department believes that it is important that the process of selecting an OCP-D be designed to generate the greatest benefit for the department. The department believes that a fair and competitive process will help ensure that the department is obtaining the greatest benefit from an OCP-D designation.

Proposed new §51.701(b) would stipulate that all OCP-Ls be selected through a fair process that takes into consideration the availability of other possible OCP-Ls for the program, project, or site; the amount of support being offered; and the needs of the site or program. Since an OCP-L's support is limited to a specific program, project or site, in many instances there will be an insufficient number of for-profit entities seeking to become an OCP-L to warrant a full competitive process. Therefore, the selection process should be based on an assessment of the potential of any given prospective relationship to generate the highest and best benefit for the department's mission by itself or in concert with other OCP-Ls.

Proposed new §51.701(c) would stipulate that an entity shall not be considered an OCP until it has been so designated by order of the executive director of the department or his or her designee. The proposed new provision is necessary to provide a method of officially acknowledging the commencement of OCP status by the executive authority of the agency.

Proposed new §51.701(d) would provide for the selection of multiple OCP-Ds and OCP-Ls by the department. The proposed new provision recapitulates the provisions of Parks and Wildlife Code, §11.222(b), as added by HB 1300, for ease of reference. This provision also provides that the department will determine whether an OCP should be designated as an OCP-D or and OCP-L. Since there are some differences in benefits and restrictions between and OCP-D and OCP-L, the department must be able to designate an OCP as either an OCP-D or an OCP-L.

Proposed new §51.701(e) would provide that the department may define the specific business category within which an OCP is designated. As explained with regard to proposed §51.701(f) the department intends that OCPs be designated within specific categories. These categories may be based on the type of service or product offered by the OCP, or the industry of which the OCP is a part. To facilitate such designation by category, the department will define the category in which an OCP will be designated. To ensure that the department's regulatory functions are not compromised by the designation, an OCP will not be designated in a business category regulated by the department (e.g., commercial shrimping).

Proposed new §51.701(f) would require the department to designate each OCP-D within a specific business category and would stipulate that the department will not select another OCP for the same business category within the term of the OCP-D's designation. The department believes that designating an OCP-D as the exclusive OCP within a specified category will increase the value of the OCP designation and thus increase the benefits to the department. Therefore, it is necessary to stipulate that the department will not designate more than one OCP-D per business category.

Proposed new §51.701(g) would allow the department to designate one or more OCP-Ls within a specific business category for the program, project, or site for which the OCP-L is designated. Unlike the OCP-Ds, which are broader in scope, the OCP-Ls are confined to specific projects, programs or sites. Since OCP-Ls may be able to offer a lower level of support, the department would like to provide for the possibility that multiple entities could

be designated as an OCP-L within a business category to maximize support for the project, program or site.

Proposed new §51.701(h) would stipulate that the designation of an OCP-L is subject to cancellation by the department in the event an OCP-D is designated within the same business category. In making the distinction between OCP-Ds and OCP-Ls, the department recognizes that a situation could arise in which an OCP-L is designated within a business category and the department subsequently enters an agreement with an OCP-D providing a much greater benefit within the same business category. In light of this possibility, the department believes it is prudent to provide for the possibility of cancellation of an OCP-L's status in this circumstance to enhance benefits to the department. The proposed new provisions also would stipulate that the department will provide reasonable advanced written notice to an OCP-L of such cancellation and shall inform all OCP-Ls of the possibility of such cancellation.

Proposed new §51.701(i) would require the department to establish minimum criteria that must be met by an entity to be considered for designation as an OCP-D. Those criteria include, but are not limited to: commitment of a minimum amount in cash, goods, and/or services; a presence in the state that is sufficiently broad for the type of OCP-D designation and the ability of the entity to engage in joint promotional campaigns and/or cooperative ventures utilizing technology and/or systems belonging to the entity; a mission or purpose that does not conflict with the mission of the department; and other criteria established by the department based on the needs of the department. In general, the department intends to consider designation as OCP-Ds only those entities that can demonstrate a credible potential to provide needed benefits to the department. Therefore, the proposed new rules would stipulate that the department develop minimum standards that an entity would have to meet to be considered for an OCP-D designation.

Proposed new §51.701(j) would stipulate that the department may establish appropriate criteria for an entity to be considered as an OCP-L. As discussed earlier, OCP-Ls will generally be much smaller and more limited in scope than OCP-Ds, but may be significant for a particular program, project or site. The department therefore prefers to create a more flexible standard for determining whether an entity should be considered for designation as an OCP-L.

Proposed new §51.701(k) would require an OCP designation to be in effect for a specified period of time. The department does not intend for an OCP designation to be open-ended or perpetual; therefore, the proposed new rules require such designations to be effective for a specific time period.

Proposed new §51.701(l) would establish that designation as an OCP in no way constitutes an endorsement of products or services of an OCP by the department. The intent of the proposed rules is to set forth the process and guidelines for developing relationships that are beneficial to the agency's mission; however, the department believes that it should be made clear that an OCP relationship with the department is for fundraising purposes only and does not in any way extend to an endorsement of products or services by the department.

Proposed new §51.701(m) would make it clear that the department will not designate an entity as an OCP if the designation would result in a conflict with the department's regulatory, contractual, or other obligations, or would otherwise create the appearance of a conflict of interest. As noted in the discussion of proposed new §51.701(l), the intent of the proposed rules is to set forth the process and guidelines for developing fundraising relationships that are beneficial to the agency's mission. The designation of an OCP that creates a conflict of interest or that militates against the department's mission would not achieve that intent.

Proposed new §51.701(n) would make it clear that the department is an independent entity and is not to be understood or construed as an agent, partner (as defined by the Business Organizations Code), or joint venture participant with respect to an OCP and is not responsible for the acts, omissions, or conduct of an OCP. The purpose of this provision is to clarify that although the word "partner" is used colloquially in referring to the relationship between the department and entities designated as OCPs, the use of "partner" is not intended to suggest a legal relationship beyond that incidental to the OCP designation.

Proposed new §51.702, regarding Guidelines, would set forth provisions establishing the conditions under which a for-profit entity designated as an OCP would be required or allowed to operate.

Proposed new §51.702(a) would require each OCP to enter into an agreement with the department regarding the terms, conditions, restrictions, benefits, roles, and responsibilities of the department and the OCP and the scope of the OCP designation. The department has determined that in order to ensure that relationships with OCPs are not jeopardized by misunderstandings or misinterpretations, it is prudent to have a written agreement with each OCP that spells out the exact nature of the arrangement between the OCP and the department.

Proposed new §51.702(b) would stipulate that among the benefits that may be provided by the department to an OCP-D is the right of the OCP-D to be designated as the "official" OCP-D of the department within a business category and to identify itself as the "Official" product or service of Texas Parks and Wildlife or the Texas Parks and Wildlife Department, or some variation thereof. In order to provide an OCP-D with exclusive product visibility in a given business category, the department has determined that it is useful to allow the designation of the product, service or industry as the "official" good, service or industry of Texas Parks and Wildlife, the Texas Parks and Wildlife Department, Texas State Parks, or variations thereof, if such a designation can provide a benefit to the department.

Proposed new §51.702(c) would stipulate that among the benefits that may be provided by the department to an OCP-L is the right to be designated as the "official" OCP-L for the program, project, or site for which the OCP-L is designated (or within a business category for the program, project, or site) and be allowed to identify itself as the "Official" product, service or industry of the specific program, project or site. For the same reasons noted in the discussion of proposed new §51.702(b), the department believes that it is useful to allow the designation of the product or service as the "official" good, service or industry of a department program, project, or site if such a designation can provide a benefit to department programs, projects, or sites.

Proposed new §51.702(d) would require an OCP to maintain and retain all work and other supporting documents pertaining to its designation as the OCP and all work performed pursuant to its designation as an OCP, and to provide or make such documentation available, upon request, for purposes of inspecting, monitoring, auditing, or evaluating by the department and any authorized agency of the State of Texas. Obviously, in order to maintain the

public trust it is an imperative duty of the department to ensure that all work performed in the role of OCP is documented and available for any purpose authorized by law.

Proposed new §51.702(e) would require an OCP to carry out the fiscal, business, legal, and tax responsibilities required and appropriate for an entity of the size and structure as the OCP. The department seeks to ensure to the greatest extent possible that an OCP is a responsible business entity.

Proposed new §51.702(f) would stipulate that an OCP's work with the department not conflict with the department's mission and goals. As noted in the discussion of proposed new §51.701(m), the intent of the proposed rules is to set forth the process and ground rules for developing fundraising relationships that are beneficial to the agency's mission. The department is less likely to benefit from the designation of an OCP that creates a conflict of interest or that militates against the department's mission.

Proposed new §51.702(g) would require an OCP to be authorized to conduct business in the state of Texas and must be in good standing with the State of Texas. The department has determined that it is prudent to require all OCPs to be legitimate and lawful businesses with no outstanding issues that would reflect poorly on the department.

Proposed new §51.702(h) would require all fundraising activities or programs undertaken by the OCP for the benefit of the department to be approved in advance in writing by the department. This provision is intended to ensure that an OCP's fundraising activities address the needs of the department and are not misdirected.

Proposed new §51.702(i) would prohibit an OCP from subcontracting or entering into an agreement with another person or entity to carry out the OCP's functions as an OCP, except as agreed in writing by the department. This provision is intended to ensure appropriate controls of the OCP's activities on behalf of the department.

Proposed new §51.702(j) would require an OCP to submit funds generated on behalf of or for the benefit of the department as soon as possible in a manner as determined by the department and to observe applicable accounting standards during the interim between obtaining such funds and transferring them to the department. Under Parks and Wildlife Code, §11.223(a) as added by HB 1300, the department is required to "ensure that an official corporate partner transfers the contributions, gifts, grants, and promotional campaign proceeds accepted on behalf of the department to the department as soon as possible." The proposed new subsection includes this statutory requirement for ease of reference. In order to ensure that money, goods, or services accepted on behalf of the department by an OCP can be tracked and audited, it is necessary to require that they be accounted for appropriately.

Proposed new §51.702(k) would stipulate that all projects undertaken for the department by an OCP-L be related to and supportive of the department project, program, or site for which the OCP-L is designated. The department believes that it is critical that the activities of an OCP-L be consistent with the purpose and goals of the particular project, program, or site.

Proposed new §51.702(l) would recapitulate the provisions of Parks and Wildlife Code, §11.226 as added by HB 1300, for ease of reference. This proposed subsection provides that the proposed rules do not limit the department's authority to accept donations that are otherwise authorized. The proposed new subsection also stipulates that all such other donations shall be in accordance with applicable law and department policy and may be made in support of a specific purpose or program.

Proposed new §51.703, concerning Advertising, would set forth specific provisions governing the use and content of advertising by an OCP in the context of activities conducted under the subchapter.

Proposed new §51.703(a) would prohibit the use of department funds to advertise a product and/or service of the OCP, except to provide information about the relationship with the OCP and encourage public participation in OCP-sponsored activities or events support of the department's mission, to provide information about the availability of products and/or services of an OCP that have been created and/or are being made available pursuant to an agreement with the department to support department programs, projects, or sites, or to offset fulfillment costs or opportunity costs incurred by the department to provide advertising to the OCP in department publications, web sites, at department sites and other department vehicles and outlets. The department believes that it is prudent to limit the use of department resources to only those circumstances in which the department's interests are clearly and directly being served.

Proposed new §51.703(b) would prohibit the use of department brands (as defined in §51.700(a)(2)) except as authorized by written agreement with the department. The department must ensure that its brands, like other department property, are used appropriately and for the benefit of the department.

Proposed new §51.703(c) would set forth the conditions under which the department would allow advertising by an OCP in department publications, web sites, other media vehicles, and/or at department sites. In order to ensure that the positioning of OCP advertising content on department media platforms is managed in a careful and responsible manner, the department has determined that it is prudent to stipulate that no OCP advertising will appear in department media unless and until it has been approved in writing in advance by the department's executive director or designee, that the advertising must be in the best interest of the department and not conflict with the department's mission and goals, and that the advertising not be more prominent than or overshadows the role of the department. Similarly, advertising content or placement at a department site that would have the effect of interfering with public enjoyment or impact the natural or scenic integrity of the site would not be authorized.

Proposed new §51.703(d) would provide that the designation of an OCP as the exclusive OCP for a specific business category would not limit the department's ability to accept advertising for department publications (including but not limited to the Texas Parks and Wildlife Magazine), the department web site, or other media from potential competitors of the OCP. This provision is intended to clarify that the designation of an OCP will not impair the department's ability to seek advertising revenue necessary to support department publications or other media outlets.

Proposed new §51.703(e) would affirm that the department will not accept any advertisement that does not comply with department rules or Parks and Wildlife Code, §11.0172 or §11.0173. Under Parks and Wildlife Code, §11.0172, the department is required to adopt rules regarding the types of advertising that are inappropriate for viewing by youth. Those rules are contained in §51.72 of this chapter. Parks and Wildlife Code, §11.0173 prohibits the department from accepting advertising in a publi-

cation sponsored or published by the agency if the advertising promotes the sale of tobacco. Similarly, §51.72 of this chapter provides that youth appropriate advertising means advertising that does not include any alcohol or tobacco products.

Proposed new §51.704 concerning Licensing of the Department Brands, sets forth the conditions under which the department would license the use of department brands and permit an OCP to use them.

Proposed new §51.704(a) would establish that the department may license the use of department brands as a benefit to an OCP-D or as a means to generate revenue for the department. An incentive that the department may be able to offer a potential OCP-D to enhance revenue to the department may be the ability of the OCP-D to use department brands. In addition, the department may be able to generate revenue for the department by authorizing the use of the department brand by entities other than an OCP-D. The intent of HB 1300 is to create the opportunity for the department to enter into financially beneficial relationships with for-profit entities. Appropriate and limited licensing of the department brand is a means to generate revenue for the department.

Proposed new §51.704(b) would stipulate that the department will not license a use of department brands that conflicts with the department's mission and goals. The department's intent in licensing the department's brands is to generate revenue to further the agency's mission. A use of department brands that conflicts with the department's mission would not likely carry out that intent.

Proposed new §51.704(c) would require the department to use a competitive process to award the licensing rights for one or more department's brands. The department believes that it is important that the process of awarding licensing rights be predicated on generating the highest and best benefit for the department's mission. Therefore, the proposed new rules would provide that the department will award licensing rights through a competitive process.

Proposed new §51.704(d) would stipulate that any licensing or use of the department brands be subject to the terms, conditions, restrictions, and time frame(s) specified in writing by the department. The department has determined that to ensure that licensing relationships are not jeopardized by misunderstandings or misinterpretations, it is prudent to have a written agreement that spells out the exact nature of the licensing arrangement between the licensee and the department, including the length of time that a licensee may use department brands under an agreement.

Proposed new §51.704(e) would provide that nothing in §51.704 is to be construed to prohibit the department from authorizing the use of one or more department brands to recognize a person or entity that joins with and/or provides support to the department, including but not limited to an OCP-L, or a sponsor or supporter of a department program, project, or site. The department currently receives a number of donations, gifts, and benefits from the generosity of many for-profit entities. The department does not wish for the provisions of the section to interfere with the department's ability to recognize all beneficial contributions in furtherance of the agency's mission.

Proposed new §51.704(f) would stipulate that unless otherwise authorized, the private use of department brands is not permitted without a prior written agreement with the department. This provision is intended to ensure that the department's brands are used to support department purposes.

Proposed new §51.704(g) would allow the department to deny the use of department brands when such use is not in the best interest of the department. As discussed previously, the department brands are the most visible symbol of the department in the public eye, and the department is therefore eager to prevent situations in which the use of those brands would not be in the best interest of the department. Thus, the proposed new rules would allow the department to deny the use of department brands under such circumstances.

Darcy Bontempo, Director of Marketing Services, has determined that for each year of the first five years that the rules as proposed are in effect, there will be fiscal implications to state government as a result of enforcing or administering the rules. Those implications are expected to be positive, since the purpose of the rules is to enhance fundraising activities; however, there is no historical data upon which to base an estimate.

There will be no fiscal implications for other units of state or local government as a result of enforcing or administering the rules.

Ms. Bontempo also has determined that for each year of the first five years the rules as proposed are in effect, the public benefit anticipated as a result of enforcing or administering the rules as proposed will be the enhancement of the department's ability to raise funds to provide and maintain department programs, projects, and sites.

Under the provisions of Government Code, Chapter 2006, a state agency must prepare an economic impact statement and a regulatory flexibility analysis for a rule that may have an adverse economic effect on small businesses and micro-businesses. As required by Government Code, §2006.002(g), the Office of the Attorney General has prepared guidelines to assist state agencies in determining a proposed rule's potential adverse economic impact on small businesses. Those guidelines state that an agency need only consider a proposed rule's "direct adverse economic impacts" to small businesses and micro-businesses to determine if any further analysis is required. For that purpose, commission considers "direct economic impact" to mean a requirement that would directly impose recordkeeping or reporting requirements; impose taxes or fees; result in lost sales or profits; adversely affect market competition; or require the purchase or modification of equipment or services.

The department has determined that there will be no adverse economic effects on small businesses, microbusinesses, or persons required to comply with the rules as proposed. The rules set forth the guidelines for the selection of official corporate sponsors. The rules as proposed do not require any person or entity be an official corporate sponsor of the department, and any relationship between a person or entity and the department under the proposed rules would be strictly voluntary and set forth by contract. Accordingly, the department has not prepared a regulatory flexibility analysis under Government Code, Chapter 2006.

The department has not drafted a local employment impact statement under the Administrative Procedure Act, §2001.022, as the agency has determined that the rules as proposed will not impact local economies.

The department has determined that Government Code, §2001.0225 (Regulatory Analysis of Major Environmental Rules), does not apply to the proposed rules.

The department has determined that there will not be a taking of private real property, as defined by Government Code, Chapter 2007, as a result of the proposed rules.

Comments on the proposed rules may be submitted to Darcy Bontempo, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744; (512) 389-4574 (e-mail: darcy.bontempo@tpwd.state.tx.us).

The new rules are proposed under the authority of Parks and Wildlife Code, §11.225, as added by HB 1300, enacted by the 82nd Texas Legislature, Regular Session (2011), which requires the commission to adopt rules to implement the provisions of Parks and Wildlife Code, Chapter 11, Subchapter J-1, and under Parks and Wildlife Code, §13.303, as added by HB 1300, enacted by the 82nd Texas Legislature, Regular Session (2011), which requires the commission to adopt rules to prohibit inappropriate commercial advertising in state parks, natural areas, historic sites, or other sites under the jurisdiction of the department.

The proposed new rules affect Parks and Wildlife Code, Chapter 11.

§51.700. Definitions.

(a) The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise. All other words and terms shall have the meanings assigned by Parks and Wildlife Code, Chapter 11, Subchapter J-1.

(1) Department--The Texas Parks and Wildlife Department.

(2) Department brands--The department's trademarks, logos, name, seal, and other intellectual property.

(3) Department site (or "site")--A wildlife management area, fish hatchery, state park, state natural area, or state historic site under the jurisdiction of the department, or other property or facility owned or operated by the department.

(4) Department-wide Official Corporate Partner (OCP-D)--An Official Corporate Partner whose financial support of the department is intended to be broad in nature and not tied or restricted to a specific program, project or site.

(5) License--A written authorization allowing a person or entity to use one or more department brands for the purpose of selling products or services branded with one or more department brands, and includes the act of granting a license.

(6) Local Official Corporate Partner (OCP-L)--An Official Corporate Partner whose financial support of the department is intended to be limited to a specific program, project or site and is not broad in nature.

(7) For-profit entity--A corporation, organization, business trust, estate, trust, partnership, association, or any other legal entity, that exists for the purpose of generating profits.

(8) Official Corporate Partner (OCP)--A for-profit entity that:

(A) is designated as an official corporate partner by the department;

(B) works with the department to raise funds for state site operations and maintenance or other priority projects or programs; and

(C) is selected as provided in this subchapter.

(b) Unless clearly identified as being applicable only to an OCP-D and/or OCP-L, the use of the acronym OCP shall apply to both an OCP-D and OCP-L.

§51.701. Designation of OCPs.

(a) All OCP-Ds shall be selected through a fair and competitive process that takes into consideration the amount of support being offered and the needs of the department.

(b) OCP-Ls shall be selected through a fair process that takes into consideration the availability of other possible OCP-Ls for the program, project or site, the amount of support being offered and the needs of the site or program.

(c) An entity shall not be considered an OCP until it has been designated as an OCP by order of the department's executive director, or designee.

(d) The department may select multiple OCP-Ds and/or OCP-Ls. The department will determine, in its sole discretion whether an OCP should be classified as an OCP-D or OCP-L.

(e) The department may define the specific business category within which an OCP is designated. An OCP will not be designated in a business category regulated by the department.

(f) The department shall designate each OCP-D within a specific business category and will not select another OCP for the same business category within the term of the OCP-D's designation.

(g) The department may designate one or more OCP-Ls within a specific business category for the program, project or site for which the OCP-L is designated.

(h) The designation of an OCP-L shall be subject to cancellation by the department in the event an OCP-D is designated within the same business category. The department will provide reasonable advanced written notice to the OCP-L of such cancellation and shall inform all OCP-Ls of the possibility of cancellation under this subsection.

(i) The department shall establish minimum criteria that must be met by an entity to be considered for designation as an OCP-D. Such criteria may include, but are not limited to the following:

(1) commitment of a minimum amount in cash, goods, and/or services established by the department;

(2) a presence in the state that is sufficiently broad for the type of OCP-D designation and the ability of the entity to engage in joint promotional campaigns and/or cooperative ventures utilizing technology and/or systems belonging to the entity;

(3) a mission or purpose that does not conflict with the mission of the department; and

(4) other criteria established by the department based on the needs of the department.

(j) The department may establish criteria, as appropriate, to be met by an entity to be considered for designation as an OCP-L, which may include some or all of the criteria listed in subsection (i) of this section.

(k) The designation of an OCP shall be for a specified period of time.

(l) The designation of an OCP shall not constitute an endorsement by the department of the OCP or the OCP's products and/or services.

(m) The department will not designate an entity as an OCP if the designation would result in a conflict with the department's regulatory, contractual or other obligations, or would otherwise create the appearance of a conflict of interest.

(n) Notwithstanding the designation of an entity as an OCP and unless otherwise expressly agreed by the department in writing:

(1) the department and an OCP are independent entities and are not agents, partners, joint venture participants or otherwise responsible for the acts, omissions, or conduct of the other party; and

(2) the legal relationship of the department and an OCP shall not be considered a "partnership" and neither the department nor an OCP shall be considered a "partner" of the other as those terms are defined and used in the Business Organizations Code.

§51.702. Guidelines.

(a) Each OCP shall enter an agreement with the department regarding the terms, conditions, restrictions, benefits, roles and responsibilities of the department and the OCP and the scope of the OCP designation.

(b) Among the benefits that may be provided by the department to an OCP-D is the right of the OCP-D to be designated as an "official" OCP-D of the department within a business category and to identify itself as the "Official (specific business category) of Texas Parks and Wildlife" or other variations of this designation, including but not limited to the "Official (specific business category) of Texas State Parks."

(c) Among the benefits that may be provided by the department to an OCP-L is the right to be designated as the "official" OCP-L for the program, project or site for which the OCP-L is designated or within a business category for the program, project, or site and be allowed to identify itself as an "Official (specific business category) of the (specific program, project or site)."

(d) An OCP shall maintain and retain all work and other supporting documents pertaining to its designation as the OCP and all work performed pursuant to its designation as an OCP. Such documents shall be provided or made available, upon request, for purposes of inspecting, monitoring, auditing, or evaluating by the department and any authorized agency of the State of Texas.

(e) An OCP shall carry out the fiscal, business, legal, and tax responsibilities required and appropriate for an entity of the size and structure as the OCP.

(f) An OCP's work with the department must not conflict with the department's mission and goals.

(g) An OCP must be authorized to conduct business in the State of Texas and must be in good standing with the State of Texas.

(h) Any fundraising or programs undertaken by the OCP for the benefit of the department must be approved in advance in writing by the department.

(i) An OCP shall not subcontract or enter an agreement with another person or entity to carry out the OCP's functions as an OCP, except as agreed in writing by the department.

(j) The OCP shall submit funds generated on behalf of or for the benefit of the department as soon as possible and in a manner as determined by the department. During the time such funds are being held by the OCP, the OCP shall manage and account for such funds in accordance with applicable accounting standards.

(k) All projects undertaken for the department by an OCP-L must be related to and supportive of the department project, program or site for which the OCP-L is designated.

(l) Nothing in this subchapter shall limit the ability of an OCP to make an unrestricted donation of cash, goods, or services to the department, so long as the donation is accepted by the department in accordance with applicable law and department policy. Such a donation may be for a specific purpose or program.

§51.703. Advertising.

(a) Department funds shall not be used to advertise a product and/or service of the OCP, except as follows:

(1) to provide information about the relationship with the OCP and encourage public participation in OCP-sponsored activities or events in support of the department's mission;

(2) to provide information about the availability of products and/or services of an OCP that have been created and/or are being made available pursuant to an agreement with the department to support department programs, projects or sites;

(3) to offset fulfillment costs or opportunity costs incurred by the department to provide advertising to the OCP in department publications, web sites, at department sites and other department vehicles and outlets.

(b) The OCP shall not use department brands, except as authorized by written agreement with the department.

(c) The department may provide to an OCP opportunities to run advertising in department publications, web sites, other media vehicles, and/or at department sites so long as such advertising:

(1) has been approved in writing in advance by the department's executive director or designee;

(2) is in the best interest of the department and does not conflict with the department's mission and goals;

(3) if on a department site, preserves the natural and scenic integrity of the site and minimizes distractions that may interfere with the enjoyment of the site by visitors; and

(4) is not more prominent than and does not overshadow the role of the department.

(d) The designation of an OCP as the exclusive OCP for a specific business category shall not limit the department's ability to accept advertising from potential competitors of the OCP in department publications, web sites and other media, including but not limited to the Texas Parks and Wildlife Magazine.

(e) The department will not accept any advertisement that does not comply with the requirements of Parks and Wildlife Code, §11.0172 and §11.0173, and §51.72 of this title (relating to Youth-appropriate Advertising).

§51.704. Licensing of the Department Brands.

(a) The department may license the use of one or more department brands:

(1) as a benefit to an OCP-D; or

(2) as a means to generate revenue for the department.

(b) The department will not license a use of department brands that conflicts with the department's mission and the goals.

(c) The department shall use a competitive process to award the licensing rights for one or more department's brands.

(d) Any licensing or use of the department brands shall be subject to the terms, conditions, restrictions and time frame(s) specified in writing by the department.

(e) Nothing in this section shall be construed to prohibit the department from authorizing the use of one or more department brands to recognize a person or entity that joins with and/or provides support

to the department, including but not limited to an OCP-L, or a sponsor or supporter of a department program, project or site.

(f) Unless otherwise authorized by this subchapter, private use of department brands is not permitted without a prior written agreement with the department.

(g) The department may deny the use of department brands when such use is not in the best interest of the department.

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 December 9, 2011.

TRD-201105454
Ann Bright
General Counsel
Texas Parks and Wildlife Department
Earliest possible date of adoption: January 22, 2012
For further information, please call: (512) 389-4775

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CHAPTER 53. FINANCE
SUBCHAPTER A. FEES
DIVISION 1. LICENSE, PERMIT, AND BOAT AND MOTOR FEES

31 TAC §53.8

The Texas Parks and Wildlife Department proposes an amendment to §53.8, concerning Alligator Licenses, Permits, Stamps, and Tags. The proposed amendment would implement a fee of $252 for the nuisance alligator control permit and clarify that there is no fee for the nuisance alligator control tag for alligators taken under a nuisance alligator control permit. In another rulemaking published elsewhere in this issue of the *Texas Register,* the department proposes a rule regarding nuisance alligator control permits.

The permit fee amount of $252 was selected because it is identical to the current fee for an alligator farmer's permit and is believed to be sufficient to both recover the department's overhead costs for administering the program and not function as a disincentive for prospective permittees.

All alligators harvested in Texas are required to be tagged with a federal CITES (Convention on International Trade in Endangered Species) hide tag, which is necessary for Texas-harvested alligators to be certified as legal for entry into international trade. The department currently does not charge a fee for the CITES hide tag required for nuisance alligator control hunters. The proposal merely clarifies that there will continue to be no fee for the CITES hide tag for nuisance alligator control under the proposed new regulatory structure for handling nuisance alligators. Staff believes that a no-charge hide tag will function as an additional inducement for persons to become permitted as nuisance control hunters.

Mitch Lockwood, Big Game Program Director, has determined that for each year of the first five years that the rule as proposed is in effect, there will be fiscal implications to state government as a result of enforcing or administering the rule. Those implications are expected to be positive, since the nuisance alligator control permit is intended to eliminate the substantial costs incurred by the department in administering the present nuisance alligator control protocol. The department expended approximately $121,000 in salary in Fiscal Year 2009 (the last full fiscal year for which data is available) on nuisance alligator control activities, primarily in the form of biologist and game warden time (travel, investigation, and disposition) for approximately 1,100 nuisance alligator complaints. This estimate was derived by multiplying the number of complaints by an estimated four-hour commitment of staff time per complaint at the average hourly salary of a field game warden ($25.66), which represents the majority of nuisance alligator control activities undertaken by the department. This estimate does not include fuel, equipment, or administrative costs, which are not segregated at a scale fine enough to isolate those costs with respect to nuisance alligator control administration.

Although the department will incur costs associated with providing mandatory nuisance alligator control hunter training (approximately $500 per student), data entry and administrative expenses related to data analysis (approximately $15,000 per year), and loss of revenue from the elimination of control hunter payments to the department (approximately $9,836 per year, using the last four years of data), that cost is expected to be significantly lower than the current costs of administering nuisance alligator control activities.

There will be no fiscal implications for other units of state or local government as a result of enforcing or administering the rule.

Mr. Lockwood has also determined that for each year of the first five years the rule as proposed is in effect, the public benefit anticipated as a result of enforcing or administering the rule as proposed will be the more efficient and effective control of nuisance alligators.

Under the provisions of Government Code, Chapter 2006, a state agency must prepare an economic impact statement and a regulatory flexibility analysis for a rule that may have an adverse economic effect on small businesses and micro-businesses. As required by Government Code, §2006.002(g), the Office of the Attorney General has prepared guidelines to assist state agencies in determining a proposed rule's potential adverse economic impact on small businesses. Those guidelines state that an agency need only consider a proposed rule's "direct adverse economic impacts" to small businesses and micro-businesses to determine if any further analysis is required. For that purpose, commission considers "direct economic impact" to mean a requirement that would directly impose recordkeeping or reporting requirements; impose taxes or fees; result in lost sales or profits; adversely affect market competition; or require the purchase or modification of equipment or services.

The department has determined that most if not all businesses affected by the proposed rule qualify as small or microbusinesses. The department also has determined that there will be no adverse economic effects on small businesses, microbusinesses, and persons required to comply with the amendment as proposed. Although the proposed rule would impose a permit fee of $252, the elimination of the per-foot charge paid to the department, coupled with the permittee's ability to both charge a fee for nuisance control services and sell the meat and hides, means that the net effect of the proposed rule on small and microbusinesses and persons required to comply will be positive. Accordingly, the department has not prepared a regulatory flexibility analysis under Government Code, Chapter 2006.

There will be an economic cost for persons to comply with the rule as proposed, namely, the $252 fee to obtain the nuisance alligator control permit.

The department has not drafted a local employment impact statement under the Administrative Procedure Act, §2001.022, as the agency has determined that the rule as proposed will not impact local economies.

The department has determined that Government Code, §2001.0225 (Regulatory Analysis of Major Environmental Rules), does not apply to the proposed rule.

The department has determined that there will not be a taking of private real property, as defined by Government Code, Chapter 2007, as a result of the proposed rule.

The department has determined that the proposed rule is in compliance with 31 TAC §505.11 (Actions and Rules Subject to the Coastal Management Program) and §505.22 (Consistency Required for New Rules and Rule Amendments Subject to the Coastal Management Program).

Comments on the proposed rule may be submitted to Robert Macdonald, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744; (512) 389-4775 (e-mail: robert.macdonald@tpwd.state.tx.us).

The amendment is proposed under the authority of Parks and Wildlife Code, §65.003, which authorizes the commission to regulate taking, possession, propagation, transportation, exportation, importation, sale, and offering for sale of alligators, alligator eggs, or any part of an alligator that the commission considers necessary to manage this species, including regulations to provided for the periods of time when it is lawful to take, possess, sell, or purchase alligators, alligator hides, alligator eggs, or any part of an alligator; and limits, size, means, methods, and places in which it is lawful to take or possess alligators, alligator hides, alligator eggs, or any part of an alligator; and control of nuisance alligators.

The proposed amendment affects Parks and Wildlife Code, Chapter 53.

§53.8. Alligator Licenses, Permits, Stamps, and Tags.

(a) resident retail alligator dealer's permit--$126;

(b) nonresident retail alligator dealer's permit--$504;

(c) resident wholesale alligator dealer's permit--$252;

(d) nonresident wholesale alligator dealer's permit--$1,008;

(e) alligator import permit--$105;

(f) alligator farmer permit--$252;

(g) nuisance alligator control permit--$252;

(h) [~~(g)~~] alligator nest stamp--$63;

(i) [~~(h)~~] wild caught alligator hide tag--$21;

(j) [~~(i)~~] farm raised alligator hide tag--$5;

(k) [~~(j)~~] commercial wildlife management area alligator hide tag--$126;

(l) [~~(k)~~] alligator export fee--$5 per alligator, except for alligators accompanied by a valid department issued hide tag; [~~and~~]

(m) [~~(l)~~] alligator management tag--$6; and[~~.~~]

(n) nuisance alligator control tag--free.

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 December 9, 2011.

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Ann Bright
General Counsel
Texas Parks and Wildlife Department
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For further information, please call: (512) 389-4775

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CHAPTER 59. PARKS
SUBCHAPTER A. PARK ENTRANCE AND PARK USER FEES

31 TAC §59.5

The Texas Parks and Wildlife Department proposes new §59.5, concerning Outsourcing the Sale of State Park Passes. The proposed new rule is necessary to comply with the provisions of House Bill 1300 (HB 1300), enacted by the 82nd Texas Legislature, Regular Session (2011). HB 1300 amended Parks and Wildlife Code, Chapter 13 by adding new §13.0151, which authorizes the department to contract with any entity the department considers appropriate to sell state park passes in any of the entity's retail locations and delegates rulemaking authority to the Parks and Wildlife Commission (commission) for that purpose.

Under the provisions of Parks and Wildlife Code, §21.111, the department may charge and collect an entrance fee to state park sites. Under Parks and Wildlife Code, §11.027, the commission by rule may establish and provide for the collection of a fee for entering, reserving, or using a facility or property owned or managed by the department. Pursuant to this authority, the department currently sells state parks passes.

Proposed new §59.5(a) would define "state park pass" as a "pass that allows entry to a state park, state natural area, or state historic site under the jurisdiction of the department." The definition is necessary to provide a specific meaning for the term.

Proposed new §59.5(b) would stipulate that the department, at its discretion and following the completion of feasibility and cost-benefit analyses, may outsource the sale of state park passes to commercial entities. The proposed new provision is necessary to allow for the selection of third-party entities only following careful study of the benefits to the department of outsourcing the sale of state park passes.

Proposed new §59.5(c) would stipulate that prior to outsourcing the sale of state parks passes, the department will determine the form and manner in which awarded commercial entities may issue state park passes. The proposed new provision is necessary to ensure that state park passes being sold by a third-party entity meet department standards.

Mike Crevier, Director of State Parks Business Management, has determined that for each year of the first five years that the rule as proposed is in effect, the fiscal implications to state government as a result of enforcing or administering the rule, if any,

will be positive. The intent of HB 1300 is to provide the department with additional methods to increase revenue. Any agreement between the department and a third-party entity to sell state park passes will be contingent on a positive fiscal impact on the agency; however, that impact will be determined by the feasibility and cost-benefit analyses required by the rule.

There will be no fiscal implications for other units of state or local government as a result of enforcing or administering the rule.

Mr. Crevier also has determined that for each year of the first five years the rule as proposed is in effect, the public benefit anticipated as a result of enforcing or administering the rule as proposed will be the increased availability of state park passes for purchase by the public.

Under the provisions of Government Code, Chapter 2006, a state agency must prepare an economic impact statement and a regulatory flexibility analysis for a rule that may have an adverse economic effect on small businesses and micro-businesses. As required by Government Code, §2006.002(g), the Office of the Attorney General has prepared guidelines to assist state agencies in determining a proposed rule's potential adverse economic impact on small businesses. Those guidelines state that an agency need only consider a proposed rule's "direct adverse economic impacts" to small businesses and micro-businesses to determine if any further analysis is required. For that purpose, commission considers "direct economic impact" to mean a requirement that would directly impose recordkeeping or reporting requirements; impose taxes or fees; result in lost sales or profits; adversely affect market competition; or require the purchase or modification of equipment or services.

The department has determined that there will be no adverse economic effects on small businesses, microbusinesses, or persons required to comply with the rule as proposed. Accordingly, the department has not prepared a regulatory flexibility analysis under Government Code, Chapter 2006.

The department has not drafted a local employment impact statement under the Administrative Procedure Act, §2001.022, as the agency has determined that the rule as proposed will not impact local economies.

The department has determined that Government Code, §2001.0225 (Regulatory Analysis of Major Environmental Rules), does not apply to the proposed rule.

The department has determined that there will not be a taking of private real property, as defined by Government Code, Chapter 2007, as a result of the proposed rule.

Comments on the proposed rule may be submitted to Darcy Bontempo, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744; (512) 389-4574 (e-mail: darcy.bontempo@tpwd.state.tx.us).

The new rule is proposed under the authority of Parks and Wildlife Code, §13.051, as added by HB 1300, enacted by the 82nd Texas Legislature, Regular Session (2011), which authorizes the commission to adopt rules to implement that section.

The proposed new rule affects Parks and Wildlife Code, Chapter 13.

§59.5. Outsourcing the Sale of State Park Passes.

(a) As used in this section, a "state park pass" is a pass that allows entry to a state park, state natural area, or state historic site under the jurisdiction of the department.

(b) At the discretion of the department, following the completion of feasibility and cost-benefit analyses, the department may outsource the sale of state park passes to commercial entities.

(c) Prior to outsourcing the sale of state parks passes, the department will determine the form and manner in which awarded commercial entities may issue state park passes.

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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Ann Bright
General Counsel
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CHAPTER 65. WILDLIFE
SUBCHAPTER C. PERMITS FOR TRAPPING, TRANSPORTING, AND TRANSPLANTING GAME ANIMALS AND GAME BIRDS

31 TAC §65.101, §65.104

The Texas Parks and Wildlife Department proposes amendments to §65.101 and §65.104, concerning Permits for Trapping, Transporting, and Transplanting Game Animals and Game Birds. The proposal would amend §65.101, concerning Definitions and §65.104, concerning Permit to Trap, Transport, and Process Surplus White-tailed Deer (TTP permit). The proposed amendments would establish the conditions under which a qualified individual could be issued a TTP permit.

Parks and Wildlife Code, Chapter 43, Subchapter E, authorizes the Texas Parks and Wildlife Commission to establish permits and promulgate rules governing the trapping, transporting, and processing of surplus white-tailed deer by property owners' associations and political subdivisions. Under the provisions of Senate Bill 498, enacted by the 82nd Texas Legislature, Parks and Wildlife Code, Chapter 43, Subchapter E, was amended to require the commission to adopt rules for determining the circumstances under which a qualified individual (in addition to property owners' associations and political subdivisions) may obtain a TTP permit.

The proposed amendment to §65.101 would add the statutory definition of "qualified individual," contained in Parks and Wildlife Code §43.0612(a)(2), as added by Senate Bill 498, which is "an individual who has a wildlife management plan approved by the department." This definition is included for ease of reference.

The proposed amendment to §65.104 would stipulate the circumstances under which a qualified individual may obtain a TTP permit. The circumstances would require a qualified individual to have been a qualified individual for at least the two-year period immediately preceding an application for a TTP; to have been in reasonable compliance, as determined by the department, with the recommendations of the wildlife management plan for the two years immediately preceding an application for a TTP; and to

have a wildlife management plan that recommends the harvest of at least 100 deer in the year for which a TTP is sought. The two-year period for maintaining and reasonably complying with the recommendations of a wildlife management plan was selected because the department intends to ensure that a reasonable and genuine effort has been made to control deer populations by means of traditional hunting activities before authorizing measures that would preempt traditional hunting. The 100-deer harvest recommendation threshold was selected because the department intends for the rules to function as a method for landowners to reduce surplus populations on a single property when traditional hunting pressure is inadequate, rather than a method to remove nuisance deer in an area of multiple properties, and to restrict TTP activities to properties where the removal is biologically efficacious.

Alan Cain, White-tailed Deer Program Leader, has determined that for each year of the first five years that the rules as proposed are in effect, there will be no fiscal implications to state and local governments as a result of enforcing or administering the rules.

Mr. Cain has also determined that for each year of the first five years the rules as proposed are in effect, the public benefit anticipated as a result of enforcing or administering the rules as proposed will be the conformity of department regulations with the provisions of the Parks and Wildlife Code.

Under the provisions of Government Code, Chapter 2006, a state agency must prepare an economic impact statement and a regulatory flexibility analysis for a rule that may have an adverse economic effect on small businesses and micro-businesses. As required by Government Code, §2006.002(g), the Office of the Attorney General has prepared guidelines to assist state agencies in determining a proposed rule's potential adverse economic impact on small businesses. Those guidelines state that an agency need only consider a proposed rule's "direct adverse economic impacts" to small businesses and micro-businesses to determine if any further analysis is required. For that purpose, the department considers "direct economic impact" to mean a requirement that would directly impose recordkeeping or reporting requirements; impose taxes or fees; result in lost sales or profits; adversely affect market competition; or require the purchase or modification of equipment or services. The department has determined that the rules as proposed would not affect any person, small or microbusinesses. Accordingly, the department has not prepared a regulatory flexibility analysis under Government Code, Chapter 2006.

The department has not drafted a local employment impact statement under the Administrative Procedure Act, §2001.022, as the department has determined that the rules as proposed will not impact local economies.

The department has determined that Government Code, §2001.0225 (Regulatory Analysis of Major Environmental Rules), does not apply to the proposed rules.

The department has determined that there will not be a taking of private real property, as defined by Government Code, Chapter 2007, as a result of the proposed rules.

Comments on the proposed rules may be submitted to Robert Macdonald, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744; (512) 389-4775 (e-mail: robert.macdonald@tpwd.state.tx.us).

The amendments are proposed under the authority of Parks and Wildlife Code, §43.0612, as amended by Senate Bill 498, enacted by the 82nd Texas Legislature, Regular Session (2011), which requires the commission to adopt rules for determining the circumstances under which a qualified individual may obtain a TTP permit.

The proposed amendments affect Parks and Wildlife Code, Chapter 43, Subchapter E.

§65.101. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise. All other words and terms shall have the meanings assigned by Parks and Wildlife Code.

(1) Amendment--A specific alteration or revision of currently permitted activities, the effect of which does not constitute, as determined by the department, a new trapping, transporting and transplanting operation.

(2) Certified Wildlife Trapper--An individual who receives a department-issued permit pursuant to this section.

(3) Natural Habitat--The type of site where a game animal or game bird normally occurs and existing game populations are not dependent on manufactured feed or feeding devices for sustenance.

(4) Nuisance Squirrel--A squirrel that is causing damage to personal property.

(5) Overpopulation--A condition where the habitat is being detrimentally affected by high animal densities, or where such condition is imminent.

(6) Permittee--Any person authorized by a permit to perform activities governed by this subchapter.

(7) Permit year--September 1 of any year to August 31 of the following year.

(8) Processing facility--The specific destination of white-tailed deer trapped and transported pursuant to a permit to trap, transport, and process surplus white-tailed deer where deer will be processed for consumption.

(9) Qualified individual--An individual who has a wildlife management plan approved by the department.

(10) [~~(9)~~] Recruitment--The Fall survey estimate of the number of fawns (any deer less than one year of age) on a property.

(11) [~~(10)~~] Release Site--The specific destination of game animals or game birds to be relocated pursuant to a permit issued under this subchapter.

(12) [~~(11)~~] Stocking Policy--The policy governing stocking activities made or authorized by the department as specified in §§52.101 - 52.105, 52.201, 52.202, 52.301 and 52.401 of this title (relating to Stocking Policy).

(13) [~~(12)~~] Supervisory permittee--A person who supervises the activities of permittees authorized to conduct activities.

(14) [~~(13)~~] Trap Site--The specific source of game animals or game birds to be relocated pursuant to a permit issued under this subchapter.

(15) [~~(14)~~] Wildlife Stocking Plans--The stocking plan for a:

(A) trap site consists of the biological information about the trap site required by the department on the application for a permit under this subchapter; and

(B) release site is the same as that required for a wildlife management plan under the provisions of §65.25 of this title (relating to Wildlife Management Plan).

§65.104. Permit to Trap, Transplant, and Process Surplus White-Tailed Deer.

(a) All deer trapped and transported pursuant to this section shall be delivered to a processing facility selected by the applicant and approved by the department. Acceptable processing facilities are:

(1) Texas Department of Criminal Justice penal facilities located in Palestine and Amarillo;

(2) other government-sanctioned penal facilities in the state of Texas;

(3) independent facilities in the state of Texas inspected for food safety by the Department of State Health Services [~~Texas Department of Health~~]; and

(4) any other processing facility approved by the department.

(b) All carcasses shall be utilized, either by a penal facility, or by donation to a department-approved charitable organization.

(c) Deer may be euthanized at either the trap site or the processing facility. If deer are euthanized at the trap site, carcasses must be maintained in edible condition.

(d) The permittee is responsible for establishing an acceptable schedule for delivery of deer with the processing facility. However, transport of live, trapped deer shall begin within 20 hours of trapping.

(e) The applicant shall specify whether a trap site is the entire political subdivision or property owners' association, or one or more individual tracts within the boundaries of the political subdivision or property owners' association. If the trap site is an individual tract, it must be identified on the permit application.

(f) The department may issue a permit under this section to a qualified individual, provided, with respect to the tract of land for which a TTP is sought:

(1) the person has been a qualified individual for at least the two-year period immediately preceding an application for a TTP;

(2) the qualified individual has been in reasonable compliance, as determined by the department, with the recommendations of the wildlife management plan for each of the two years immediately preceding an application for a TTP; and

(3) the qualified individual's wildlife management plan recommends the harvest of at least 100 deer in the year for which a TTP is sought.

(g) [~~(f)~~] The department may, at its discretion, require the applicant to supply additional information concerning the proposed trapping, transporting, and processing activity when deemed necessary to carry out the purposes of this subchapter.

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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Ann Bright
General Counsel
Texas Parks and Wildlife Department
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SUBCHAPTER P. ALLIGATOR PROCLAMATION

The Texas Parks and Wildlife Department proposes the repeal of §65.363 and new §65.363, concerning Nuisance Alligator Control. The proposed new rule would establish a permit for the control of nuisance alligators; prescribe requirements for permit application and issuance; set forth permit privileges and restrictions; specify reporting, notification, and recordkeeping requirements; and establish provisions for the denial of permit issuance and review of agency decisions to deny permit issuance. For purposes of this preamble, a reference to "permit" or "control permit," unless otherwise indicated, is a reference to a nuisance alligator control permit.

Over the last 20 years, once-imperiled alligator populations in Texas have rebounded spectacularly; however, increased suburban, exurban, and industrial development in and adjacent to coastal counties, particularly along the mid- and upper coast, has resulted in increasing numbers of nuisance alligator complaints, especially in areas biologically characterized by diminishing or little to no habitat. Under the current regulatory protocol for nuisance alligator control, the department contracts with qualified individuals for the removal of nuisance alligators. Each control hunter bids for the privilege of conducting nuisance control activities in a specific territory, agreeing to pay a per-foot price to the department for every alligator removed. In return, the control hunter is allowed to retain captured alligators and either sell them to alligator farmers or process and sell the skin and meat. All removals are authorized on a case-by-case basis by the department.

The department has concluded that given the increased number of nuisance alligator complaints, the current system for addressing nuisance alligators is obsolete and inefficient, as it depends on a small number of contract hunters whose availability is not guaranteed and consumes large amounts of staff time with respect to response, evaluation, and disposition of nuisance alligator complaints. The proposed new rule would implement a new approach that would allow control hunters to contract directly with landowners for the removal of nuisance alligators. The control hunter still would be permitted to retain captured alligators and process or sell them.

Proposed new §65.363(a) would prohibit any person from taking, killing, transporting, selling, or releasing a nuisance alligator in Texas unless the person possesses a valid permit to do so, except as provided in 31 TAC §65.49(g), which allows any person to kill an alligator in the immediate defense of human life or to protect livestock or other domestic animals from imminent injury or death. The proposed provision is necessary to establish the acts that encompass nuisance alligator control.

Proposed new §65.363(b) would set forth the procedure and requirements for the application and issuance of a nuisance alligator control permit. Proposed new subsection (b)(1) would require an applicant to submit a completed application, complete a department-administered course on nuisance alligator control,

pass a department-administered examination, and pay a permit fee of $252. Under the current protocol, nuisance alligator complaints are evaluated by department personnel on a case-by-case basis and handled by the department or by a control hunter notified by the department, depending on the circumstances. Under the proposed new protocol, nuisance alligator complaints would be handled directly by control hunters for a price negotiated between the control hunter and the landowner. Because department staff will not be directly involved on a case-by-case basis, the department believes that it is important to ensure that control hunters are qualified and trained to employ appropriate and effective techniques to minimize threats to human safety, determine whether and alligator is a nuisance alligator and ensure that nuisance alligators are treated humanely. For this reason, the proposed rule would require prospective permittees to complete a department-administered course in the proper methods of alligator control and to pass a test to assess that knowledge, before a permit could be issued. The proposed new subsection would establish an annual deadline of November 1 for the submission of permit applications, which is necessary to allow staff to process applications and conduct training activities at a time of the year when alligators are not active. The proposed new subsection also provides for the refusal of permit issuance to any person who, in the department's determination, lacks the skill, experience, or aptitude to adequately perform the activities typically involved in nuisance alligator control. There is an inherent danger in approaching and handling alligators under any circumstances, and it is axiomatic that such encounters in urban or suburban environments involve animals and humans under increased stress. Therefore, the department seeks to provide for instances in which a prospective permittee, despite department training, is believed to be unready to conduct control activities.

Proposed new §65.363(c) would establish the period of validity for a nuisance alligator control permit at one year, which is consistent with validity periods of other, similar types of permits.

Proposed new §65.363(d) would set forth the privileges and restrictions of a nuisance alligator control permit. Proposed paragraph (1) would authorize a control hunter to contract directly with a landowner or landowner's authorized agent (including a political subdivision, governmental entity, or property owner's association) for a fee or other compensation for the removal of nuisance alligators. As noted previously, the number of nuisance alligator complaints in urban and suburban areas has steadily increased, making it unfeasible for both fiscal and practical reasons for department personnel to continue to supervise nuisance control activities on a case-by-case basis. By allowing control hunters to contract directly with landowners, the department hopes to streamline the process and allow game wardens and biologists to attend to other duties. The proposed new paragraph also would allow control hunters to take nuisance alligators at any time of day, to retain and sell alligators taken under a permit, and to release alligators into suitable habitat with the approval of the department and the owner of the land on which the release occurs. Proposed new paragraph (2) would prohibit control hunters from taking alligators that are not nuisance alligators and from using any means, methods, or procedure not approved by the department for the capture, immobilization, transport, or dispatch of a nuisance alligator. The department intends for the proposed rule to be used only in instances when an alligator is a bona fide nuisance as defined in 31 TAC §65.352 ("an alligator that is depredating or a threat to human health or safety"). The department will specify the authorized means and methods for the capture of nuisance alligators, and the take of nuisance alligators by permittees will be lawful at any time of day.

Proposed new §65.363(e) would stipulate that all tagging requirements currently in effect would also apply to alligators taken or possessed under a nuisance control permit. By federal law (50 CFR §23.70), alligators cannot be exported from any state that is not approved for export by U.S. Fish and Wildlife Service. To receive export approval, the state must, among other things, require all harvested alligators to be tagged with a CITES (Convention on International Trade in Endangered Species) tag, an identification marker that allows lawfully taken crocodilian species to be differentiated from protected lookalike species.

Proposed new §65.363(f) would prescribe the reporting, notification, and recordkeeping requirements for nuisance control hunters. Proposed new paragraph (1) would prohibit nuisance control activities unless certain information regarding the owner of the land where the control activities take place is possessed in writing on the person of the control hunter. The department seeks to ensure that all alligators taken under a control permit are in fact nuisance alligators and that each nuisance alligator can be traced back to a named complainant who is legally able to authorize the removal of nuisance alligators from the property where control activities are or have been conducted. The department does not intend for a control permit to authorize indiscriminate or unlimited alligator harvest. Proposed new paragraph (2) would require each control hunter to maintain a daily log of nuisance control activities, to include the case number of the nuisance alligator complaint (if the nuisance complaint was referred to the control hunter by the department), the date and location of each nuisance alligator captured, the sex and length of each alligator captured, and the disposition of each alligator captured. As mentioned in the discussion of proposed paragraph (1), the department does not intend to create a way for unscrupulous persons to engage in wholesale removal of alligators under the guise of nuisance control. Requiring permittees to maintain a record of activities in real time creates two checks on such behavior. First, because the proposed new rule also would require permittees to submit hide tag utilization reports and quarterly harvest reports, inconsistencies between those reports and the daily log will alert the department to possible unscrupulous behavior. Second, department game wardens will from time to time make spot checks in the field to ensure that daily logs are being maintained and that the information in the logs is accurate. Proposed new paragraph (3) would require control hunters to retain an invoice or receipt for each alligator taken by the permittee that is sold or otherwise transferred to another person. The department has determined that the creation of a paper trail is necessary to establish and/or verify that any given alligator was lawfully taken. Proposed new paragraph (4) would require that all records and documents required under the proposed new section be retained and kept on file for inspection upon request of a department employee acting within the official scope of duty for a two-year period immediately following the expiration of the period of validity of the permit. The two-year record retention period was selected because that is the statute of limitations for a Class C misdemeanor, which is the statutory penalty for violations of Parks and Wildlife Code, Chapter 65, the statutory authority for the regulation of alligators by the department. The proposed new provision is necessary to enable the department to track the activities of persons in the event that an investigation is necessary. Proposed new paragraph (5) would require control hunters to complete an alligator hide tag report immediately upon the take of a nuisance alligator and to submit it to the

department within seven days of take; require control hunters to submit quarterly reports of nuisance control activity, and specify that the department may refuse to issue a new or subsequent permit to anyone who has not complied with the provisions of the proposed new paragraph. As discussed previously, the export of alligators from a state is prohibited unless the state has been approved to do so by the U.S. Fish and Wildlife Service (Service). In order to receive export approval, the state annually must furnish the Service an assessment of the condition of the wild alligator population; a description of the types of information on which the assessment is based, such as an analysis of carcass demographics, population models, analysis of past harvest levels as a function of skin prices or harvester effort, or indices of abundance independent of harvest information, such as nest surveys, spotlighting surveys, or nuisance complaints; harvest control measures, including laws regulating harvest seasons and methods; total allowable harvest; tagging or marking requirements for skins and parts; habitat evaluation; and information on nuisance alligator management programs. In order for the department to provide this information to the Service, which in turn allows alligators harvested in Texas to be exported, the department must get data from persons who raise or take alligators. The data is also useful in the event that law enforcement investigations become necessary.

Proposed new subsection (g) would set forth the conditions under which the department could refuse to issue a control permit, based on the criminal history of a permittee or applicant with regard to wildlife law. The proposed new subsection would allow the department to refuse permit issuance to any person who has been convicted of, pleaded *nolo contendere* to, or received deferred adjudication for a violation of Parks and Wildlife Code, Chapter 43, Subchapters C, E, L, or R, or a violation of Parks and Wildlife Code, Chapter 65; a violation of Parks and Wildlife Code that is a Class B misdemeanor, a Class A misdemeanor, or felony; or a violation of Parks and Wildlife Code, §63.002. In addition, the proposed new subsection would allow the department to refuse permit issuance to any person who has been convicted of, pleaded *nolo contendere* to, received deferred adjudication or pre-trial diversion for, or assessed a civil penalty for a violation of 16 U.S.C. §§3371-3378 (the Lacey Act). The department has determined that the decision to issue a permit should take into account an applicant's history of violations involving the capture and possession of live animals, major violations of the Parks and Wildlife Code (Class B misdemeanors, Class A misdemeanors, and felonies), and violations involving alligators (Parks and Wildlife Code, Chapter 65). The department reasons that it is appropriate to deny the privilege of taking wildlife resources for personal benefit to persons who exhibit a demonstrable disregard for the regulations governing wildlife. Similarly, it is appropriate to deny the privilege of personally benefitting from wildlife to a person who has exhibited demonstrable disregard for wildlife law in general by committing more egregious (Class B misdemeanors, Class A misdemeanors, and felonies) violations of wildlife law.

The denial of the ability to conduct nuisance alligator control activities as a result of an adjudicative status listed in the proposed new rule would not be automatic, but within the discretion of the department. Factors that may be considered by the department in determining whether to refuse permit issuance based on adjudicative status include, but are not limited to, the seriousness of the offense, the number of offenses, the existence or absences of a pattern of offenses, the length of time between the offense and the permit application, the applicant's efforts towards rehabilitation, and the accuracy of the information provided by the applicant regarding the applicant's prior permit history.

Proposed new subsection (h) would provide a mechanism for persons who have been denied permit issuance to have the opportunity have such decisions reviewed by department managers. The proposed new subsection is intended to help ensure that decisions affecting permit privileges are correct.

Proposed new §65.363(i) would establish the broad context of acts that would constitute an offense under the rule and the Parks and Wildlife Code.

Mitch Lockwood, Big Game Program Director, has determined that for each year of the first five years that the rule as proposed is in effect, there will be fiscal implications to state government as a result of enforcing or administering the rule. Those implications are expected to be positive, since the nuisance alligator control permit is a new protocol intended to eliminate the substantial costs incurred by the department in administering the present nuisance alligator control protocol. The department expended approximately $121,000 in salary in Fiscal Year 2009 (the last full fiscal year for which data is available) on nuisance alligator control activities, primarily in the form of biologist and game warden time (travel, investigation, and disposition) for approximately 1,100 nuisance alligator complaints. This estimate was derived by multiplying the number of complaints by an estimated four-hour commitment of staff time per complaint at the average hourly salary of a field game warden ($25.66), which represents the majority of nuisance alligator control activities undertaken by the department. This estimate does not include fuel, equipment, or administrative costs, which are not segregated at a scale fine enough to isolate those costs with respect to nuisance alligator control administration.

Although the department will incur costs associated with providing mandatory nuisance alligator control hunter training (approximately $500 per student), data entry and administrative expenses related to data analysis (approximately $15,000 per year), and loss of revenue from the elimination of control hunter payments and loss of hide fees (approximately $9,836 per year, using the last four years of data) to the department, that cost is expected to be significantly lower than the current costs of administering nuisance alligator control activities and may well be offset or more than offset by an increase in permit issuance.

There will be no fiscal implications for other units of state or local government as a result of enforcing or administering the rule.

Mr. Lockwood has also determined that for each year of the first five years the rule as proposed is in effect, the public benefit anticipated as a result of enforcing or administering the rule as proposed will be the control of nuisance alligators.

Under the provisions of Government Code, Chapter 2006, a state agency must prepare an economic impact statement and a regulatory flexibility analysis for a rule that may have an adverse economic effect on small businesses and micro-businesses. As required by Government Code, §2006.002(g), the Office of the Attorney General has prepared guidelines to assist state agencies in determining a proposed rule's potential adverse economic impact on small businesses. Those guidelines state that an agency need only consider a proposed rule's "direct adverse economic impacts" to small businesses and micro-businesses to determine if any further analysis is required. For that purpose, the department considers "direct economic impact" to mean a requirement that would directly impose recordkeeping or reporting requirements; impose taxes or fees; result in lost sales or profits;

adversely affect market competition; or require the purchase or modification of equipment or services.

The department has determined that most if not all businesses affected by the proposed rule qualify as small or microbusinesses. The department also has determined that there will be no adverse economic effects on small businesses, microbusinesses, and persons required to comply with the amendments as proposed. Although the proposed rule would impose a permit fee of $252 (proposed in a separate rulemaking published elsewhere in this issue of the *Texas Register),* the elimination of the per-foot charge paid to the department, coupled with the permittee's ability to both charge a fee for nuisance control services and sell the meat and hides, means that the net effect of the proposed rule on small and microbusinesses and persons required to comply will be positive. Accordingly, the department has not prepared a regulatory flexibility analysis under Government Code, Chapter 2006.

There will be an economic cost for persons to comply with the rule as proposed, namely, the $252 fee to obtain the nuisance alligator control permit, and the cost of recordkeeping, which is estimated to be less than $100 per year per permittee.

The department has not drafted a local employment impact statement under the Administrative Procedure Act, §2001.022, as the agency has determined that the rule as proposed will not impact local economies.

The department has determined that Government Code, §2001.0225 (Regulatory Analysis of Major Environmental Rules), does not apply to the proposed rule.

The department has determined that there will not be a taking of private real property, as defined by Government Code, Chapter 2007, as a result of the proposed rule.

The department has determined that the proposed rule is in compliance with 31 TAC §505.11 (Actions and Rules Subject to the Coastal Management Program) and §505.22 (Consistency Required for New Rules and Rule Amendments Subject to the Coastal Management Program).

Comments on the proposed rule may be submitted to Robert Macdonald, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744; (512) 389-4775 (e-mail: robert.macdonald@tpwd.state.tx.us).

31 TAC §65.363

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

The repeal is proposed under the authority of Parks and Wildlife Code, §65.003, which authorizes the commission to regulate taking, possession, propagation, transportation, exportation, importation, sale, and offering for sale of alligators, alligator eggs, or any part of an alligator that the commission considers necessary to manage this species, including regulations to provided for the periods of time when it is lawful to take, possess, sell, or purchase alligators, alligator hides, alligator eggs, or any part of an alligator; and limits, size, means, methods, and places in which it is lawful to take or possess alligators, alligator hides, alligator eggs, or any part of an alligator; and control of nuisance alligators.

The proposed repeal affects Parks and Wildlife Code, Chapter 65.

§65.363. Alligator Control.

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 December 9, 2011.

TRD-201105460
Ann Bright
General Counsel
Texas Parks and Wildlife Department
Earliest possible date of adoption: January 22, 2012
For further information, please call: (512) 389-4775

31 TAC §65.363

The new rule is proposed under the authority of Parks and Wildlife Code, §65.003, which authorizes the commission to regulate taking, possession, propagation, transportation, exportation, importation, sale, and offering for sale of alligators, alligator eggs, or any part of an alligator that the commission considers necessary to manage this species, including regulations to provided for the periods of time when it is lawful to take, possess, sell, or purchase alligators, alligator hides, alligator eggs, or any part of an alligator; and limits, size, means, methods, and places in which it is lawful to take or possess alligators, alligator hides, alligator eggs, or any part of an alligator; and control of nuisance alligators.

The proposed new rule affects Parks and Wildlife Code, Chapter 65.

§65.363. Nuisance Alligator Control.

(a) Permit Required. Except as provided in §65.49(g) of this title (relating to Alligators), no person may take, kill, transport, sell, or release a nuisance alligator, or offer to take, kill, transport, sell, or release a nuisance alligator unless that person possesses a valid nuisance alligator control permit issued by the department.

(b) Permit Application and Issuance.

(1) The department may issue a nuisance alligator control permit to a person who has:

(A) submitted a completed application on a form supplied by the department;

(B) completed a department-administered course on nuisance alligator control;

(C) taken a department-administered examination and obtained a minimum passing score as determined by the department; and

(D) paid the nonrefundable fee prescribed by Chapter 53, Subchapter A of this title (relating to Fees).

(2) In order to be considered for permit issuance in any given year, an applicant shall submit a completed application to the department by no later than November 1.

(3) The department may refuse to issue a permit to any person who, in the department's determination, lacks the skill, experience, or aptitude to adequately perform the activities typically involved in nuisance alligator control.

(c) Period of Validity. A nuisance alligator control permit is valid from the date of issuance through August 31 of the following year.

(d) Permit Privileges and Restrictions.

(1) A permittee under this section may:

(A) contract directly with a landowner or landowner's authorized agent (including a political subdivision, governmental entity, or property owner's association, as defined by Property Code, §2004.004), for a fee or other compensation to be determined by the parties involved, for the removal of a nuisance alligator or alligators;

(B) capture or kill a nuisance alligator at any time of day;

(C) retain and sell nuisance alligators, alive or dead, taken under a nuisance alligator control permit as provided under §65.357 of this title (relating to Purchase and Sale of Alligators); and

(D) release nuisance alligators in areas of suitable habitat with the prior written approval of the department and the owner (or the owner's authorized agent) of the property where the release occurs.

(2) A permittee may not:

(A) capture or kill an alligator that is not a nuisance alligator; or

(B) use any means, method, or procedure not approved by the department for the capture, immobilization, transport, or dispatch of a nuisance alligator.

(e) Tagging Requirements. All provisions of this subchapter applicable to the tagging of alligators apply to alligators taken under a nuisance alligator control permit.

(f) Reporting, Notification, and Recordkeeping Requirements.

(1) Landowner authorization. No permittee may engage in nuisance alligator control activities unless the written authorization of the landowner, the landowner's authorized agent, or a government official acting within the scope of official duty has been obtained. The authorization shall contain, at a minimum, the date, the name, address, phone number, and Texas Department of Public Safety driver's license or identification card number (or, if the person is not a Texas resident, similar documentation from the person's state of residence) of the person with whom the permittee has contracted for nuisance alligator control; and shall be signed by the landowner, agent, or official. The permittee shall physically possess the authorization required by this paragraph:

(A) at all times that the permittee is engaged in or conducts nuisance alligator control activities; and

(B) subsequent to the capture of a nuisance alligator, at all times the permittee is in possession of the alligator, dead or alive, until the alligator is sold, transferred to another person legally permitted to possess the alligator, or released.

(2) Daily Log. A permittee shall continuously maintain and possess upon their person while engaged in any activity governed by this subchapter a completed daily log on a form prescribed by the department, indicating:

(A) the date, location, and department-assigned case number for each nuisance alligator complaint responded to by the permittee as a result of a referral from the department;

(B) the date and location of each nuisance alligator captured by the permittee;

(C) the sex and length of each alligator captured;

(D) the disposition of each alligator captured, to include:

(i) the means of dispatch, if lethal control is employed; and

(ii) if the alligator is lawfully sold or lawfully transferred to another person, the name and applicable permit number of the person to whom the nuisance alligator is sold or transferred.

(3) Record of Sale or Transfer. A permittee shall retain an invoice or sales receipt for each alligator sold or transferred to another person.

(4) Record Retention. All records and documents required by this section shall be retained and kept available for inspection upon request of a department employee acting within the official scope of duty for a two-year period immediately following the expiration of the period of validity of the permit under which they are required to be kept.

(5) Reporting.

(A) A permittee shall complete a Nuisance Alligator Hide Tag Report (PWD-305) immediately upon the take of a nuisance alligator and shall submit the report to the department within seven days.

(B) A permittee shall submit completed quarterly reports to the department by March 15, June 15, September 15, and December 15. The reports must be on a form supplied or approved by the department and must be submitted even if no nuisance alligators were taken by the permittee.

(C) The department may refuse to issue an initial or subsequent permit to any person who is not in compliance with the provisions of this paragraph.

(g) Denial of Permit Issuance. The department may refuse permit issuance to any person who has been convicted of, pleaded nolo contendere to, or received deferred adjudication for:

(1) a violation of Parks and Wildlife Code, Chapter 43, Subchapters C, E, L, or R, or Parks and Wildlife Code, Chapter 65; or

(2) a violation of Parks and Wildlife Code that is a Class B misdemeanor, a Class A misdemeanor, or felony; or

(3) a violation of Parks and Wildlife Code, §63.002; or

(4) convicted, pleaded nolo contendere, received deferred adjudication or pre-trial diversion, or assessed a civil penalty for a violation of 16 U.S.C. §§3371-3378 (the Lacey Act).

(h) Review of Agency Decision. An applicant for a permit under this subchapter may request a review of a decision of the department to refuse issuance of a permit.

(1) An applicant seeking review of a decision of the department with respect to permit issuance under this subchapter shall first contact the department within 10 working days of being notified by the department of permit denial.

(2) The department shall schedule a review within 10 days of receipt of a request for a review. The department shall conduct the review and notify the applicant of the results within 45 working days of receiving a request for review.

(3) The request for review shall be presented to a review panel. The review panel shall consist of the following, or their designees:

(A) the Deputy Executive Director for Fisheries and Wildlife;

(B) the Director of the Wildlife Division; and

(C) the Deputy Division Director of the Wildlife Division.

(4) The decision of the review panel is the final department decision.

(i) Prohibited Acts. It is an offense for a permittee to:

(1) violate a provision of this subchapter;

(2) violate a condition of a permit issued under this subchapter; or

(3) treat or allow the treatment of an alligator in a cruel manner as defined in Penal Code, §42.09.

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 December 9, 2011.

TRD-201105461
Ann Bright
General Counsel
Texas Parks and Wildlife Department
Earliest possible date of adoption: January 22, 2012
For further information, please call: (512) 389-4775

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TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 9. PROPERTY TAX ADMINISTRATION

SUBCHAPTER H. TAX RECORD REQUIREMENTS

34 TAC §9.3031

The Comptroller of Public Accounts proposes an amendment to §9.3031, concerning rendition forms. This amendment is being proposed to delete the reference to Form 50-160, Mobile Homes Rendition of Taxable Property, which is no longer being published.

John Heleman, Chief Revenue Estimator, has determined that for the first five-year period the rule will be in effect, there will be no significant revenue impact on the state or units of local government.

Mr. Heleman also has determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be by improving the administration of local property valuation and taxation. The proposed amendment would have no fiscal impact on small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

Comments on the amendment may be submitted to Deborah Cartwright, Director, Property Tax Assistance Division, P.O. Box 13528, Austin, Texas 78711-3528. Comments must be received no later than 30 days from the date of publication of the proposal in the *Texas Register.*

The amendment is proposed pursuant to Tax Code, §22.24.

This section implements Tax Code, §22.24.

§9.3031. Rendition Forms.

(a) All appraisal offices and all tax offices appraising property for purposes of ad valorem taxation shall prepare and make available at no charge, printed or electronic forms for the rendering of property.

(b) A person rendering property shall use the model form adopted by the Comptroller of Public Accounts or a form containing information which is in substantial compliance with the model form if approved by the comptroller.

(c) Nothing in this section shall be construed to prohibit the combination of the information contained on two or more model forms into a single form in order to use a single form to achieve substantial compliance with two or more model forms.

(d) The comptroller's model forms applicable to this section may be revised at the discretion of the comptroller. Current forms can be obtained from the Comptroller of Public Accounts' Property Tax Assistance Division. The model rendition forms are:

(1) General Real Property Rendition of Taxable Property (Form 50-141);

(2) General Personal Property Rendition of Taxable Property-Non Incoming Producing (Form 50-142);

(3) Report of Leased Space for Storage of Personal Property (Form 50-148);

(4) Industrial Real Property Rendition of Taxable Property (Form 50-149);

(5) Oil and Gas Lease Rendition of Taxable Property (Form 50-150);

(6) Mine and Quarry Real Property Rendition of Taxable Property (Form 50-151);

(7) Telephone Company Rendition of Taxable Property (Form 50-152);

(8) REA-Financed Telephone Company Rendition of Taxable Property (Form 50-153);

(9) Electric Company and Electric Cooperative Rendition of Taxable Property (Form 50-154);

(10) Gas Distribution Utility Rendition of Taxable Property (Form 50-155);

(11) Railroad Rendition of Taxable Property (Form 50-156);

(12) Pipeline and Right-of-Way Rendition of Taxable Property (Form 50-157);

(13) Business Personal Property Rendition of Taxable Property (Form 50-144);

(14) Watercraft Rendition of Taxable Property (Form 50-158);

(15) Aircraft Rendition of Taxable Property (Form 50-159); and

[(16) Mobile Homes Rendition of Taxable Property (Form 50-160); and]

(16) [(17)] Residential Real Property Inventory (Form 50-143).

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 December 7, 2011.

TRD-201105383
Ashley Harden
General Counsel
Comptroller of Public Accounts
Earliest possible date of adoption: January 22, 2012
For further information, please call: (512) 475-0387

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 6. TEXAS DEPARTMENT OF CRIMINAL JUSTICE

CHAPTER 152. CORRECTIONAL INSTITUTIONS DIVISION
SUBCHAPTER A. MISSION AND ADMISSIONS

37 TAC §§152.1, 152.3, 152.5

The Texas Board of Criminal Justice proposes amendments to Chapter 152, Subchapter A, §§152.1, 152.3, and 152.5, concerning Mission and Admissions in the Correctional Institutions Division of the Texas Department of Criminal Justice (TDCJ). The proposed amendments redesignate state jail regions pursuant to changes made by the 82nd Texas Legislature.

Jerry McGinty, Chief Financial Officer for the TDCJ, has determined that for each year of the first five years the rules will be in effect, enforcing or administering the rules will not have foreseeable implications related to costs or revenues for state or local government.

Mr. McGinty has also determined that for each year of the first five-year period, there will not be an economic impact on persons required to comply with the rules. There will not be an adverse economic impact on small or micro businesses. Therefore, no regulatory flexibility analysis is required. The anticipated public benefit, as a result of enforcing the rules, will be to provide clear direction to local officials for admissions to prisons and state jails.

Comments should be directed to Melinda Hoyle Bozarth, General Counsel, Texas Department of Criminal Justice, P.O. Box 13084, Austin, Texas 78711, Melinda.Bozarth@tdcj.state.tx.us. Written comments from the general public should be received within 30 days of the publication of the proposal in the *Texas Register.*

The amendments are proposed under Texas Government Code §§499.071, 499.153, 507.003, 507.004, and 507.024.

Cross Reference to Statutes: Texas Government Code §492.013 and §494.001.

§152.1. Correctional Institutions Division.

The Correctional Institutions Division (CID) [("CI Division")] is the division of the Texas Department of Criminal Justice [("TDCJ" or "Agency")] with operational responsibility for providing safe and appropriate confinement, supervision, and rehabilitation of Texas adult felony offenders sentenced under the [Chapter 12,] Texas Penal Code[,] or under [Article 42.12,] Texas Code of Criminal Procedure Article 42.12 §14B. The CID [CI Division] operates a variety of secure correctional facilities including prisons [(institutional units)], pre-release facilities, psychiatric facilities, medical facilities, substance abuse felony punishment [treatment] facilities, state jails [jail felony facilities], transfer facilities, [and] state boot camps and an intermediate sanction facility. [camp programs. The CI Division also administers and monitors privately operated secure correctional facilities.]

§152.3. Admissions.

(a) Counties will [shall] send commitment papers on offenders sentenced to the Texas Department of Criminal Justice (TDCJ) [TDCJ] to the TDCJ Records Office immediately following completion of the commitment papers. Those counties equipped to do so may send paperwork electronically.

(b) The TDCJ shall accept offenders sentenced to prison within 45 days of [day "state ready" period begins] the date the commitment papers are sent. If sent by mail, the 45 days begins on the postmarked date.

(c) Offenders shall [will] be scheduled for admission based on:

(1) their length of confinement in relation to the 45 days from the date the commitment papers are sent [paper-ready status]; and

(2) transportation routes.

(d) Counties will [shall] inform the TDCJ State Ready Office when [paper-ready] offenders for whom commitment papers have been sent are transferred to another facility by [due to] bench warrants.

(e) The TDCJ shall [will] notify counties via electronic transmission, such as [(]facsimile or computer transmission[)] when applicable, of offenders scheduled for intake, the date of intake, the respective reception unit, and transportation arrangements. Offenders shall [will] be sorted by name and State Identification (SID) number, as identified by the court docket.

(f) Counties will [shall in turn] notify the TDCJ admissions coordinator [Admissions Coordinator] of any offenders who are not available for transfer and the reason they are not available for transfer [why].

(g) Counties may identify offenders with medical or security issues that may be scheduled for intake out of sequence on a case-by-case basis by contacting the TDCJ admissions coordinator [Admissions Coordinator].

(h) After the entry of an order by a judge for admission of an offender to a state jail, the placement determination shall be made by the TDCJ Office of Admissions. Placement shall be made in the state jail designated as serving the county in which the offender resides unless:

(1) the offender has no residence or was a resident of another state at the time of committing an offense;

(2) alternative placement would protect the life or safety of any person;

(3) alternative placement would increase the likelihood of the offender's successful completion of confinement or supervision; [~~or~~]

(4) alternative placement is necessary to efficiently use [~~utilize~~] available state jail capacity, including alternative placement because of [~~due to~~] gender; or[~~.~~]

(5) alternative placement is necessary to provide medical or psychiatric care to the offender.

(i) If the offender is described by subsection (h)(1) of this section, placement shall be made in the state jail designated as serving the county in which the offense was committed, unless a circumstance in subsection (h)(2) - (5) [~~(4)~~] of this section applies.

(j) The TDCJ Admissions Office shall attempt to have placement determinations made at a regional level that may include one or more regions as designated in 37 Texas Administrative Code §152.5 [~~of this title (relating to Designation of State Jail Regions)~~].

§152.5. Designation of State Jail Regions.

(a) The Texas Board of Criminal Justice (TBCJ) [~~By law the Board~~] may not designate a region that subdivides a geographical area served by a community supervision and corrections department (CSCD). The TBCJ [~~Board~~] may designate a region that contains only one judicial district if that district serves a municipality with a population of 400,000 or more. The TBCJ shall consider [~~Board considers~~] the following factors [~~to be of significance~~] in ensuring that the CSCDs [~~community supervision and corrections departments~~] are served as efficiently as possible:

(1) The [~~the~~] number and size of counties being served by the CSCD [~~community supervision and corrections departments~~];

(2) Geographic [~~geographic~~] distances between counties; and

(3) The [~~the~~] need for state jail [~~felony facility~~] capacity as determined by the anticipated number of defendants who will be required by a judge to serve a term of confinement in a state jail.

(b) Based on these [~~factors~~] and any other factors deemed relevant [~~by the Board~~], the TBCJ [~~Board~~] designates a total of nine regions in the state for the purpose of providing regional state jail felony facilities. The following map shows the nine regions and the counties to be served in each region.
Figure: 37 TAC §152.5(b)

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 December 12, 2011.

TRD-201105465
Melinda Hoyle Bozarth
General Counsel
Texas Department of Criminal Justice
Earliest possible date of adoption: January 22, 2012
For further information, please call: (512) 463-9693

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SUBCHAPTER B. CORRECTIONAL CAPACITY

37 TAC §§152.21, 152.23, 152.25, 152.27

The Texas Board of Criminal Justice proposes amendments to Chapter 152, Subchapter B, §§152.21, 152.23, 152.25, and 152.27, concerning Correctional Capacity in the Correctional Institutions Division of the Texas Department of Criminal Justice (TDCJ). The proposed amendments increase the unit capacities at select units.

Jerry McGinty, Chief Financial Officer for the TDCJ, has determined that for each year of the first five years the rules will be in effect, enforcing or administering the rules will not have foreseeable implications related to costs or revenues for state or local government.

Mr. McGinty has also determined that for each year of the first five-year period, there will not be an economic impact on persons required to comply with the rules. There will not be an adverse economic impact on small or micro businesses. Therefore, no regulatory flexibility analysis is required. The anticipated public benefit, as a result of enforcing the rules, will be to provide additional capacity to offset capacity reductions and in preparation for projected offender population growth.

Comments should be directed to Melinda Hoyle Bozarth, General Counsel, Texas Department of Criminal Justice, P.O. Box 13084, Austin, Texas 78711, Melinda.Bozarth@tdcj.state.tx.us. Written comments from the general public should be received within 30 days of the publication of the proposal in the *Texas Register.*

The amendments are proposed under Texas Government Code §§499.101 - 499.110.

Cross Reference to Statutes: Texas Government Code §492.013 and §494.001

§152.21. Purpose.

[~~(a)~~] Pursuant to Texas Government Code[~~,~~] §§499.102 - 499.110, the purpose of this chapter is to establish the maximum rated capacity of individual units [~~and the systems of units, describe constraints on capacity and memorialize changes to capacity in a rulemaking format as required by law. Capacity determinations are no longer affected by Ruiz v. Johnson, Cause Number H-78-987, Southern District of Texas, Houston Division, which was dismissed in June of 2002. This chapter is intended to provide guidance to corrections officials and to policymakers for the sound determination and management of correctional capacity~~]. This chapter is not intended to create a liberty interest or grant a right on the part of any offender within the custody of the Texas Department of Criminal Justice [~~TDCJ~~].

[~~(b) The CI Division may confine an offender in a transfer facility only if paperwork and processing required under Section 8(a), Article 42.09, Code of Criminal Procedure, for transfer of the offender to the division has been completed, and only during a period in which the offender would otherwise be confined in a county jail awaiting transfer to the division following conviction of a felony or revocation of probation, parole, or release on mandatory supervision. (Government Code §499.152.)~~]

[~~(c) The CI Division may not confine an offender in a transfer facility for a period that exceeds two years, the maximum period for which a state jail felon may be confined in a state jail felony facility under Section 12.35, Penal Code. If an offender confined in a transfer facility is released from or transferred from the transfer facility or returned to the convicting county under court order, and is convicted~~

of a subsequent offense, is returned from the convicting county, or is the subject of a revocation of parole or mandatory supervision, the CI division shall not calculate the previous period of confinement in determining the maximum period the defendant may be confined in a transfer facility following conviction of the subsequent offense, return from the convicting county, or revocation. (Government Code §499.155.)]

[(d) The CI Division may confine in a state jail felony facility defendants required by a judge to serve a term of confinement in a state jail felony facility following a grant of deferred adjudication for or conviction of an offense punishable as a state jail felony. (Government Code §507.002.)]

[(e) The CI Division, with the approval of the Board, may designate one or more state jail felony facilities or discrete areas within one or more state jail felony facilities to treat offenders who are eligible for confinement in a substance abuse felony punishment facility or to house offenders who are eligible for confinement in a transfer facility, but only if the designation does not deny placement in a state jail felony facility of defendants required to serve terms of confinement in a facility following conviction of state jail felonies. The division may not house in a state jail felony facility an offender who has a history of or has shown a pattern of violent or assaultive behavior in county jail or a facility operated by the department, or an offender who will increase the likelihood of harm to the public if housed in the facility (Government Code §507.006).]

§152.23. Definitions.

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

[(1) "Capacity" means the greatest density of offenders in relation to space available for offender housing that is in compliance with standards for prison population established herein by the Board or as established by staff pursuant to authority conferred by the Board.]

(1) [(2)] De minimus increase in maximum rated unit capacity is ["De minimus increase in capacity" means] the addition of 2% [two percent] or fewer beds to the capacity of a unit on a one time basis as originally established by the Texas Board of Criminal Justice (TBCJ), and that the addition will not increase the monthly gross payroll of the unit to which it is added [to] by $500,000 or more.

(2) [(3)] H.B. 124 is ["H.B. 124" means] the statutory process for increases other than a de minimus ["de minimus"] increase to capacity pursuant to Texas Government Code[,] §§499.102 - 499.110, as enacted by H.B. 124, Acts 1991, 72nd Leg., ch. 655.

(3) Maximum rated unit capacity is the greatest density of offenders in relation to space available for offender housing as established by the TBCJ.

[(4) "Maximum system population" means the total number of offenders who may be assigned to units under this chapter.]

[(5) "Maximum system capacity" means 100% of the maximum system population permissible under this chapter.]

§152.25. Maximum Rated Capacity of Individual Units.

The Texas Board of Criminal Justice establishes the following capacities for existing units.
Figure: 37 TAC §152.25

§152.27. Unit and System Capacity Standards.

(a) Unit Capacity General Standard. Except as necessary on a temporary basis, the [The] number of offenders assigned to a unit shall not exceed the unit's maximum rated capacity as[. The unit's capacity is] established by the Texas Board of Criminal Justice.

(b) Texas Department of Criminal Justice (TDCJ) Operational Capacity Standard. The TDCJ should operate at no higher than 96% of the maximum system capacity.

(c) Increases in Capacity. An increase in maximum rated unit capacity, other than a de minimus increase, shall be made in accordance with Texas Government Code §§499.102 - 499.110.

[(b) System I Capacity. The combined capacity of all prison units built prior to 1985 ("System I capacity") is 42,210.]

[(c) System II Capacity. The combined capacity of all prison units built after 1985 ("System II capacity") is 54,321. Of this figure, there are 374 transient beds in System II that are not included in the combined System I and System II capacities.]

[(d) System III Capacity. The combined capacity of all state jail felony, transfer, substance abuse felony punishment, mentally retarded offender, and psychiatric facilities and boot camps, pre-release centers, private prisons and leased beds is 58,741.]

[(e) Correctional Institutions Division ("CI Division") Operational Capacity Standard. In accordance with Government Code §§499.021 et seq. (the Population Management Act), TDCJ CI Division will operate at no higher than 100% of the combined capacities of TDCJ Systems I and II.]

[(f) TDCJ Operational Capacity Standard. TDCJ CI Division should operate at no higher than 97.5% of the combined capacity of Systems I, II, and III.]

[(g) Increases in Capacity. An increase in unit capacity, other than a de minimus increase, shall be made in accordance with Government Code §§499.102 - 499.110.]

[(h) Statutory constraints on capacity.]

[(1) Temporary housing may not be considered for the purpose of computation of space available for offender housing. (Government Code §499.024.)]

[(2) The CI Division may not house offenders in tents, cellblock runs, hallways, laundry distribution rooms, converted dayroom space, gymnasiums, or any other facilities not specifically built for housing. Temporary housing may be used to house roving offender construction crews and offenders temporarily displaced only because of housing renovation, fire, natural disaster, riot or hostage situations, if the CI Division provides those offenders with reasonable sanitary hygiene facilities. (Government Code §501.111.)]

[(3) The CI Division may not house offenders with different custody classifications in the same cellblock or dormitory unless the structure of the cellblock or dormitory allows the physical separation of the different classifications of offenders. If an appropriate justification is provided by the unit classification committee or the state classification committee, the Board may permit the CI Division to temporarily house offenders with different custody classifications in the same cellblock or dormitory. The temporary housing shall only be used until sufficient beds become available to allow the Division to house the offenders by custody classification and in no event for more than 30 days. (Government Code §501.112.)]

[(4) The CI Division may not house more than two offenders in a cell designed for occupancy by one or two offenders. The following classes of offenders shall be housed in single occupancy cells:]

[(A) offenders confined in death row segregation;]

[(B) offenders confined in administrative segregation;]

[(C) offenders assessed a term of solitary confinement;]

~~[(D) offenders assessed as mentally retarded and whose habilitation plans recommend housing in a single occupancy cell;]~~

~~[(E) offenders with a diagnosed psychiatric illness being treated on an inpatient or outpatient basis whose individual treatment plans recommend housing in single occupancy cells; and]~~

~~[(F) offenders whose medical treatment plans recommend housing in a single occupancy cell. (Government Code §501.113)]~~

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 December 12, 2011.

TRD-201105466
Melinda Hoyle Bozarth
General Counsel
Texas Department of Criminal Justice
Earliest possible date of adoption: January 22, 2012
For further information, please call: (512) 463-9693

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37 TAC §152.29

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

The Texas Board of Criminal Justice proposes the repeal of §152.29, concerning Standards for Functional Areas.

The purpose of the repeal is to eliminate a rule that is merely a restatement of Texas Government Code §499.102.

Jerry McGinty, Chief Financial Officer for the Texas Department of Criminal Justice, has determined that for the first five years after the repeal, there will be no fiscal implications for state or local government.

Mr. McGinty has also determined that for the first five years after the repeal, there will not be an economic impact on the public because of the repeal. There will be no anticipated effect on small or micro businesses. The anticipated public benefit will be to ensure that state law solely controls this process.

Comments on the proposed repeal should be directed to Melinda Hoyle Bozarth, General Counsel, Texas Department of Criminal Justice, P.O. Box 13084, Austin, Texas 78711, Melinda.Bozarth@tdcj.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

The repeal is proposed under the Texas Government Code §499.102.

Cross Reference to Statutes: Texas Government Code §499.101 and §§499.103 - 499.110.

§152.29. Standards for Functional Areas.

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 December 12, 2011.

TRD-201105469
Melinda Hoyle Bozarth
General Counsel
Texas Department of Criminal Justice
Earliest possible date of adoption: January 22, 2012
For further information, please call: (512) 463-9693

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37 TAC §§152.31, 152.33, 152.35, 152.37

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

The Texas Board of Criminal Justice proposes the repeal of §152.31, concerning Addition to the Skyview Capacity; §152.33, concerning Addition to the Estes Unit Capacity; §152.35, concerning Addition to the Bartlett State Jail Capacity; and §152.37, concerning Addition to Capacity.

The purpose of the repeal is to eliminate unnecessary rules as the capacities for these facilities have been incorporated into 37 Texas Administrative Code §152.25.

Jerry McGinty, Chief Financial Officer for the Texas Department of Criminal Justice, has determined that for the first five years after the repeal, there will be no fiscal implications for state or local government.

Mr. McGinty has also determined that for the first five years after the repeal, there will not be an economic impact on the public because of the repeal. There will be no anticipated effect on small or micro businesses. The anticipated public benefit will be to ensure that all unit and state jail capacities are consolidated into one rule.

Comments on the proposed repeal should be directed to Melinda Hoyle Bozarth, General Counsel, Texas Department of Criminal Justice, P.O. Box 13084, Austin, Texas 78711, Melinda.Bozarth@tdcj.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

The repeal is proposed under the Texas Government Code §499.101 and §499.105.

Cross Reference to Statutes: Texas Government Code §§499.102 - 499.104 and §§499.106 - 499.110.

§152.31. Addition to the Skyview Capacity.

§152.33. Addition to the Estes Unit Capacity.

§152.35. Addition to the Bartlett State Jail Capacity.

§152.37. Addition to Capacity.

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 December 12, 2011.

TRD-201105470
Melinda Hoyle Bozarth
General Counsel
Texas Department of Criminal Justice
Earliest possible date of adoption: January 22, 2012
For further information, please call: (512) 463-9693

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CHAPTER 159. SPECIAL PROGRAMS

37 TAC §159.13

The Texas Board of Criminal Justice proposes amendments to §159.13, concerning Educational Services to Released Offenders/Memorandum of Understanding. The proposed amendments are necessary to delete an unnecessary legal reference and adopt a new memorandum of understanding.

Jerry McGinty, Chief Financial Officer for the Texas Department of Criminal Justice, has determined that for each year of the first five years the rule will be in effect, enforcing or administering the rule will not have foreseeable implications related to costs or revenues for state or local government.

Mr. McGinty has also determined that, for the first five-year period, there will not be an economic impact on persons required to comply with the rule. There will not be an adverse economic impact on small or micro businesses. Therefore, no regulatory flexibility analysis is required. The anticipated public benefit, as a result of enforcing the rule, is to offer releasees educational opportunities that will assist them in the successful reintegration into the community and help them to succeed.

Comments should be directed to Melinda Hoyle Bozarth, General Counsel, Texas Department of Criminal Justice, P.O. Box 13084, Austin, Texas 78711, Melinda.Bozarth@tdcj.state.tx.us. Written comments from the general public should be received within 30 days of the publication of the proposal in the *Texas Register.*

The amendments are proposed under Texas Government Code §508.318.

Cross Reference to Statutes: Texas Government Code §492.013.

§159.13. Educational Services to Released Offenders/Memorandum of Understanding.

(a) The Texas Department of Criminal Justice (TDCJ) adopts a memorandum of understanding with the Texas Education Agency (TEA) concerning the respective responsibilities of the TDCJ and the TEA in implementing a continuing educational program to increase the literacy of releasees.
[~~Figure: 37 TAC §159.13(a)~~]

(b) The memorandum of understanding is required by the Texas Government Code[~~,~~] §508.318[~~, as added by the 75th Texas Legislature, 1997, Chapter 165, §12.01~~].

(c) Copies of the memorandum of understanding are filed with the TEA [~~Texas Education Agency~~], 1701 North Congress Avenue, Austin, Texas 78701 and with the TDCJ Parole Division, 8610 Shoal Creek Blvd., Austin, Texas 78758 and may be reviewed during regular business hours.
Figure: 37 TAC §159.13(c)

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 December 12, 2011.

TRD-201105467
Melinda Hoyle Bozarth
General Counsel
Texas Department of Criminal Justice
Earliest possible date of adoption: January 22, 2012
For further information, please call: (512) 463-9693

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CHAPTER 195. PAROLE

37 TAC §195.81

The Texas Board of Criminal Justice proposes amendments to §195.81, concerning Temporary Housing Assistance for offenders under supervision of the Texas Department of Criminal Justice (TDCJ) Parole Division. The proposed amendments clarify the criteria for seeking temporary housing assistance.

Jerry McGinty, Chief Financial Officer for the TDCJ, has determined that for each year of the first five years the rule will be in effect, enforcing or administering the rule will not have foreseeable implications related to costs or revenues for state or local government.

Mr. McGinty has also determined that for each year of the first five-year period, there will not be an economic impact on persons required to comply with the rule. There will not be an adverse economic impact on small or micro businesses. Therefore, no regulatory flexibility analysis is required. The anticipated public benefit, as a result of enforcing the rule, will be to provide a mechanism for housing assistance for offenders released on parole or mandatory supervision on or after January 1, 2010.

Comments should be directed to Melinda Hoyle Bozarth, General Counsel, Texas Department of Criminal Justice, P.O. Box 13084, Austin, Texas 78711, Melinda.Bozarth@tdcj.state.tx.us. Written comments from the general public should be received within 30 days of the publication of the proposal in the *Texas Register.*

The amendments are proposed under Texas Government Code §508.157.

Cross Reference to Statutes: Texas Government Code §492.013

§195.81. Temporary Housing Assistance Program.

(a) Purpose. The temporary housing assistance program is intended primarily to provide housing assistance for offenders who have been approved for parole, but have no home plan, and to assist offenders in the transition from community residential facilities and transitional treatment centers. The Texas Department of Criminal Justice (TDCJ) is authorized to pay for temporary housing[~~, including food, clothing, and hygiene items~~] for any offender who has insufficient financial and residential resources when released on parole or mandatory supervision on or after January 1, 2010.

(b) Criteria for Temporary Housing Assistance.

(1) Temporary housing assistance may only be provided if the TDCJ does not operate or contract for the operation of a residential correctional facility in the offender's legal county of residence. A residential correctional facility does not include a transitional treatment center, a substance abuse felony punishment facility, or any other facil-

ity operated by or under contract with the TDCJ for the primary purpose to provide substance abuse treatment or aftercare.

(2) The temporary housing must have existed on June 1, 2009, as either a multifamily residence or a motel unless the TDCJ or the owner of the structure provides notice and has a public meeting as required for a community corrections facility on the issue of whether the use is appropriate.

(3) An offender's family, personal sponsors, or anyone on community supervision, parole, or mandatory supervision or persons required to register as a sex offender are not eligible to provide housing for temporary housing assistance.

(c) [~~(b)~~] Temporary Housing Site Approval.

(1) Any provider that wants to provide temporary housing for an offender shall forward the following information to the TDCJ Parole Division, Huntsville Placement and Release Unit, 1650 7th St., West Building, Huntsville, Texas 77320.

(A) Director's name or point of contact;

(B) E-mail [~~Email~~] address;

(C) Physical address, city, and zip code;

(D) Telephone number;

(E) Cost; and

(F) Services provided.

(2) The TDCJ shall investigate and approve the sites it deems appropriate. [~~Priority shall be given to sites located in communities where halfway houses are not under contract with the TDCJ.~~] Factors considered shall include, but not be limited to whether:

(A) An on-site manager is available 24 hours per day, seven days per week.

(B) The site is located within range of public transportation routes [~~range~~], or transportation is provided by the provider to job interviews, employment, housing searches, and counseling appointments.

(C) The site is located within 1,000 feet of premises where children commonly gather, including a school, day-care facility, playground, public or private youth center, public swimming pool, or video arcade facility.

(D) The site is properly maintained and clean.

(E) The provider rules are consistent with parole rules and conditions of supervision.

[~~(F) Kitchen, cooking utensils, and food are provided by the provider or other arrangements are made by the provider for meals.~~]

[~~(G) Hygiene items, clothing, washer, and dryer are provided by the provider.~~]

(3) The TDCJ shall maintain a list of all providers and sites that have been approved for temporary housing.

(d) [~~(c)~~] Offender Selection and Placement.

(1) The TDCJ shall not discriminate against any offender because of race, color, religion, gender, national origin, age, disability, or genetic information.

(2) An offender [~~Offenders~~] released on parole or mandatory supervision on or after January 1, 2010, with insufficient financial and residential resources, shall be considered for temporary housing assistance.

(3) An offender [~~Offenders~~] released on parole or mandatory supervision on or after January 1, 2010, who is [~~are~~] residing in a community residential facility or transitional treatment center and who demonstrates [~~demonstrate~~] progress toward self sufficiency, may also be considered for temporary housing assistance if it appears they will become capable of meeting their own financial needs. The TDCJ shall consider whether the offender has:

(A) A savings account balance;

(B) Current employment [~~Employment~~];

(C) An employment history;

(D) Vocational skills; and

(E) A level of educational achievement above the sixth grade.

(4) An offender [~~Offenders~~] shall only receive temporary housing assistance at sites in the county in which the offender resided at the time of committing the offense for which the offender was sentenced to the TDCJ or in the county of conviction if not a resident of the state at the time of conviction.

[~~(d) Payment. The amount of payment shall not exceed an amount that is equal to the system-wide average cost per day the TDCJ would incur to incarcerate the offender for the period for which the payment is issued. Such payment shall be made from funds appropriated by the legislature to the TDCJ for use in administering the parole system with respect to the housing of offenders on supervision.~~]

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 December 12, 2011.

TRD-201105468
Melinda Hoyle Bozarth
General Counsel
Texas Department of Criminal Justice
Earliest possible date of adoption: January 22, 2012
For further information, please call: (512) 463-9693

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PART 7. TEXAS COMMISSION ON LAW ENFORCEMENT OFFICER STANDARDS AND EDUCATION

CHAPTER 221. PROFICIENCY CERTIFICATES AND OTHER POST-BASIC LICENSES

37 TAC §221.35

The Texas Commission on Law Enforcement Officer Standards and Education (commission) proposes an amendment to §221.35, concerning Firearms Proficiency for Juvenile Probation Officers. Subsection (a)(2) is amended to reflect an agency name change. Subsection (d) is amended to reflect the effective date of the changes.

These amendments are necessary to incorporate the statutory name change from Senate Bill 653 of the 82nd Legislative Session.

The commission has determined that for each year of the first five years the section as proposed will be in effect, there will be no effect on state or local governments as a result of administering this section.

The commission has determined that for each year of the first five years the section as proposed will be in effect, there will be a positive benefit to the public by correctly identifying the Juvenile Justice Department.

The commission has determined that for each year of the first five years the section as proposed will be in effect, there will be no anticipated cost to small businesses, individuals, or both as a result of the proposed amendment.

Comments may be submitted electronically to *public.comment@tcleose.state.tx.us* or in writing to Mr. Kim Vickers, Executive Director, Texas Commission on Law Enforcement Officer Standards and Education, 6330 E. Highway 290, Ste. 200, Austin, Texas 78723-1035.

The amendment is proposed under Texas Occupations Code, Chapter 1701, §1701.151, General Powers of the Commission; Rulemaking Authority, which authorizes the commission to promulgate rules for administration of this chapter.

The rule amendment as proposed is in compliance with Texas Occupations Code, Chapter 1701, §1701.402 and §1701.259 as amended by Article 27, Senate Bill 1303 of the 82nd Legislative Session.

No other code, article, or statute is affected by this proposal.

§221.35. Firearms Proficiency for Juvenile Probation Officers.

(a) To qualify for a firearms proficiency certificate for juvenile probation officers, an applicant must meet the following requirements, including:

(1) current employment as a juvenile probation officer for at least one year by the county juvenile probation department;

(2) active certification as a juvenile probation officer by the Texas Juvenile Justice Department; [~~Texas Juvenile Probation Commission;~~]

(3) successful completion of the commission's current firearms training program for juvenile probation officers;

(4) documentation from each chief administrative officer that has authorized the applicant's participation in the juvenile probation officer firearms proficiency training program that the applicant has been subjected to a complete search of local, state and national records to disclose any criminal record or criminal history; and

(5) written documentation from each chief administrative officer that has authorized the applicant's participation in the juvenile probation officer firearms proficiency training program that the applicant has been examined by a psychologist, selected by the current appointing/employing agency, who is licensed by the Texas State Board of Examiners of Psychologists. The applicant must be declared in writing by that professional to be in satisfactory psychological and emotional health to serve as the type of juvenile probation officer for which the certificate is sought.

(b) The holder of a certificate issued under this section must meet the firearms proficiency requirements at least once every 12 months.

(c) Certificates issued under this section expire two years from the date of issuance. Within forty-five days of the expiration of a certificate, a juvenile probation officer may apply for the issuance of a renewal. Juvenile probation officers must meet the requirements in subsections (a)(1), (a)(2) and (b) of this section in order to renew the certificate.

(d) The effective date of this section is April 12, 2012. [~~July 15, 2010.~~]

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 December 6, 2011.

TRD-201105345
Kim Vickers
Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
Earliest possible date of adoption: January 22, 2012
For further information, please call: (512) 936-7713

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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 3. OFFICE OF THE ATTORNEY GENERAL

CHAPTER 63. PUBLIC INFORMATION

SUBCHAPTER B. REVIEW OF PUBLIC INFORMATION REDACTIONS

1 TAC §§63.11 - 63.16

The Office of the Attorney General (OAG) adopts a new subchapter of rules consisting of six new sections added at Texas Administrative Code, Title 1, Part 3, Chapter 63, Public Information, Subchapter B, Review of Public Information Redactions, §§63.11 - 63.16. These rules are adopted without changes to the proposed text published in the October 21, 2011, issue of the *Texas Register* (36 TexReg 7055) and will not be republished.

The adopted rules are being relocated to Subchapter B of Chapter 63 from Chapter 67, which is simultaneously being repealed, in order to consolidate rules concerning public information in one chapter. The adopted rules also include new language to account for recent statutory amendments to §§552.130, 552.136, and 552.309 of the Texas Government Code enacted by the 82nd Legislature, Regular Session (2011). The rules are adopted in accordance with Texas Government Code §§552.024(c-1), 552.1175(g), 552.130(d), 552.136(d), and 552.138(d), which require the attorney general to adopt rules establishing the procedures and deadlines for a requestor to request a review of a governmental body's redaction of public information under these sections.

No comments were received regarding the proposed rules during the comment period.

Section 63.11, Purpose and Application, identifies the sections of the Public Information Act, Texas Government Code Chapter 552, under which a requestor may seek review of a governmental body's redaction of public information. Section 63.11 also makes the Public Information Act's provisions on timeliness of actions by mail and electronic filing applicable to all deadlines in this subchapter.

Section 63.12, Request for Review by the Attorney General, describes the steps a requestor must take in order to request an attorney general review of a governmental body's decision to redact information when the redaction is not based on an attorney general decision.

Section 63.13, Notice, establishes the deadline and manner in which the attorney general must notify a governmental body and requestor of a request for review.

Section 63.14, Submission of Documents and Comments, requires a governmental body to submit certain information to the attorney general upon receiving notice from the attorney general of a request for review, allows interested persons to submit written comments to the attorney general, and requires both the governmental body and an interested person to provide the requestor with copies of their written comments.

Section 63.15, Additional Information, allows the attorney general to obtain additional information from the governmental body if necessary and sets a deadline for the submission of such information.

Section 63.16, Rendition of Attorney General Decision; Issuance of Written Decision, sets a deadline for the attorney general to issue a written decision and requires that the decision be provided to the requestor, the governmental body, and any interested person who submitted comments.

The new sections are adopted in accordance with Texas Government Code §§552.024(c-1), 552.1175(g), 552.130(d), 552.136(d), and 552.138(d), which require the OAG to establish the procedures and deadlines for a requestor to seek an attorney general review of a governmental body's redaction of public information.

The adopted rules do not affect any other statutes.

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 December 12, 2011.

TRD-201105491
Jay Dyer
Deputy Attorney General
Office of the Attorney General
Effective date: January 1, 2012
Proposal publication date: October 21, 2011
For information regarding this publication, contact Zindia Thomas, Agency Liaison, at (512) 936-9901.

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CHAPTER 67. REVIEW OF PUBLIC INFORMATION REDACTIONS

1 TAC §§67.1 - 67.6

The Office of the Attorney General (OAG) adopts the repeal of Chapter 67, §§67.1 - 67.6, concerning the review of public information redactions, without changes to the proposal as published in the October 21, 2011, issue of the *Texas Register* (36 TexReg

7056). The repealed sections will not be republished. The repeal of Chapter 67 is necessary to address the OAG's space limitations within Title 1, Part 3 of the Texas Administrative Code and consolidate rules concerning public information in Chapter 63. There is a continued need for these rules, and therefore the OAG is simultaneously adopting new sections in Chapter 63, Subchapter B.

No comments regarding the repeal were received during the comment period.

The repeal is adopted in accordance with Texas Government Code §§552.024(c-1), 552.1175(g), and 552.138(d), which require the OAG to establish the procedures and deadlines for a requestor to seek an attorney general review of a governmental body's redaction of public information.

The adopted repeal does not affect any other statutes.

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 December 12, 2011.

TRD-201105489
Jay Dyer
Deputy Attorney General
Office of the Attorney General
Effective date: January 1, 2012
Proposal publication date: October 21, 2011
For information regarding this publication, contact Zindia Thomas, Agency Liaison, at (512) 936-9901.

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TITLE 10. COMMUNITY DEVELOPMENT

PART 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

CHAPTER 33. 2010 MULTIFAMILY HOUSING REVENUE BOND RULES

10 TAC §§33.1 - 33.10

The Texas Department of Housing and Community Affairs (the "Department") adopts the repeal of 10 TAC Chapter 33, §§33.1 - 33.10, concerning 2010 Multifamily Housing Revenue Bond Rules, without changes to the proposal as published in the September 30, 2011, issue of the *Texas Register* (36 TexReg 6385) and will not be republished.

The repeal is adopted in order to enact new sections.

Public hearings on the repeal were held in Brownsville, Austin, Houston and Abilene. Additionally, written comments on the proposed repeal were accepted by mail, email, and facsimile through October 19, 2011.

No comments were received concerning the proposed repeal.

The Board approved the final order adopting this repeal on November 10, 2011.

The repeal is adopted pursuant to the authority of the Texas Government Code, Chapter 2306 which provides the Department with the authority to adopt rules governing the administration of the Department and its programs.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 9, 2011.

TRD-201105452
Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
Effective date: December 29, 2011
Proposal publication date: September 30, 2011
For further information, please call: (512) 475-3916

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CHAPTER 33. 2012 MULTIFAMILY HOUSING REVENUE BOND RULES

10 TAC §§33.1 - 33.9

The Texas Department of Housing and Community Affairs (the "Department") adopts new 10 TAC Chapter 33, §§33.1 - 33.9, concerning 2012 Multifamily Housing Revenue Bond Rules. Sections 33.1, 33.3, and 33.5 are adopted with changes to the proposed text as published in the September 30, 2011, issue of the *Texas Register* (36 TexReg 6385). Sections 33.2, 33.4, and 33.6 - 33.9 are adopted without changes and will not be republished.

The new sections are adopted in order to implement changes that will improve the 2012 Private Activity Bond Program.

Public hearings on the proposed new sections were held in Brownsville, Austin, Houston and Abilene. Additionally, written comments on the proposed new sections were accepted by mail, email, and facsimile through October 19, 2011.

No comments were received concerning the proposed new sections; however, administrative corrections were made as needed for consistency within this chapter.

The Board approved the final order adopting the new sections, as well as administrative changes as needed for consistency within this chapter, on November 10, 2011.

As provided for in §2306.6724(c) of the Texas Government Code, the Governor has modified and approved the 2012-2013 Qualified Allocation Plan (QAP). The modifications to the QAP as approved by the Governing Board of the Texas Department of Housing and Community Affairs for submittal to the Governor include deletion of the discretionary factors the Board may consider in their decision-making of low income housing tax credit allocations as set forth in §50.10(a)(2) of the Qualified Allocation Plan and §33.5(m) of the 2012-2013 Multifamily Housing Revenue Bond Rule.

The new sections are adopted pursuant to the authority of the Texas Government Code, Chapter 2306 which provides the Department with the authority to adopt rules governing the administration of the Department and its programs.

§33.1. Introduction.

The purpose of this chapter is to state the Texas Department of Housing and Community Affairs (the "Department") requirements for issu-

ing Bonds, the procedures for applying for multifamily housing revenue Bond financing, and the regulatory and land use restrictions imposed upon Developments financed with the issuance of Bonds for the 2012-2013 Private Activity Bond Program years. The rules and provisions contained in this chapter are separate from the rules relating to the Department's administration of the Housing Tax Credit Program. Applicants seeking a housing tax credit allocation should consult the Department's Qualified Allocation Plan ("QAP"), in effect for the program year for which the Housing Tax Credit application will be submitted. If the applicable QAP contradicts rules set forth in this chapter, the applicable QAP will take precedence over the rules in this chapter. The Department encourages the participation in the Multifamily Bond programs by working directly with Applicants, lenders, trustees, legal counsels, local and state officials and the general public to conduct business in an open, transparent and straightforward manner. The Department has simplified the process, within the limitation of statute, to affirmatively support and create affordable housing throughout the State of Texas.

§33.3. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise. Any capitalized terms not specifically mentioned in this section shall have the meaning as defined in Chapter 2306 of the Texas Government Code, §§42, 141 and 145 of the Internal Revenue Code, and §1.1 of this title (relating to Definitions and Amenities for Housing Program Activities) and repeated in the Tax Credit (Procedures) Manual.

(1) Eligible Tenants--

(A) Individuals and families of Extremely Low, Very Low and Low Income;

(B) Individuals and families of Moderate Income; or

(C) Persons with Special Needs, in each case, with an Anticipated Annual Income not in excess of 140% of the area median income for a four-person household in the applicable standard metropolitan statistical area; provided that all Low-Income Tenants shall count as Eligible Tenants.

(2) Institutional Buyer--

(A) An accredited investor as defined in Regulation D promulgated under the Securities Act of 1933, as amended (17 CFR §230.501(a)), but excluding any natural person or any director or executive officer of the Department (17 CFR §230.501(a)(4) - (6)); or

(B) A qualified institutional buyer as defined by 17 CFR §230.144(A), promulgated under the Securities Act of 1935, as amended.

(3) Owner--An Applicant that is approved by the Department as qualified to own, construct, acquire, rehabilitate, operate, manage, or maintain a Development subject to the regulatory powers of the Department and other terms and conditions required by the Department and the Act.

(4) Persons with Special Needs--Persons who:

(A) Are considered to be disabled under a state or federal law;

(B) Are elderly;

(C) Are designated by the Board as experiencing a unique need for decent, safe housing that is not being met adequately by private enterprise; or

(D) Are legally responsible for caring for an individual described by subparagraph (A), (B) or (C) of this paragraph and meet the income guidelines established by the Board.

(5) Private Activity Bond Program Scoring Criteria--The scoring criteria established by the Department for the Department's Multifamily Housing Revenue Bond Program, §33.5(e) of this chapter (relating to Application Procedures, Evaluation and Approval).

(6) Private Activity Bond Program Threshold Requirements--The threshold requirements established by the Department for the Department's Multifamily Housing Revenue Bond Program, §33.5(d) of this chapter.

(7) Program--The Department's Multifamily Housing Revenue Bond Program.

(8) Trustee--A national banking association organized and existing under the laws of the United States, as trustee (together with its successors and assigns and any successor trustee).

§33.5. Application Procedures, Evaluation and Approval.

(a) Application Costs, Costs of Issuance, Responsibility and Disclaimer. The Applicant shall pay all costs associated with the preparation and submission of the Pre-application including costs associated with the publication and posting of required public notices and all costs and expenses associated with the issuance of the Bonds, regardless of whether the Application is ultimately approved or whether Bonds are ultimately issued. At any stage during the Application process, the Applicant is solely responsible for determining whether to proceed with the Application, and the Department disclaims any and all responsibility and liability in this regard.

(b) Pre-application. An Applicant who requests financing from the Department for a Development shall submit a pre-application in the format prescribed by the Department. Within fourteen (14) days of the Department's receipt of the pre-application, the Department will be responsible for federal, state, and local community notifications of the proposed Development. Department review at this stage is limited and not all issues of Eligibility pursuant to §50.4 of this title (relating to Ineligible Applicants, Applications and Developments) and Threshold pursuant to §50.8 of this title (relating to Threshold Criteria) are reviewed. Acceptance by staff of a pre-application does not ensure that the Applicant satisfies all Application Eligibility and Threshold requirements, including supporting documentation. The Department is not responsible for notifying an Applicant of potential areas of ineligibility or threshold deficiencies at the time of pre-application. If the Development is determined to be eligible for Bond financing by the Department, the Department will score and rank the pre-application based on the Private Activity Bond Program Scoring Criteria as described in subsection (e) of this section.

(1) The Department will rank the pre-application with higher scores ranking higher within each priority defined by §1372.0321, Texas Government Code. All Priority 1 Applications will be ranked above all Priority 2 Applications which will be ranked above all Priority 3 Applications, regardless of score, reflecting a priority structure which gives consideration to the income levels of the tenants and the rent levels of the units consistent with §2306.359, Texas Government Code. This priority ranking will be used throughout the calendar year. In the event two or more Applications receive the same score, the Department will use as a tie-breaking mechanism the criteria as stipulated in §50.6(e) of this title (relating to Allocation and Award Process). Pre-Applications must meet the threshold requirements as stated in the Private Activity Bond Program Threshold Requirements as set out in subsection (d) of this section.

(2) After scoring and ranking, the Development and the proposed financing structure will be presented to the Department's Board for consideration of an inducement resolution declaring the Department's initial intent to issue Bonds with respect to the Development.

(c) Approval of the inducement resolution does not guarantee final Board approval of the Bond Application. Department staff, for good cause, may recommend that the Board not approve an inducement resolution for an Application. Because each Development is unique, making the final determination is often dependent on the issues presented at the time the full Application is presented to the Board.

(d) Pre-Application Threshold Requirements.

(1) As the Department reviews the Application, the Department will use the assumptions as reflected in §1.32 of this title (relating to Underwriting Rules and Guidelines), even if not reflected by the Applicant in the Application.

(A) Construction Costs Per Unit Assumption. Costs not to exceed $85 per square foot for general population developments and $95 for elderly developments (Rehabilitation developments are exempt from this requirement).

(B) Anticipated Interest Rate and Term. As stated in the pre-application.

(C) Size of Units as reflected in §50.8(5)(B) of this title.

(2) Zoning. Evidence of appropriate zoning must be provided as referenced in §50.8(8)(B) of this title.

(3) Proper Site Control. Properly executed and escrow receipted Site Control in the name of the Applicant (principal or member of the General Partner) valid through the inducement Board meeting at pre-application and ninety (90) days from the date of the Certificate of Reservation with the option to extend through the scheduled TDHCA Board meeting at full application. The potential expiration of site control does not warrant the application being presented to the TDHCA Board prior to the scheduled meeting.

(4) Current Market Information (must support affordable rents).

(5) Completed current TDHCA Bond Pre-Application.

(6) Completed Bond Review Board Residential Rental Attachment for the current program year.

(7) Evidence of paid Application Fees ($1,000 to TDHCA, $2,000 to Vinson and Elkins, as the Department's bond counsel, and $5,000 to Texas Bond Review Board).

(8) Boundary Survey or Plat clearly identifying the location and boundaries of the subject property.

(9) Local Area map showing the location of the Property and Community Services/Amenities within a three (3) mile radius (radius ring or scale must be present on the map).

(10) Organization Chart showing the structure of the Applicant and the ownership structure of any principals of the Applicant with evidence of Entity Registration or Reservation with the Office of the Secretary of State.

(11) Required Notification. Evidence of notification is required in the form provided in the pre-application. The "Public Information Form" must be completed and include a list of all of the recipients (including names and complete addresses). Proof of delivery, though not required to be submitted with the Application, must not be older than three months prior to the Application submission date. Notification must be sent to all the following individuals and entities (if the QAP in effect for the program year for which the Bond and Housing Tax Credit applications are submitted reflect a notification process that is different from the process listed in subparagraphs (A) - (G) of this paragraph, then the QAP will override the notification process listed in subparagraphs (A) - (G) of this paragraph):

(A) State Senator and Representative that represents the district containing the development;

(B) Presiding Officer of the governing body of any municipality containing the development and all elected members of that body (Mayor, City Council members);

(C) Presiding Officer of the governing body of the county containing the development and all elected members of that body (County Judge and/or Commissioners);

(D) School District Superintendent of the school district containing the development;

(E) Presiding Officer of the School Board of Trustees of the school district containing the development; and

(F) The Applicant must request Neighborhood Organizations on record with the county or state whose boundaries include the proposed Development Site as follows:

(i) No later than fourteen (14) days prior to the date the pre-application is submitted, the Applicant must e-mail, fax or mail with registered receipt a completed, "Neighborhood Organization Request" letter as provided in the pre-application materials to the local elected official for the city and county where the Development is proposed to be located. If the Development is located in an area that has district based local elected officials, or both at-large and district based local elected officials, the request must be made to the city council member or county commissioner representing that district; if the Development is located in an area that has only at-large local elected officials, the request must be made to the mayor or county judge for the jurisdiction. If the Development is not located within a city or is located in the Extra Territorial Jurisdiction (the "ETJ") of a city, the county local elected official must be contacted. In the event that local elected officials refer the Applicant to another source, the Applicant must request Neighborhood Organizations from that source in the same format;

(ii) If no reply letter is received from the local elected officials by seven (7) days prior to the pre-application submission, then the Applicant must certify to that fact in the pre-application materials; and

(iii) The Applicant must list all Neighborhood Organizations on record with the county or state whose boundaries include the proposed Development Site as provided by the local elected officials, or that the Applicant has knowledge of (regardless of whether the organization is on record with the county or state) as of the pre-Application submission in the "Certification of Notification Form" provided in the pre-application.

(G) No later than the date the pre-application is submitted, notification must be sent to all of the following individuals and entities by e-mail, fax or mail with registered receipt (email or fax to be "receipt confirmed") in the format required in the "Pre-application Notification Template" provided in the pre-Application materials. Developments located in an ETJ of a city are not required to notify city officials; however the county officials are required to be notified. It is strongly encouraged that Applicants retain proof of delivery of the notifications to the persons or entities prescribed in clauses (i) - (ix) of this subparagraph in the event the Department requires proof of notification. Evidence of proof of delivery is demonstrated by signed receipt

for mail or courier delivery and confirmation of receipt by recipient for facsimile and electronic mail. Officials to be notified are those officials in office at the time the pre-application is submitted.

(i) Neighborhood Organizations on record with the state or county whose boundaries contain the proposed Development Site as identified in subparagraph (F)(iii) of this paragraph;

(ii) Superintendent of the school district containing the Development;

(iii) Presiding officer of the board of trustees of the school district containing the Development;

(iv) Mayor of any municipality containing the Development;

(v) All elected members of the governing body of any municipality containing the Development;

(vi) Presiding officer of the governing body of the county containing the Development;

(vii) All elected members of the governing body of the county containing the Development;

(viii) State representative of the district containing the Development; and

(ix) State senator of the district containing the Development.

(H) Each such notice must include, at a minimum, all of the following:

(i) The Applicant's name, address, individual contact name and phone number;

(ii) The Development name, address, city and county;

(iii) A statement informing the entity or individual being notified that the Applicant is submitting a request for Private Activity Bonds and Housing Tax Credits with the Texas Department of Housing and Community Affairs;

(iv) Statement of whether the Development proposes New Construction or Rehabilitation;

(v) The type of Development being proposed (single family homes, duplex, apartments, townhomes, highrise etc.); and

(vi) The approximate total number of Units and approximate total number of low-income Units.

(e) Pre-application Scoring Criteria.

(1) Income and Rent Levels of the Tenants. Applications submitted as a Priority 1 will receive (10 points), Priority 2 will receive (7 points) and Priority 3 will receive (5 points).

(2) Cost of the Development by Square Foot. For this item, costs shall be defined as construction costs, including site work, direct hard costs, contingency, contractor profit, overhead and general requirements, as represented in the Development Cost Schedule. This calculation does not include indirect construction costs. The calculation will be costs per square foot of Net Rentable Area (NRA). Costs do not exceed $85 per square foot for general population Developments and $95 per square foot for elderly Developments (1 point) (Rehabilitations will automatically receive (1 point)).

(3) Size of Units. The average size of all Units combined in the Development must be greater than or equal to 950 square foot for general and must be greater than or equal to 750 square foot for elderly (5 points) (Rehabilitations will automatically receive (5 points)).

(4) Period of Guaranteed Affordability for Low Income Tenants. Add ten (10) years of affordability after the extended use period for a total affordability period of forty (40) years (4 points).

(5) Quality of the Units as referenced in §50.9(b)(4)(B) of this title (relating to Selection Criteria) and further defined in §1.1 of this title (relating to Definitions and Amenities for Housing Program Activities). Must select at least (14 points).

(6) Common Amenities as referenced in §50.8(5)(A) of this title and further defined in §1.1 of this title.

(7) Tenant Services. Acceptable services include those described in §1.1 of this title (maximum 8 points).

(8) Development Support/Opposition. Maximum net points of +24 to -24. Each letter will receive a maximum of +3 to -3. All letters received by 5:00 PM, seven (7) business days prior to the date of the Board meeting at which the Application will be considered for Applications submitted for waiting list and carryforward will be used in scoring. Letters must clearly state support or opposition to the specific Development. State Representatives or Senators as well as local elected officials to be considered are those in office at the time the Application is submitted and represent the district containing the proposed Development Site. Letters of support from State or local elected officials that do not represent the district containing the proposed Development Site will not qualify for points under this exhibit. Neutral letters, or letters that do not specifically refer to the Development, will receive (0 points). A letter that does not directly express support by expresses it indirectly by inference (i.e. a letter that says "the local jurisdiction supports the Development and I support the local jurisdiction" will be treated as a neutral letter).

(A) Texas State Senator and Texas State Representative (maximum +3 to -3 points per official);

(B) Presiding officer of the governing body of any municipality containing the Development and the elected district member of the governing body of the municipality containing the Development (maximum +3 to -3 points per official);

(C) Presiding officer of the governing body of the county containing the Development and the elected district member of the governing body of the county containing the Development (if the site is not in a municipality, these points will be doubled) (maximum +3 to -3 points per official);

(D) Local School District Superintendent and Presiding Officer of the Board of Trustees for the School district containing the Development (maximum +3 to -3 points per official).

(9) Proximity to Community Services/Amenities within three (3) miles of the site. A map must be included identifying the Development Site and the location of services by name. If the services are not identified by name, points will not be awarded. All services must exist or, if under construction must be under active construction, post pad by the date pre-application is submitted. The map must include either a three (3) mile radius ring or a scale (Rehabilitation developments will receive (1.5 points) for each item in subparagraphs (A) - (O) of this paragraph).

(A) Full service grocery store (1 point);

(B) Pharmacy (1 point);

(C) Convenience store/mini-market (1 point);

(D) Department or Retail Merchandise Store (1 point);

(E) Bank/Credit Union (1 point);

(F) Restaurant (including fast food) (1 point);

(G) Indoor public recreation facilities, such as civic centers, community centers, and libraries (1 point);

(H) Outdoor public recreation facilities, such as parks, golf courses, and swimming pools (1 point);

(I) Fire/Police Station (1 point);

(J) Medical offices (physician, dentistry, optometry) or hospital/medical clinic (1 point);

(K) Public School (only one school required for point and only eligible with general population developments) (1 point);

(L) Senior Center (1 point);

(M) Religious Institutions (1 point);

(N) Day Care Services (must be licensed - only eligible for Developments that are not Qualified Elderly Developments) (1 point);

(O) Post Office, City Hall, County Courthouse (1 point).

(10) Rehabilitation or Reconstruction Developments will receive (30 points). This will include the demolition of old buildings and New Construction of the same number of units if allowed by local codes or less units to comply with local codes.

(11) Preservation Developments will receive (10 points). This includes Rehabilitation proposals on properties which are nearing expiration of an existing affordability requirement within the next two (2) years or for which there has been a rent restriction requirement in the past ten (10) years. Evidence must be provided.

(12) Declared Disaster Areas. Applications will receive (7 points), if at the time the complete pre-application is submitted or at any time within the two-year period preceding the date of submission, the proposed Development Site is located in a declared Disaster Area. This includes federal, state and Governor declared disaster areas.

(13) Developments in Census Tracts with No Other Existing Developments Supported by Tax Credits. Applications will receive (6 points) if the proposed Development is located in a census tract in which there are no other existing Developments that were awarded housing tax credits in the last five (5) years and (3 points) if there are no other existing developments that were awarded housing tax credits in the last three (3) years. The applicant must provide evidence of the census tract in which the Development is located. These census tracts are outlined in the Housing Tax Credit Site Demographic Characteristics Report for the current program year.

(f) Multiple Site Applications. For the purposes of scoring, applicants must submit the required information as outlined in the Pre-Application Submission Manual. Each individual property will be scored on its own merits and the final score will be determined based on an average of all of the individual scores.

(g) Financing Commitments. After approval by the Board of the inducement resolution, and as part of the submission of a final application, the Applicant will be solely responsible for making appropriate arrangements with financial institutions which are to be involved with the issuance of the Bonds or the financing of the Development, and to begin the process of obtaining firm commitments for financing from each of the financial institutions involved.

(h) Trustee and Investment Banking Firm Selection. The Applicant shall select, from the Approved list on the Department's website, a Trustee. An Applicant may coordinate with an out-of-state Trustee on the Approved list; however the funds must flow through a Texas office. The Applicant shall also select from the Approved list on the Department's website, an investment banking firm to serve as senior managing underwriter, co-managing underwriter or placement agent, as applicable. The Applicant will be responsible for all fees and expenses including those of the respective counsels, associated with the transaction.

(i) Full Application. Once the inducement resolution has been approved by the Board, an Applicant who elects to proceed with submitting a final Application to the Department must submit the Volumes I and II of the Housing Tax Credit Application. Priority 1 and 2 Applications (as elected on the Bond Review Board Residential Rental Attachment) must submit the volumes prior to receipt of a Certificate of Reservation from the Texas Bond Review Board. For Priority 3 Applications the Volumes I and II must be submitted within fourteen (14) days of the Certificate of Reservation date from the Texas Bond Review Board. The Volume III of the Application and all Third Party reports as required by the Department must be submitted at least sixty (60) days prior to the scheduled meeting of the Board at which the Development and the Bond issuance are to be considered, unless the Department directs the Applicant otherwise in writing. The Application consists of the completed Uniform Application and Multifamily Rental Worksheets in the format required by the Department as posted to the Department's website. The Tax Credit (Procedures) Manual provides guidance on completing the Uniform Application. If the Applicant is applying for other Department funding then they are encouraged to refer to the Rules for that program regarding Application submission requirements. The full Application must adhere to the Department's QAP in effect for the program year for which the Bond and Housing Tax Credit applications are submitted. The Department may determine that supporting materials listed in the full Application shall be provided subsequent to the final Application deadline in accordance with a schedule approved by the Department. Failure to provide any supporting materials in accordance with the approved schedule may be grounds for terminating the Application and returning the reservation to the Texas Bond Review Board.

(j) Administrative Deficiencies. If an Application contains deficiencies which, in the determination of the Department staff, require clarification, correction, or non-material missing information to resolve inconsistencies in the original Application the Department staff may request such information in the form of an Administrative Deficiency as described in §50.7(b)(2)(B) of this title (relating to Application Process).

(k) Eligibility Criteria. The Department, in addition to those items described in §50.4 of this title, will evaluate the Development for eligibility at the time of full Application. If there are changes to the Application at any point prior to closing that have an adverse affect on the score and ranking order and that would have resulted in the Application being placed below another Application in the ranking, the Department will terminate the Application and return the Certificate of Reservation to the Texas Bond Review Board (with the exception of changes to deferred developer's fees and support or opposition points). The Development and the Applicant must satisfy the conditions set out in paragraphs (1) and (2) of this subsection in order for a Development to be considered eligible:

(1) The proposed Development must further meet the public purposes of the Department as identified in the Code.

(2) An Application may include either the Rehabilitation or New Construction, or both the Rehabilitation and New Construction, of qualified residential rental facilities located at multiple sites and with respect to which 51% or more of the residential units are located:

(A) in a county with a population of less than 75,000; or

(B) in a county in which the median income is less than the median income for the state, provided that the units are located in that portion of the county that is not included in a metropolitan statistical area containing one or more projects that are proposed to be financed, in whole or in part, by an issuance of bonds. The number of sites may be reduced as needed without affecting their status as a project for purposes of the application, provided that the final application for a reservation contains at least two sites. (§1372.002, Texas Government Code)

(l) Bond Documents. After receipt of the final Application, bond counsel for the Department shall draft Bond documents which conform to the state and federal laws and regulations which apply to the transaction. Bond counsel is not required to begin drafting the Bond documents until the appropriate fees have been received. The Applicant will be responsible for all bond counsel fees and expenses associated with the transaction.

(m) Public Hearings. For every Bond issuance, the Department will hold a public hearing in accordance with §147(f) of the Code, in order to receive comments from the public pertaining to the Development and the issuance of the Bonds. The Applicant or member of the Development team must be present and will be responsible for conducting a brief presentation on the proposed Development and providing handouts at the hearing that should contain at a minimum, a description of the Development, maximum rents and income restrictions. If the proposed Development is a Rehabilitation then the presentation should include the scope of work that will be done to the property. All handouts must be submitted to the Department for review at least two (2) days prior to the public hearing. Publication of all notices required for the public hearing shall be at the sole expense of the Applicant.

(n) Approval of the Bonds.

(1) Subject to the timely receipt and approval of commitments for financing, an acceptable evaluation for eligibility, the satisfactory negotiation of Bond documents, and the completion of a public hearing, the Board, upon presentation by the Department's staff, will consider the approval of the Bond issuance, final Bond documents and in the instance of privately placed Bonds, the pricing of the Bonds. The process for appeals and grounds for appeals may be found under §1.7 of this title (relating to Staff Appeals Process) and §1.8 of this title (relating to Board Appeals Process). To the extent applicable to each specific bond issuance, the Department's conduit housing transactions will be processed in accordance with 34 TAC Part 9, Chapter 181, Subchapter A (relating to Bond Review Rules) and Chapter 1372, Texas Government Code. The Bond issuance must receive an approving opinion from the Department's bond counsel with respect to the legality and validity of the Bonds and the security therefore, and in the case of tax-exempt Bonds, with respect to the excludability from gross income for federal income tax purposes of interest on the Bonds.

(2) Alternative Dispute Resolution Policy. The Department encourages use of Alternative Dispute Resolution methods as outlined in §1.17 of this title.

(o) Local Permits. Prior to the closing of the Bonds, all necessary approvals, including building permits, from local municipalities, counties, or other jurisdictions with authority over the Development must have been obtained or evidence that the permits are obtainable subject only to payment of certain fees must be provided to the Department.

(p) Closing. Once all approvals have been obtained, including final approval by the Board and Bond documents have been finalized to the respective parties' satisfaction, the Bond transaction will close. Any outstanding Housing Trust Fund Pre-Development loans, if applicable, for the proposed Development Site must be paid in full at the time the bond transaction is closed. All Applicants are subject to §1.20 of this title (relating to Asset Review Committee). Upon satisfaction of all conditions precedent to closing, the Department will issue Bonds in exchange for payment thereof. The Department will then loan the proceeds of the Bonds to the Applicant and disbursements of the proceeds may begin.

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 December 9, 2011.

TRD-201105451
Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
Effective date: December 29, 2011
Proposal publication date: September 30, 2011
For further information, please call: (512) 475-3916

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CHAPTER 50. 2010 HOUSING TAX CREDIT PROGRAM QUALIFIED ALLOCATION PLAN AND RULES

10 TAC §§50.1 - 50.23

The Texas Department of Housing and Community Affairs (Department) adopts the repeal of 10 TAC Chapter 50, §§50.1 - 50.23, concerning 2010 Housing Tax Credit Program Qualified Allocation Plan and Rules, without changes to the proposal as published in the October 21, 2011, issue of the *Texas Register* (36 TexReg 7068) and will not be republished.

The repeal is adopted in order to enact new sections.

The Department accepted comments through October 28, 2011 on the proposed repeal in writing and by email.

No comments were received concerning the proposed repeal.

The Board approved the final order adopting the repeal on November 10, 2011.

The repeal is adopted pursuant to the authority Chapter 2306 of the Texas Government Code, which provides the Department with the authority to adopt rules governing the administration of the Department and its programs.

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 December 9, 2011.

TRD-201105450

Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
Effective date: December 29, 2011
Proposal publication date: October 21, 2011
For further information, please call: (512) 475-3916

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CHAPTER 50. 2012 HOUSING TAX CREDIT PROGRAM QUALIFIED ALLOCATION PLAN

10 TAC §§50.1 - 50.17

The Texas Department of Housing and Community Affairs (the "Department") adopts new 10 TAC Chapter 50, §§50.1 - 50.17, concerning the 2012 Housing Tax Credit Program Qualified Allocation Plan (QAP). Sections 50.1 - 50.14, 50.16, and 50.17 are adopted with changes to the proposed text as published in the October 21, 2011, issue of the *Texas Register* (36 TexReg 7069). Section 50.15 is adopted without change and will not be republished.

The new sections are adopted in order to implement changes that will improve the 2012 Housing Tax Credit Program.

The Department accepted comments to the proposed new sections in writing and by email. This document provides the Department's response to all comments received and the comments and responses are presented in the order they appear in the QAP.

Public comments were accepted through October 28, 2011 with comments received from: (1) John Henneberger, Texas Low Income Housing Information Service; (2) Walter Moreau, Foundation Communities; (3) Elizabeth Glynn, Travois; (4) Brad Forslund, Churchill Residential; (5) Audrey Martin, Realtex Development Corporation; (6), Robin White, Gonzalez Newell Bender, Inc Architects; (7) Ben Medina, Director of Planning and Community Development of Brownsville; (8) Jason Holenbeck, Avenue Community Development Corporation; (9) Sarah Anderson; (10) Sarah Andre; (11) Texas Affiliation of Affordable Housing Providers (TAAHP); (12) George Littlejohn, Novogradac & Company LLP; (13) Bill Schlesinger, Project Vida; (14) Diana McIver, DMA Development Company, LLC; (15) Terry Coyne, Juniper Housing LLC; (16) Jim Lavery, Department of Veterans Affairs; (17) Belinda Carlton, Texas Council for Developmental Disabilities; (18) Scott Marks, Coats Rose; (19) Bob Coe, Affordable Housing Analysts; (20) Bobby Bowling, Tropicana Building Corporation; (21) Jerry Wright, Dougherty Mortgage, LLC; (22) Chris Porter, The Reliant Group; (23) Donna Rickenbacker, Marque Real Estate Consultants; (24) Michael Hartman, Roundstone Development; (25) Steve Ford, Resolution, Inc.; (26) Barry Kahn, Hettig-Kahn; (27) David Koogler, Mark-Dana Corporation; (28) Bill Wenson; (29) Ken Brinkley, KG Residential, LLC; (30) Deepak P. Sulakhe; (31) Walter Schellhase, Hill Country Veterans Council; (32) Cherno Njie, Songhai Development Company; and (33) Pres Kabacoff, HRI Properties.

The comments and responses include both administrative clarifications and corrections to the QAP recommended by Staff and substantive comments on the QAP and the corresponding Departmental responses. After each comment title, numbers are shown in parentheses. These numbers refer to the person or entity that made the comment as reflected in the previous paragraph. If comment resulted in recommended language changes to the Draft QAP as presented to the Board in October, such changes are indicated.

REASONED RESPONSE TO PUBLIC COMMENT ON THE PROPOSED ADOPTION OF 10 TAC CHAPTER 50, 2012 HOUSING TAX CREDIT PROGRAM QUALIFIED ALLOCATION PLAN

Chapter 50 - General - No specific part of the QAP referenced in comment. (1)

COMMENT SUMMARY: Commenter (1) suggested incentives be reduced for Qualified Elderly Developments, especially in High Opportunity Areas. Commenter stated that based on their research previous Allocation Rounds have yielded too many Qualified Elderly Applications being approved compared to General population. Commenter suggested that the Department's policy should be to encourage intergenerational Developments in all areas of the state and to accomplish this; Commenter suggested reducing incentives for Qualified Elderly segregated housing in the Qualified Allocation Plan and further suggested points be awarded to intergenerational or General population Developments in High Opportunity Areas to offset the higher community opposition in those areas.

STAFF RESPONSE: Staff understands the concern expressed by the Commenter and recommended the following language be added to the end of §50.9(b)(16)(A) relating to points for Development location: (A) Two (2) points for Qualified Elderly Developments or (4 points) for all other Developments."

BOARD RESPONSE: The Board directed Staff to modify this amendment by changing the point differential from (2 points) to (3 points) for Qualified Elderly Developments.

§50.2 - Definitions - Applicable Percentage. (4), (27)

COMMENT SUMMARY: Commenter (4) stated that if the full 9% credit is not extended by March 1, 2012, the current language would require Applications to be underwritten using the floating applicable percentage since no Development will be able to place in service by December 31, 2013. Commenter suggested that few Applications will be able to underwrite using the floating rate applicable percentage and Commenter suggested the due date for approval of the full 9% approval by Congress be moved to June 1, 2012, which would give Applicants additional time to re-submit their Applications if Congress doesn't extend the rate and allow the Department additional time to re-underwrite the Application given the change. Commenter (27) suggested, based on their understanding, there is a proposal before Congress to fix the Applicable Percentage for 30% present value credits at 4% and as a result the Department may want to include such provision in the QAP.

STAFF RESPONSE: In response to Commenter (4), the language does not require that Congress act by March 1, 2012 but enables the Department to use the 9% rate for application review and underwriting if deemed appropriate by the Department or if such fixed rate is extended by Congress. Applicants that provide documentation in the Application that placement in service by December 31, 2013 is achievable will be able to use the 9% rate even if it is not extended by Congress. Other Applications will be underwritten at the floating rate. The Real Estate Analysis Division may include conditions in the Commitment related to the timing of closing to ensure that Developments dependent on the 9% rate are able to place in service by the end of 2013. In response to Commenter (27), Staff agreed and proposed language in the definition that reflected the Application will be underwritten

fifteen (15) basis points over the current applicable percentage for 30% present value credits, unless fixed by Congress.

BOARD RESPONSE: Accepted Staff's recommendation.

§50.2 - Definitions - Central Business District. (2), (5), (9), (24), (30)

COMMENT SUMMARY: Commenter (2) supported this definition; a Central Business District should be the major, truly urban cities. Commenter (5) suggested an area can be a legitimate Central Business or Downtown District without having a ten-story building and suggested this requirement be deleted or a reduction in the number of stories. Commenter (9) suggested that if there is a ten-story building then the population number is arbitrary and suggested the Department require one or the other in order to meet the definition. Commenter (24) suggested the Department shouldn't discriminate against a city that doesn't have a ten-story building if they have a designated Central Business District (CBD). Commenter (30) requested clarification on whether the ten-story building needed to be located in the CBD itself or could such building be located outside the CBD but within the boundaries of the city.

STAFF RESPONSE: Developments in Central Business Districts may receive a 130% boost in eligible basis and also receive points for Development Location (§50.9(b)(16)). The minimum population and ten-story building are requirements to be inclusive of higher cost downtown areas in larger cities where job opportunities and amenities may be in proximity to the Development. While other cities may have central business districts, the definition in the QAP specifically targets Central Business Districts with these characteristics. Additionally, the ten-story building does have to be located within the boundaries of the CBD in order to meet this definition. Staff recommended no change based on these comments; however, the definition has been revised to clarify that both the minimum population and ten-story building criteria must be met to qualify as a Central Business District.

BOARD RESPONSE: Accepted Staff's recommendation.

§50.2 - Definitions - High Opportunity Area. (2), (5), (11), (15), (17), (19), (20), (23), (27)

COMMENT SUMMARY: Commenter (2) supported the definition and believed that while the definition is tough, the concept is great. Commenter (5) supported the allowance for district-wide enrollment; however, suggested the requirement for only one elementary school within those districts be deleted. Commenter suggested that this undermines the allowance for open enrollment (open enrollment and one school is the same thing as an attendance zone). If the goal of the Department is to incentivize development in areas where children have access to better schools, this is achieved when children from the Development can go to a good school, regardless of whether the district has adopted attendance zones or has open enrollment. Commenter (15) suggested this definition is too broad and is biased against Rural Developments competing in the At-Risk set aside; specifically, that meeting this criteria is far more difficult in a Rural Area. Commenter further suggested that if a Rural Development targeting the general population is within an exemplary school attendance zone then this relative to other Rural Developments is a highly sought after location; this would be especially true if the Rural region, for example, has higher poverty than its urban counterparts. Commenter also suggested "a Rural Development competing in the At-Risk set-aside must be located in an area that includes any two (2) of subparagraphs (A) - (E)" be added to the end of the first sentence in the definition. Commenters (14) and (27) supported the inclusion of population growth as one of the elements in the definition; however, if the Department does not believe such data can be obtained in a satisfactory way then the test should be modified to require an Applicant to meet two of the four criteria in order to meet the definition. Commenter (11) suggested a Development be required to meet two of the five criteria (assuming the high growth criterion remains). Commenter (17) suggested this definition be modified to reflect a Development located near transportation that must be usable by the pedestrian and suggested that subparagraph (C) be changed to the following: "within a radius of one-quarter mile from an existing or proposed transit stop, designed to encourage pedestrian activities and maximize access to public transportation." Commenters (11), (19), (23), and (27) suggested the Department use the lesser of all people or families American Community Survey (2005-2009) data in determining qualification under subparagraph (B) relating to a census tract with less than 15% poverty. Commenters (19) and (23) suggested similar treatment for subparagraph (A) referring to the use of the greater of household income or family income in determining if the median income for the census tract is greater than the county median income, as long as the same data (household or family) is used for both the census tract and county. Additionally, Commenters (11), (19), (20) and (23), suggested an increase to the poverty percentage in subparagraph (B) for Developments proposed in Regions 11 and 13 and suggested a percentage between 35% and 40%.

STAFF RESPONSE: In response to Commenter (5), the purpose of generally limiting open enrollment districts is to encourage Development Sites located near schools with an "Exemplary" or "Recognized" rating. Allowing open enrollment districts may allow Development Sites that require travel across longer distances and there is no assurance that a student would have the ability to attend the school with the higher rating. However, Staff has found a school labeled a "magnet" school that has a clearly defined attendance zone which does not restrict attendance. Staff has clarified the definition to not specifically exclude other schools with the "magnet" label but that otherwise meet the definition with a clear attendance zone in which all students living in the zone have the right to attend. In response to Commenter (15), Staff acknowledged the issue presented by the Commenter but is recommending as an alternative that applications under the At-Risk Set-Aside not qualify for High Opportunity Area Development Location (§50.9(b)(16)) points. In response to Commenter (14), Staff agreed that the growth factor is difficult as a result of limited data and recommended elimination of the growth factor criterion. With the first two criteria still being required, Staff maintains that at least one of the remaining two criteria should be additionally required. With incentives in the form of both a 130% boost in eligible basis and scoring, Staff believes that such Developments should be located in targeted High Opportunity Areas meeting several of the criteria. Staff agreed with Commenters (19) and (23) regarding using the greater of household income or family income in determining if the median income for the census tract is greater than the county median income under subparagraph (A), as long as the same data (household or family) is used for both the census tract and county. Additionally, Staff agreed with suggestions provided by Commenters (11), (19), (20), (23) and (27) regarding using the lesser of all people or families American Community Survey (2005-2009) data in determining qualification under subparagraph (B) relating to a census tract with less than 15% poverty. With regard to an increase in the poverty percentage in

this subparagraph for those Regions 11 and 13 Staff suggested a census tract with a less than 35% poverty rate. In response to these comments, Staff recommended the following revisions to the definition: "(as designated in the Housing Tax Credit Site Demographic Characteristics Report for the current Application Round)" be added to subparagraph (A); "according to the most recent census data" be deleted from subparagraph (B); "or, for Regions 1 and 13 with a 35% or less poverty rate" be added at the end of subparagraph (B); subparagraph (C) be revised to read "within a half-mile of an accessible transit stop for public transportation if such transportation is available in the municipality or county in which the Development is located; or"; subparagraph (D) be revised to read "An elementary attendance zone does not include elementary schools with district-wide possibility of enrollment or no defined attendance zones, sometimes known as magnet schools"; and Staff recommended deleting subparagraph (E) in its entirety.

BOARD RESPONSE: Accepted Staff's recommendation.

§50.2 - Definitions - Single Room Occupancy. (17)

COMMENT SUMMARY: Commenter (17) suggested the Department should not limit Single Room Occupancy (SRO) to buildings comprised solely of SROs because such model does not promote integration, inclusion and economic opportunity, but rather such units should be encouraged and incorporated into integrated multifamily apartment units.

STAFF RESPONSE: Staff agreed with the Commenter and recommended the definition be revised to reflect the following: "An Efficiency Unit that meets all the requirements of a Unit except that it may, but is not required, to be rented on a month to month basis to facilitate Transitional Housing. Buildings with SRO Units have extensive living areas in common and are required to be Supportive Housing and include the provision for substantial supports from the Development Owner or its agent on site."

BOARD RESPONSE: Accepted Staff's recommendation.

§50.2 - Definitions - Supportive Housing. (17)

COMMENT SUMMARY: Commenter (17) suggested this definition is not consistent with current thinking and specifically suggested the definition be replaced with the Department's Housing and Health Services Coordinating Council (HHSCC) definition citing that individuals in supportive housing need medical and behavioral health services and supports in addition to non-medical services, such as employment readiness and job search.

STAFF RESPONSE: This definition was drafted in a way that reflects the types of Applications received in prior Application Rounds that would not violate IRS Revenue Ruling 98-47 regarding the continual or frequent nursing, medical or psychiatric services. Due to federal regulations that govern the Housing Tax Credit program, Staff is concerned that the definition adopted by the HHSCC could conflict with a Development's compliance with the federal regulations. Staff recommended no change based on this comment.

BOARD RESPONSE: Accepted Staff's recommendation.

§50.2 - Definitions - Transit Oriented District. (1), (17)

COMMENT SUMMARY: While Commenter (1) did not object to removing transit oriented districts as a qualifier for the 30% boost, they encouraged the Department maintain the definition and offer a point to Applications that meet such definition. Commenter (17) suggested that while an increase in eligible basis may not be necessary, the Department should still retain this definition in order to encourage, differentiate and favor transit oriented development.

STAFF RESPONSE: Location near public transit already receives incentives in scoring, specifically, in Site Characteristics (§50.9(b)(19)) and as a criterion in the definition of High Opportunity Area, which qualifies for the 130% boost and Development Location points (§50.9(b)(16)). Staff believes that access to public transportation generally is more important than location in designated transit oriented district. Additionally, Staff removed the definition when it was removed from consideration under the 130% boost in eligible basis and the Development Location scoring item. As a result, the term is not referred to anywhere in the QAP and Staff does not believe that simply having a definition promotes development in one area over another. Staff recommended no change based on these comments.

BOARD RESPONSE: Accepted Staff's recommendation.

§50.2 - Definitions - Transitional Housing. (17)

COMMENT SUMMARY: Commenter (17) suggested the Department remove "more limited" in the definition as it relates to kitchen and bathroom facilities stating that units must meet accessibility requirements pursuant to the Fair Housing Act.

STAFF RESPONSE: Staff has allowed, based on the definition of Unit as defined in the Department's governing statute, to include limited facilities (i.e. a microwave oven in lieu of an oven/range). Typically, such accommodations are found in Efficiency Units in Supportive Housing Developments. As with all Developments funded by the Department, they would need to comply with all regulations governing accessibility. Staff removed the reference to limited bathroom facilities.

BOARD RESPONSE: Accepted Staff's recommendation.

§50.3 - Program Calendar. (5), (27)

COMMENT SUMMARY: Commenter (5) requested this section include a date by which the Pre-application Submission Log must be posted and suggested the date of January 13. Commenter (27) requested this section be revised to reflect the Executive Director may extend a deadline not statutorily imposed for a period of not more than five business days instead of five calendar days due to weekends and holidays that may shorten the extension period. Commenter further suggested the time frame for amendment requests be shortened and requested clarification that Administrative Deficiencies be for five business days rather than five days.

STAFF RESPONSE: Staff will act expeditiously to post the Pre-application Submission Log and expects to post a log within three days of Application submission; however, offers no guarantee that issues won't arise that may prevent the posting of an accurate log within this time frame or that changes would not be necessary if posted within three days. In response to Commenter (27), Staff agreed with the suggested change for deadlines extended by the Executive Director. As with the amendment process, Staff will act expeditiously to review and take appropriate action whether the request is handled administratively or with Board consideration when such requests are submitted to the Department and Staff has clarified that the intent of the submission is forty-five (45) calendar days. Regarding Commenter (27) suggestion on Administrative Deficiencies, Staff did not propose changes to how this process has been handled in the past and intends to keep the five business day requirement.

BOARD RESPONSE: Accepted Staff's recommendation.

§50.4(b) - Ineligible Applicants. (11), (27), (21)

COMMENT SUMMARY: Commenter (11) suggested the word "voluntarily" be removed. Commenter (27) asked why the voluntary removal from participation in a housing tax credit development should be grounds for ineligibility. Commenter (21) suggested paragraph (6) in this subsection be revised to mirror language in §2306.6703 regarding use of the word "and" between subparagraphs (A) and (B).

STAFF RESPONSE: The intent behind the voluntary or involuntary removal section is for the Applicant to provide full disclosure of any prior (or ongoing as of the date of Application submission) situations of such termination of ownership and to disclose the circumstances behind such event. It will only be after such matter is heard and action is taken by the Board will such circumstance deem the Applicant ineligible. In response to Commenter (21) the current language in §50.4(b)(6) reflects the intent of the legislation in §2306.6703. The intent is that an Applicant that proposes to replace in less than fifteen (15) years any private activity bond financing would be ineligible unless it meets criteria in subparagraph (A) and subparagraph (B) or subparagraph (C) or subparagraph (D). When this legislation was implemented in 2009 Staff drafted it in a way that merely separated the requirement for the one-third public housing/Section 8 units and 100% at 50% AMGI whereas statute included them as one item. Regardless, they would both have to be met if attempting to qualify under this criteria or an Applicant could qualify under items in subparagraph (C) or (D). Staff recommended no change based on these comments.

BOARD RESPONSE: Accepted Staff's recommendation.

§50.4(c) - Ineligible Applications - Unit Cap on Credits Requested. (1), (2)

COMMENT SUMMARY: Commenters (1) and (2) supported the $13,000/Unit cap on the amount of housing tax credits requested and stated the limitation is a reasonable use of funds.

STAFF RESPONSE: At the direction of the Board on October 4, 2011, Staff removed the $13,000 per unit cap in the proposed QAP. Therefore, it was not in the proposed rule as published in the October 21, 2011, issue of the *Texas Register* for public comment. Staff recommended no change based on these comments.

BOARD RESPONSE: Accepted Staff's recommendation.

§50.4(c) - Ineligible Applications - Limit on Amount of Credits Requested as Available in Sub-region. (1), (2), (11), (20), (27)

COMMENT SUMMARY: Commenter (1) supported the cap identified on the credit amount available in the sub-region and indicated that it recognizes the intent of the RAF. Commenter further suggested that if this language is to be altered to incorporate a fixed regional minimum cap that over-allocates to smaller regions, then the RAF design should recognize and adjust for the multi-year impact of such over-allocation by decreasing the amount available in that region the following year. Commenter (2) suggested the percentage limitation on the credit amount available in the sub-region be revised from 150% to 120% and further stated that if a region gets any leftover credits from a prior year with a minimum of $500,000 and an Application can apply for 120% of that amount, this should be enough. Commenter (11) supported the limitation on the credits being requested but to ensure that Rural Area's are not unduly penalized suggested paragraph (10) be revised to read as follows: "for Applications submitted under the State Housing Credit Ceiling, if the Application exceeds a $1 million request in a sub-region where the allocation is less than $1 million. For purposes of determining the credit allocation for the sub-region, a date of January 1, 2012 will be used and any forward committed allocations will not be subtracted from the amount for purposes of determining this eligible amount." Commenters (20) and (27) similarly suggested placing a floor on Applications to the greater of $1 million or the set-aside in the Regional Allocation Formula (RAF); however, Commenter (20) was in agreement with using 150% of a region's RAF set-aside as another option to accomplish this.

STAFF RESPONSE: In response to Commenter (1), the QAP does not include specifics with regard to the Regional Allocation Formula. The over or under allocation of sub-regions is addressed in the reasoned response under the Regional Allocation Formula agenda item. The percentage limitation on the credit amount available in the sub-region, as referenced by Commenters (2), (11), (20) and (27) was revised from 120% to 150% based on public comment at the October 4, 2011 Board meeting and as directed by the Board. Therefore, it was amended prior to the publication in the October 21, 2011, issue of the *Texas Register* for public comment. Staff recommended no change based on these comments.

BOARD RESPONSE: Accepted Staff's recommendation.

§50.4(d)(7) - Ineligible Developments. (2), (11), (18), (27)

COMMENT SUMMARY: Commenter (2) suggested there be an exception for Supportive Housing Developments located in a Central Business District that exceed the limitation allowed for the percentage of one-bedroom units. Commenter (27) requested clarification that paragraph (7) in this section would permit a Development with 100% one and two bedroom units in a Central Business District (i.e. Qualified Elderly Development). Commenters (11) and (18) suggested that the amendment to the tax credit statute in 2008 clarified that properties serving special needs do not violate the general public use requirement and thus should not be required to seek a private letter ruling. Commenter (18) further suggested that special needs groups can be served in tax credit Developments and the Department, not the IRS, should decide which special needs Development's qualify. Commenters (11) and (18) also recommended paragraph (12) be revised to read as follows: "Any Development that violates the general public use requirement under Treasury Regulation §1.42-9 unless the Applicant provides evidence that the Development will serve special needs." Commenter (11) suggested the negative site characteristics be a scoring item instead of an ineligibility item and further suggested that if such characteristics remain in ineligibility then the Department should outline a waiver process for Developments that may have extenuating circumstances.

STAFF RESPONSE: Staff agreed with Commenter (2) and clarified the implementation of this provision as noted in the following amendment: "any Development (excluding Supportive Housing Developments) proposed in a Central Business District with more than 70% one bedrooms and/or Efficiency Units or 70% two bedrooms or more than 20% three bedrooms. An Application may reflect a total of Units for a given bedroom size greater than these percentages to the extent that the increase is only to reach the next highest number divisible by four;..." In response to Commenter (27), Qualified Elderly Developments, whether in or outside of a Central Business District, would have to meet the requirements of both paragraphs (6) and (7) of this subsec-

tion. In response to Commenters (11) and (18), Staff has and will continue to take into account the changes to the tax credit statute regarding the general public use requirement before considering any Application ineligible based on the tenant population it proposes to serve. Staff believes that if a proposed Development does not appear to meet such requirement it would be prudent to seek a private letter ruling rather than risk awarding credits to a Development it believes is in violation of the regulations. With regards to the movement of the negative site characteristics to a scoring item in response to Commenter (11), Staff believes it is the intent of the Board for such characteristics to remain an ineligibility item. The QAP currently provides for a waiver process, should an Applicant elect to seek one; however, it is the Applicant's responsibility to submit such a request to the Department in advance of when it is actually needed so as to avoid unnecessary filing costs associated with the Application process. Additionally, Staff notes clarification to the Ineligible Development item relating to a Rehabilitation Development over 40 years old. Specifically, it was not the Department's intent to restrict this item to only those Developments that are occupied at the time of Application submission and recommended the first sentence in paragraph (9) be revised as follows for clarification "A proposed Rehabilitation (excluding Reconstruction) of an Existing Residential Development that is more than forty (40) years old unless the property is either...."

BOARD RESPONSE: Accepted Staff's recommendation.

§50.4(d)(14) - Ineligible Developments - Two Mile Same Year Rule.

GOVERNOR RESPONSE: This section was amended to remove references to forward commitments.

§50.4(d)(16) - Ineligible Developments - Mandatory Development Amenities. (20), (27)

COMMENT SUMMARY: Commenter (20) disagreed with the proposed revision regarding the requirement of fire sprinklers where no local code prevails and further stated that they know of no local building code that prohibits the use of fire sprinklers and believed the language would require fire sprinklers everywhere in the state, including single-family homes and other design types where almost no local building code requires them. Commenter (27) requested clarification on what is meant by RG-6/U in this section as opposed to RG-6 as specified in the 2011 QAP.

STAFF RESPONSE: Staff recommended a change to the fire sprinkler provision to confirm its requirement for all Units except for single family Units. Staff disagreed with Commenter (20) and has clarified and maintained this requirement due to concerns with health and safety. Fire sprinklers allow additional time for the occupants of a building to evacuate in the case of a fire. Staff recommended subparagraph (M) be revised to read as follows: "Fire sprinklers in all Units, except for single family Units; and..." With regards to the RG-6/U requirement, Staff believes this to be the most recent technology and believes the "U" to represent "universal." Additionally, Staff has clarified its intent in subparagraph (L) of this paragraph to only allow Packaged Terminal Air Conditioners on SRO Units in Supportive Housing Developments.

STAFF COMMENT: Staff made a technical change that removed the term Supportive Housing from subparagraph (E) and instead included subparagraph (E) as a carve-out for mandatory amenities in the opening paragraph of this section.

BOARD RESPONSE: The Board recommended removing subparagraph (M) concerning fire sprinklers as a mandatory Development amenity.

§50.5(c) - Credit Amount. (5), (11), (14), (23), (27), (33)

COMMENT SUMMARY: Commenters (5), (11), (23), (27), and (33) suggested the language in this section be updated to reflect the change implemented by the legislature; specifically, increasing the credit amount from $2 million to $3 million. Commenters (14), (23), and (27) suggested that in order to facilitate capacity building of inexperienced Applicants, as expressed by the Board and Staff, an Applicant that cannot otherwise meet the experience requirements in Threshold, may enter into a joint venture relationship (or in comparable legal structure involving multiple owners) with one or more experienced individuals or a business organization in which they are involved (such individuals or organization being referred to as the Experienced Venturor. Commenters (11) and (14) suggested that when working with an Experienced Venturor, an inexperienced Applicant may, by agreement, provide the Experienced Venturor with the ability to approve certain matters related to the Development but the Principal(s) of the inexperienced Applicant must retain Control. Additionally, the full credit request of the Application under this provision may not exceed $1 million in credits, the full amount of which will be attributed to both the inexperienced Applicant and the Experienced Venturor. Commenters (11) and (14) further suggested that the Experienced Venturor will be allowed to participate in such joint venture in excess of its $2 million cap, up to and not exceeding total requests of more than $3 million in annual tax credits.

STAFF RESPONSE: Statutory changes enable the Board to increase the overall per Applicant cap from $2 million to $3 million. Based on significant public comment requesting an increase in the cap to $3 million as allowed in statute, Staff recommended a change to increase the credit cap to $3 million. Staff proposed the $2 million be replaced with $3 million and that the last sentence be revised to reflect the following: "For purposes of determining the $3 million limitation of tax credits, a Person is not deemed to be an Applicant, Developer, Affiliate or Guarantor solely because it..." Staff also recommended paragraph (5) in this subsection be revised to read as follows "is acting as a General Contractor providing experience or is providing a required construction guarantee because of that role." These changes incorporate a few clarifications based on current practice.

BOARD RESPONSE: Accepted Staff's recommendation.

GOVERNOR RESPONSE: This section was amended to remove references to forward commitments.

§50.5(d)(4) - Limitations on the Size of Developments. (27)

COMMENT SUMMARY: Commenter (27) suggested this provision apply only to developments of the same type and recommended paragraph (4) be revised to read as follows: "For Applications that are proposing an additional phase to an existing tax credit Development of the same type; that are otherwise adjacent to an existing tax credit Development of the same type; or that are proposing a Development of the same type on a contiguous site to another Application awarded in the same program year, the combined Unit total for the existing and proposed Developments may not exceed the maximum allowable Development size set forth in this subsection unless:..."

STAFF RESPONSE: Staff agreed with the change and recommended language by the Commenter. Staff notes that the intent

is for any additional phase to be approved subsequent to and apart from an existing or under construction phase.

BOARD RESPONSE: Accepted Staff's recommendation.

§50.5(e) - Developments Proposing to Qualify for a 30% Increase in Eligible Basis. (5), (11), (14), (26), (27)

COMMENT SUMMARY: Commenter (5) suggested the language in this section needed clarification, specifically, regarding how the Department will measure infeasibility without the boost. Commenter further recommended the opening paragraph of this subsection be revised to read as follows: "Staff will evaluate Applications for a 30% increase in Eligible Basis provided they meet the criteria identified in paragraph (1) or (2) of this subsection and Staff will recommend a 30% increase in Eligible Basis unless a 30% increase in Eligible Basis would cause the development to be oversourced, as evaluated by the Real Estate Analysis division, in which case a credit amount necessary to fill the gap in financing will be recommended (paragraph (2) of this subsection does not apply to Tax-Exempt Bond Applications)." Commenters (11) and (14) suggested that "Difficult to Develop Areas (DDA's)" be added to the list of qualifiers for the 30% boost, similar to that for Qualified Census Tracts (QCT's). Commenters (11) and (26) suggested the following as an addition criterion to qualify for the 30% boost: "(E) A net boost not to exceed 130% less the adjustment for local funding is available where local HOME, CDBG or other funds distributed or administered by the local jurisdiction is provided to a non-elderly Development that is not in a QCT. Such amounts must be equal to at least $2,000 per unit ($1,000 for Rural Developments located in non-participating jurisdictions)." Commenters (11) and (27) suggested re-instating the provision for additional 30% units as a criterion for the 30% boost and believed it is good public policy and should not be deleted. With the increased requirement for deep rent targeting in the scoring criteria, the 30% boost will help with the associated increased costs.

STAFF RESPONSE: Staff agreed with the proposed change and language provided by Commenter (5). With regard to Commenters (11) and (14), while federal regulation allows for developments located in DDAs to receive the 30% boost, individual states have discretion to include it as a criterion in their Qualified Allocation Plans. The Department's Governing Board has not directed Staff to include developments located in such areas to qualify for the 30% boost. In response to Commenters (11) and (27), Staff seeks to target areas that result in higher development costs rather than creating the need for a boost by incentivizing slimmer operating margins through deeper rent targeting. In response to Commenters (11) and (26), Staff generally agreed with the proposed change except that the difference for rural Developments is not necessary since they already are eligible for the boost. Staff recommended the addition of the following language: "(E) any non-Qualified Elderly Development not located in a QCT that receives local HOME, CDBG or other funds distributed or administered by the local jurisdiction provided that such funding amounts are equal to at least $2,000 per Unit and is removed from Eligible Basis."

BOARD RESPONSE: Accepted Staff's recommendation.

§50.6(c) Allocation and Award Process - Allocation Set-Asides. (16), (31)

COMMENT SUMMARY: Commenters (16) and (31) suggested a special funding priority similar to the At-Risk and USDA Set-Asides be created for Enhanced Use Lease Developments located on Veterans Affairs Medical Center Campuses which have a specific designation (at least in part) to house at-risk Veterans.

STAFF RESPONSE: The Department's Governing Board has not directed Staff to create an additional set-aside specific to Veterans or any other specific Target Population. Additionally Staff is concerned that such a dramatic change may need additional public consideration. Staff recommended no changes based on this comment.

BOARD RESPONSE: Accepted Staff's recommendation.

§50.6(f) Allocation and Award Process - Tie Breakers. (1), (2), (4), (5)

COMMENT SUMMARY: Commenter (1) supported using de-concentration as a tie-breaker. Commenter (2) suggested the current language for the second tie breaker is not fair to Developments with smaller unit sizes and further suggested the language be modified to credits per bedroom which seems to be the most fair among the different Target Populations. Commenter (4) suggested the first tie breaker be changed based on the lowest tax credits per capita per municipality or county (if not in a municipality). Commenter (5) suggested the census tract the Development is located in should be the sole tract used for evaluation and further suggested using contiguous census tracts could skew results and should not be considered.

STAFF RESPONSE: Staff agreed with Commenter (2) in respect to modifying the second tie breaker to be based on credits per bedroom instead of credits per square foot and recommended the following revised language: "(B) The amount of requested tax credits per Bedroom (Efficiency Units will be considered to have one Bedroom for the purposes of this provision) as of the date of Application submission. The lower credits per Bedroom will win this second tie breaker..." In response to Commenter (4), Staff believes that the first tie breaker is a better method of preventing concentration because it generally targets a smaller area as opposed to an entire municipality or county; therefore, Staff did not recommend the change as suggested. Staff agreed with Commenter (5) and recommended revising this tie breaker to consider only the census tract in which the Development is located.

BOARD RESPONSE: The Board recommended modifying the second tie breaker to the amount of housing tax credits requested per Bedroom, allowing for 1.5 people per Bedroom.

GOVERNOR RESPONSE: This section was amended to remove references to forward commitments.

§50.7 - Application Process - Administrative Deficiency Process.

Staff noted that for clarification purposes it has removed the following language that was not relative to how it will handle Application information during the review process: "Any exhibits or forms that are part of the Uniform Application and supporting documentation will not be accepted by Staff even if points were requested in the Applicant's Self-Scoring Form unless the Applicant provides an explanation satisfactory to Staff of why the item is missing and explaining how it was beyond their control."

BOARD RESPONSE: Accepted Staff's recommendation.

§50.7 - Application Process - Pre-application Submission.

Staff noted that for clarification purposes it has removed the paper certification accompanying the Pre-application; a signature on the Pre-application itself will suffice. A similar change was made to §50.7(f) pertaining to the Application submission.

Specifically, in these sections the following sentence was deleted "The pre-application must be accompanied by a paper certification with an original signature in the form provided in the pre-application. Furthermore..."

BOARD RESPONSE: Accepted Staff's recommendation.

§50.7 - Application Process - Pre-application Threshold Criteria. (20)

COMMENT SUMMARY: Commenter (20) suggested the elimination of site control at the pre-application stage defeats the purpose of allowing for external assessment of competing applications and the absence of such document will not reflect true submitted Applications. Commenter further suggested reverting to 2010 language which would prevent multiple Developers from attempting to buy up competing sites for Applications and the elimination of competition by a single Developer. Commenter also suggested the notification requirements in this section be modified to exclude specificity relating to the proposed rents and stating that such specificity may create concern when actual rents are set 2 - 3 years later as program rents and utility allowances change on an annual basis.

STAFF RESPONSE: The elimination of site control as a requirement does not prohibit site control and Staff believes that the market will dictate that a prudent Developer will likely gain site control prior to Pre-application. Additionally, eliminating this requirement may provide additional flexibility to continue structuring the development plan between the date of Pre-application and Application. Staff agreed with the specificity required in the notification letters and recommended clauses (vii) - (ix) be removed in addition to the Target Population being served in clause (v).

BOARD RESPONSE: Accepted Staff's recommendation.

§50.7(j) - Application Process - Site Evaluation.

STAFF COMMENT: This section was modified to clarify that a site evaluation may be performed instead of shall be performed and references to a Site Evaluation form were removed.

BOARD RESPONSE: Accepted Staff's recommendation.

§50.8 - Threshold Criteria (General Comments) - Signage Requirement. (1), (5)

COMMENT SUMMARY: Commenter (1) and (5) supported the removal of this threshold requirement.

STAFF RESPONSE: Staff appreciates the positive feedback. Staff recommended no change based on these comments.

BOARD RESPONSE: Accepted Staff's recommendation.

§50.8(2)(A) - Threshold - Governing Body Resolutions - Twice the State Average. (27)

COMMENT SUMMARY: Commenter (27) suggested the proposed changes make it unclear as to whether a Development located in an Extra Territorial Jurisdiction (ETJ) would require a resolution from both the city and the county in which it is located and requested clarification that a resolution from only one Governing Body is required. Additionally, Commenter suggested it does not seem appropriate to require a city resolution for an ETJ when there is no city council member that represents the ETJ and the residents of the ETJ have no right to vote in city elections.

STAFF RESPONSE: It is not Staff's intent to require a resolution from more than one Governing Body. Staff has also reviewed the statutory requirements and agreed with the comments. Staff suggested the section be read as follows: "Twice the State Average. If the Development is located in a municipality, or if located completely outside a municipality, a county, that has more than twice the state average of units per capita supported by Housing Tax Credits or private activity bonds at the time the Application Round begins (or for Tax-Exempt Bond Developments at the time the Certificate of Reservation is issued by the Texas Bond Review Board) the Applicant must obtain prior approval of the Development from the Governing Body of the appropriate municipality or county containing the Development. Such approval must reference this rule and authorize an allocation of Housing Tax Credits for the Development; (§2306.6703(a)(4))"

BOARD RESPONSE: Accepted Staff's recommendation.

§50.8(3) - Rehabilitation Costs per Unit. (1), (2), (5), (18), (22), (27), (28)

COMMENT SUMMARY: Commenter (1) supported the changes made to this section and stated the reason for many failed Developments revolved around the inadequate level of rehabilitation at the time the Application was submitted and believed the requirement should be one that brings a Development up to near new standards. Commenters (2) and (22) suggested the minimum Rehabilitation costs per Unit should be lower for 4% HTC Applications. Commenter (18) agreed with Commenters (2) and (22) and stated that the types of Developments that would need the lower threshold include 9% HTC Developments initially funded in 1995-1997 that have completed their initial 15 year compliance period and are in need of repairs and replacements. Due to their age, Commenter (18) further suggested they do not need $25,000 per unit but would be feasible with $15,000 per unit and further suggested the $25,000 per unit requirement apply only to competitive housing tax credit Developments. Commenter (28) agreed with previous Commenters regarding the increased requirement in rehabilitation costs and suggested the Department reduce the amount or at least exempt 4% HTC Applications. Commenters (5) and (27) recommended the Hard Cost definition as currently defined by the Department (including off-sites and contingency) be the measure used to establish the minimum Rehabilitation costs per unit.

STAFF RESPONSE: In response to Commenters (5) and (27), Staff believes the best measure for rehabilitation costs should be based on the work performed that directly benefits the tenant and documented in the Property Condition Assessment (PCA). Therefore, off-sites, contingency and contractor fees are excluded and Staff suggested the paragraph be revised to read as follows to maintain consistency in terms used in the QAP but defined in other Department rules: "Threshold Criteria: Rehabilitation Costs. Developments involving Rehabilitation must establish a scope of work that will substantially improve the interiors of all Units and exterior deferred maintenance, at a minimum, and will involve at least $25,000 per Unit in direct construction cost, also referred to as building costs in §1.32(e)(4) of this title, and site work unless financed with TRDO-USDA in which case the minimum is $19,000." In response to Commenters (2), (18), (22) and (28), Staff did not believe there was a clear rational for treating 4% HTC transactions differently than 9% HTC transactions.

BOARD RESPONSE: The Board recommended the threshold per Unit be reduced from $25,000/Unit to $15,000/Unit for Developments less than 25 years old that are financed utilizing the 4% Housing Tax Credit (HTC). Developments submitted under

the Competitive HTC Ceiling must meet the $25,000/Unit as well as 4% HTC Developments more than 25 years old.

§50.8(4) - Experience Certification. (1), (3), (6), (23), (27)

COMMENT SUMMARY: Commenter (1) supported the revisions to this section, specifically, that Texas specific experience is not required. Commenter (3) suggested the Department reduce the number of units necessary to prove experience stating that 150 units does not recognize the capacity and accomplishments of smaller housing authorities, particularly Native American housing authorities or departments. Because these tribes receive an annual allocation of funds through HUD based on housing need and demand, the Department should consider this demonstration of support from HUD as evidence that the developer is qualified to participate in the HTC program. Commenter (6) stated the American Institute of Architects (AIA) Document (A111) - Standard Form of Agreement between Owner and Contractor is a form the AIA has not used since 1967 for "cost plus" projects but instead uses the A102 - 2007 Standard Form of Agreement Between Owner and Contractor where the basis of payment is the Cost of the Work Plus a Fee with a Guaranteed maximum Price or the A103 - 2007 Standard Form of Agreement Between Owner and Contractor where the basis of payment is the Cost of the Work Plus a Fee without a Guaranteed Maximum Price. Commenters (23) and (27) suggested clarification in this section regarding whether the principal providing the experience needs to have a controlling interest in the Development and how this language would apply in a capacity building scenario.

STAFF RESPONSE: Staff believes the required number of units would not be a hindrance to an Applicant wanting to submit an Application; however, if such a hindrance would exist the Applicant would be allowed to include a Person who would meet such minimum requirement in their ownership structure or otherwise as part of the Development team. Staff agreed with the proposed change by Commenter (6) and recommended the removal of the AIA A111 Form and replacing it with the A102 or A103 2007 Form. Additionally, Staff has clarified that experience must be in the name of an individual, not an entity as noted in subparagraph (B). In response to Commenters (23) and (27) Staff suggested "with a controlling interest in the Development be removed in subparagraph (A).

BOARD RESPONSE: Accepted Staff's recommendation.

§50.8(5)(D) - Threshold - Certifications. (5)

COMMENT SUMMARY: Commenter (5) suggested the words "and will remain" be removed from the first sentence of subparagraph (D) of this section citing the Applicant can only accurately certify to what is the case at the time the certification is made, not to future events.

STAFF RESPONSE: The laws and requirements cited in this provision must be adhered to beyond the present. Staff believes that it is the responsibility of the Applicant to understand that they must maintain compliance and certify based on this understanding. It is Staff's expectation that all Developments remain in compliance with state and federal laws and regulations. Staff recommended no change based on this comment.

BOARD RESPONSE: Accepted Staff's recommendation.

§50.8(5)(A) - Threshold - Common Amenities. (22), (27)

COMMENT SUMMARY: Commenter (22) suggested the threshold for common amenities required for Tax Exempt Bond Applications should not be increased and stated that Developers are stuck with the properties' existing physical structure. Commenter further suggested that while it is possible to add amenities such as BBQ grills and gazebos, requiring more is not always better if it prevents new Developments from going forward. Commenter (27) suggested the 2011 QAP language awarding 1.5 times the point value for Rehabilitation Developments should remain, suggested the draft allows only 4% HTC Applications a 3 point preference and questioned why the Department increased the number of points required for larger Developments. Commenter (27) further questioned why previous drafts of the QAP included increased points for the fitness center, business center and secured entry; however, such increased points were not included in the published draft.

STAFF RESPONSE: While Staff acknowledged there may be some confines to the existing physical structure of a Rehabilitation Development, Staff believes the list of common amenities is extensive enough that such Developments, whether submitted as a 9% or 4% HTC Application, should not have difficulty meeting the minimum threshold requirements and further maintains that there should not be a 1.5 times point preference for common amenities for any Developments. Staff recommended no change based on these comments.

BOARD RESPONSE: Accepted Staff's recommendation.

§50.8(5)(A) - Threshold - Unit Amenities. (22)

COMMENT SUMMARY: Commenter (22) suggested the number of unit amenities required for threshold on Tax Exempt Bond Applications is too high for acquisition/rehabilitation Developments and stated that Developers are stuck with the present physical condition of the buildings being acquired. As such, it is not economically feasible to add some of the amenities noted on the list and the Commenter suggested the point threshold should be lowered by increasing the base score from 3 to 6 points.

STAFF RESPONSE: In consideration of the fact that Rehabilitation Developments may be limited within the confines of the Development's existing physical structure Staff has maintained a 3 point preference for such Developments. Staff recommended no change based on this comment.

BOARD RESPONSE: Accepted Staff's recommendation.

§50.8(6)(B) - Threshold - Architectural Drawings. (5)

COMMENT SUMMARY: Commenter (5) suggested photographs of the current building exterior should be sufficient to meet the requirement of this section for the "before renovation" drawings. Commenter further recommended deleting the requirement for before renovation drawings where the exterior composition is being altered.

STAFF RESPONSE: Staff agreed and suggested this section be revised to only require "after renovation" drawings in instances where the exterior composition is being altered and photographs of the "before renovation" would be sufficient.

STAFF COMMENT: Staff amended this section to remove the requirement for the site plan to indicate the location of the required basic amenities since there are no required basic amenities referenced in the QAP.

BOARD RESPONSE: Accepted Staff's recommendation.

§50.8(7)(C) - Threshold - Development Costs. (11), (25), (27), (29)

COMMENT SUMMARY: Commenters (11), (25), (27) and (29) suggested this language revert back to 2011 language regard-

ing the $9,000 per unit instead of the current 12% of the direct construction cost language and further stated the site work cost for a New Construction Development is a lot less than $9,000 in actuality.

STAFF RESPONSE: Staff agreed and revised this section to reflect the $9,000 per unit limitation. Additionally, Staff revised this section to reflect the term Hard Costs instead of construction costs to be consistent with defined terms in other Department rules.

BOARD RESPONSE: Accepted Staff's recommendation.

§50.8(8)(A)(iv) - Threshold - Identity of Interest. (5)

COMMENT SUMMARY: Commenter (5) suggested re-instating the identity of interest requirements in the QAP and such language should mirror the Real Estate Analysis Rules; however, Commenter further suggested the language should revert to that of 2011 where there is a 10% return on cost.

STAFF RESPONSE: The language in this section in previous years was identical to that in the Real Estate Analysis (REA) Rules. In an effort to streamline, the QAP requirements relating to identity of interest transactions were moved to the REA rules. The suggestion by Commenter (5) to revert to the 2011 language will be addressed in the REA rules reasoned response. Staff recommended no change based on this comment.

BOARD RESPONSE: Accepted Staff's recommendation.

§50.8(8)(B) - Threshold - Zoning. (11), (19), (20), (25), (27), (29)

COMMENT SUMMARY: Commenters (11), (19), (20), (25), (27) and (29) suggested the requirement for a letter from the Unit of General Local Government stating there is no zoning ordinance and that the proposed Development is consistent with local requirements should be removed and stated that at the time of Application it is difficult for municipalities or Units of General Local Government to sign such a statement because the plats, plans, etc. are not yet completed or reviewed.

STAFF RESPONSE: Staff disagreed with the Commenters but recommended deleting "which does not have a zoning ordinance and that the proposed Development is consistent with local requirements" and replacing with "and that the Development will not be prohibited by any ordinance of that municipality regarding zoning or permitted land uses."

BOARD RESPONSE: The Board recommended the language be modified so that areas with no zoning ordinance will need to provide a letter from the municipality stating there is no zoning ordinance; however, for Developments located in Harris County the letter must state Development is not prohibited by any local housing policy adopted by that municipality.

§50.8(9)(A)(iii) - Threshold - Notifications. (20)

COMMENT SUMMARY: Commenter (20) suggested the notification requirements in this section be modified to exclude specificity relating to the proposed rents and stating that such specificity may create concern when actual rents are set 2 - 3 years later as program rents and utility allowances change on an annual basis.

STAFF RESPONSE: Staff agreed with the specificity required in the notification letters and recommended subclauses (VII) - (IX) be removed in addition to the Target Population being served in subclause (V).

BOARD RESPONSE: Accepted Staff's recommendation.

§50.8(10)(B) - Threshold - Previous Participation. (5)

COMMENT SUMMARY: Commenter (5) suggested the authorization for national previous participation and non-compliance must be specific that includes only instances where IRS Forms 8823 remain uncorrected for 3 months or more within the past 5 years should be reported since not all states interpret noncompliance in a similar manner as the Department.

STAFF RESPONSE: This section in the QAP requires a list of developments in other states and provides the Department with the authorization to request information from other states, but does not dictate how this information will be used. The experience requirement in Threshold includes language similar to that requested by the Commenter. Staff recommended no change based on this comment.

BOARD RESPONSE: Accepted Staff's recommendation.

§50.8(8), (14) - Threshold - Property Condition Assessment. (5)

COMMENT SUMMARY: Commenter (5) supported the deletion of the requirement for the PCA for Reconstruction Developments.

STAFF RESPONSE: Staff appreciates the positive feedback. Staff recommended no change based on this comment.

BOARD RESPONSE: Accepted Staff's recommendation.

§50.9(b) - Selection Criteria (General Comments) - Green Building Initiatives. (1), (2)

COMMENT SUMMARY: Commenter (1) suggested the removal of this scoring item reduces the Department's ability to differentiate between otherwise comparable applications. Allowing points for Developments constructed with such initiatives benefits tenants and the state overall and Commenter (1) suggested this scoring item remain. Commenter (2) supported the inclusion of Green Building Initiatives as a scoring item stating that utility bills are rising faster than inflation and Texas is getting hotter.

STAFF RESPONSE: Staff removed the Green Building Initiatives as a scoring item based on comments made by the Board at the September 15, 2011 Board meeting and subsequently upheld at October 4, 2011 Board meeting. Staff recommended no change based on this comment.

BOARD RESPONSE: Accepted Staff's recommendation.

§50.9(b) - Selection Criteria (General Comments) - Development Size. (1), (8), (13)

COMMENT SUMMARY: Commenter (1) disagreed with the Department regarding the removal of this scoring item. The Commenter suggested that the Department should be encouraging smaller tax credit Developments that can be incorporated into the existing neighborhoods. Commenter further suggested if the Department is concerned with overly awarding At-Risk Developments with these points then such Developments should be excluded from obtaining them, rather than removing the scoring item completely. Commenter (8) suggested this scoring item be re-instated for Developments that may not qualify under the At-Risk set-aside in order to help them score points. Commenter (13) also disagreed with the removal of this scoring item and offered the following as justification for its re-instatement: smaller Developments take very little away from a regional allocation and allows for a better utilization of the allocation, encouraging smaller Developments opens up stronger competition as it encourages newer players to come into the process, smart growth development strategies call for

placing housing within existing urban infrastructure and within existing communities and the availability of land is often limited to smaller plots within developed communities, and many of the smaller Developments have been developed by non-profits who return the developer fee to the community through additional programs and services.

STAFF RESPONSE: Staff recommended the removal of this scoring item consistent with Board direction at the October 4, 2011 Board meeting. Therefore, it was not in the proposed rule as published in the October 21, 2011, issue of the *Texas Register* for public comment. Staff does not have a specific rational for incentivizing a Development of one size over another and is therefore not including a scoring incentive specific to Development size. Staff recommended no change based on these comments.

BOARD RESPONSE: Accepted Staff's recommendation.

§50.9(b)(1) - Selection Criteria - Financial Feasibility.

STAFF COMMENT: Staff amended subparagraph (B) of this section to reflect that a term sheet, not a commitment letter, is required to be consistent with the financing requirements in the Threshold section of the QAP. Additionally, Staff clarified that the term sheet from the lender indicates that their assessment as based on considerations that included the Development's underwriting pro forma finds that the Development will be feasible for (fifteen) 15 years.

BOARD RESPONSE: Accepted Staff's recommendation.

§50.9(b)(2) - Selection Criteria - Quantifiable Community Participation. (1), (5), (8), (11), (20), (27)

COMMENT SUMMARY: Commenter (1) supported the formal identification of a process to evaluate the fair housing implications of Quantifiable Community Participation (QCP); however, finds it odd that the Department should outsource this process to the Texas Workforce Commission since the Department has more subject matter expertise useful to evaluating the fair housing implications of such input; however, the Commenter withheld the judgment of the Texas Workforce Commissions performance. Commenter also suggested the public and/or Applicants be allowed to request the formal evaluation of letters submitted under this scoring item. In addition Commenter suggested that this scoring item be revised to reflect that support be assumed unless a legally reasoned negative letter is submitted since higher-opportunity areas are less likely to provide a letter in support of an Application compared to an Application proposed in a lower scoring area. Commenter also supported providing points for areas with no Neighborhood Organizations; however, suggested the logic be extended to areas with Neighborhood Organizations that are not organized enough to submit written comments. Commenter (5) suggested the language in this section be modified to clarify that an Applicant may provide technical assistance in the formation of a Neighborhood Organization in instances where the Development Site is not located in the boundaries of any Neighborhood Organization. Commenter further suggested clause (vi) in this subparagraph read as follows: "for purposes of this section, if there is no Neighborhood Organization already on record whose boundaries include the proposed Development Site, the Applicant, Development Owner, or Developer is allowed to provide technical assistance in the creation of and/or placing on record of a Neighborhood Organization provided that no Neighborhood Organization whose boundaries include the proposed Development Site exists and that such assistance is limited to..." Commenter further suggested some of the language in this section should be clarified since it appears to be contradictory. Specifically, Commenter suggested the sentence "the organization needs to have as participating member's representatives of two or more separate households. The representatives actually need to be individuals who reside in the Neighborhood Organization's boundaries" in subparagraph (A)(viii) of this paragraph" should be deleted and stated that since the paragraph provides guidelines and not requirements; it is therefore inappropriate to include requirements for who is involved in an optional meeting. Commenter also suggested the scoring of QCP did not include the score for letters deemed ineligible and suggested subclause (II) of subparagraph (B) be amended to include the following clarification "letters that do not meet the requirements of this section and letters that do not provide a reason for support or opposition or that are unclear even after correspondence with the Department will receive a score of (14 points);..." Commenter (8) suggested this scoring item be revised to require the Neighborhood Organization to meet to discuss the Development if they were going to write a letter in support or opposition, rather than the current language which merely encourages the group meet. Commenters (11), (20) and (27) suggested this item is punitive for areas of the state that do not have registered Neighborhood Organizations and requested that points for which no Neighborhood Organizations exist be raised 2 points to 18 instead of the proposed 16 points. This change, coupled with the points available under Input other than QCP (§50.9(b)(13)) will give areas of the state without Neighborhood Organizations an opportunity to score as high as those with Neighborhood Organizations.

STAFF RESPONSE: Staff agreed with the proposed change and language from Commenter (5) regarding clause (vi) of this subparagraph, clarifying the technical assistance allowed if there is no Neighborhood Organization already on record whose boundaries include the proposed Development Site. With regard to the meeting requirement comments from Commenters (5) and (8), the purpose of this provision is to encourage participation and transparency. Staff agreed that requiring a meeting that is optional to meet specific requirements if it is ultimately held is unnecessary and the language has been struck as suggested by Commenter (5) since this section already specifies the requirements of a Neighborhood Organization's support or opposition. Staff also agreed with the clarifying language provided by Commenter (5) that letters not meeting the requirements of this section be treated the same as letters not providing a reason for support or opposition and made this change accordingly as noted below. Staff also clarified that if no letters are received but a Neighborhood Organization does exist, such applications will receive 14 points. In response to Commenters (11), (20) and (27), Staff does not believe that in areas where no Neighborhood Organization exists such Applications should be allowed to maximize QCP points (including those allowed under the Input other than QCP scoring item). Such a change would put these Applications on a level playing field with those who do have Neighborhood Organizations and such Organizations submit a letter of support. Staff is concerned that this could cause a conflict with the statutory priorities for scoring. Staff recommended clause (i)(II) of subparagraph (B) be amended to read as follows: "letters that do not meet the requirements of this section, letters that do not provide a reason for support or opposition, letters that are unclear even after correspondence with the Department or Applications for which no letters are received will receive a score of (14 points).

BOARD RESPONSE: The Board recommended an increase in the point value for areas that do not have Neighborhood Organizations from 16 points to 18 points and the removal of the ability of the Applicant to provide limited technical assistance.

§50.9(b)(3) - Selection Criteria - Income Levels of the Tenants. (5), (10), (11), (14), (27)

COMMENT SUMMARY: Commenters (5) and (27) suggested the language of this section would require Developments located in some places that are defined as Rural to meet the same income targeting requirements as Developments located in the MSA's of Houston, Dallas, Fort Worth, San Antonio and Austin. This affects places that are within the boundaries of a MSA but which have populations less than 25,000 and that do not share a boundary with an area defined as urban. Commenter (5) suggested subparagraph (A) be revised to clarify Developments proposed to be located in "non-Rural Areas." Commenter (10) requested clarification on how the Department will determine if the Development is in a Metropolitan Statistical Area (MSA); whether it will be based on the income limits or the census definition. Commenters (11) and (14) suggested, similar to Commenter (5), that there are areas that qualify as rural that are also located in MSA's and requested subparagraph (A) be revised to clarify that it would be applicable to "urban" Developments.

STAFF RESPONSE: Staff agreed with Commenters (5), (10), (11), (14) and (27) that clarification for this scoring item is needed and proposed subparagraph (A) be revised to read as follows: "For Developments proposed to be located in an area of the MSA of Houston, Dallas, Fort Worth, San Antonio or Austin that is not in a Rural Area, an Application may qualify to receive:..."

BOARD RESPONSE: Accepted Staff's recommendation.

§50.9(b)(4) - Selection Criteria - Quality of the Units (5), (27)

COMMENT SUMMARY: Commenter (5) disagreed with the movement of the list of unit amenities to the Definitions and Amenities for Housing Program Activities rule and requested that such list remain in the QAP. Commenter (27) suggested this section be revised to allow Rehabilitation Developments 1.5 times the point value for unit amenities listed in this section as was provided for in prior year QAP's and further stated that giving such Developments a 3 point preference is not quite enough.

STAFF RESPONSE: In an effort to streamline the QAP and provide consistency across multiple programs Staff maintains the list referenced by Commenter (5) be placed in a more centralized location in the Department's rules. In response to Commenter (27) Staff believes the large number of options for unit amenities with which to select and the proposed language to not allow Owners to have to disclose which amenities they are providing until later in the Development process, coupled with the 3 point preference would be sufficient for a Rehabilitation Development. Staff recommended no change based on these comments.

BOARD RESPONSE: Accepted Staff's recommendation.

§50.9(b)(5) - Selection Criteria - Commitment of Funding from a Unit of General Local Government or Governmental Instrumentality. (2), (5), (11), (20), (23), (24), (27), (32)

COMMENT SUMMARY: Commenter (2) supported the changes to this scoring item stating it is appropriate and reasonable. Commenter (5) suggested the language in this scoring item be clarified to reflect the Unit of General Local Government or Governmental Instrumentality must have a service area that is located within the same county or contiguous county and suggested the following revision in the opening paragraph: "Funding must be from a Unit of General Local Government or a Governmental Instrumentality whose service area is within the same county or contiguous county as the proposed Development." Commenter (11) requested clarification that multi-jurisdictional entities (such as COG's and HFC's) will be eligible as long as the proposed Development is within or in an adjacent county to their service area. Commenter (5) also suggested changes to the language in this section that relates to tax exemptions and abatements and recommended the following revision based on the belief that tax exemptions and abatements provide a tangible benefit to the financial structure of a Development for the entire period over which the exemption or abatement is received because of the reduction of operating expenses and subsequent increase in the amount of loan funds that can be supported. Commenter (5) suggested this section be revised to read as follows: "(iv) In-kind contributions such as donation of land, tax exemptions, or waivers of fees such as building permits, water and sewer tap fees, or similar contributions are only eligible for points if the in-kind contribution provides a tangible economic benefit that results in a quantifiable Total Housing Development Cost reduction to benefit the Development. The quantified value of the Total Housing Development Cost reduction may only include the value during the period the contribution or waiver is received and/or assessed. Donations of land must be under the control of the Applicant, pursuant to §50.8(8)(A) of this chapter to qualify. The value of in-kind contributions may only include the time period as of the beginning of the Application Acceptance Period and the Development's Placed in Service date, with the exception of contributions of land and tax exemptions. The full value of land contributions, as established by the appraisal required pursuant to clause (viii) of this subparagraph will be counted. The full value of tax exemptions over the period of the tax exemption will be counted. Contributions in the form of tax exemptions or abatements may only count for points if the contribution is in addition to any tax exemption or abatement required under statute." Commenter (5) suggested changes to the language in this scoring item as it relates to a rental subsidy as a qualifying source and stated the contribution of a rental subsidy should be allowed regardless of whether it is for 15 years or a shorter term. Commenter (5) suggested clause (vi) of subparagraph (A) be revised to read as follows: "Development based rental subsidies may qualify under this section if evidence of the remaining value of the contract remaining as of December 31st of the application year is submitted from the Governmental Instrumentality. The value of the contract does not include past subsidies. The funding must be provided directly (not merely as administrator) by the UGLG or an instrumentality thereof." Commenters (11), (20), (23), (24) and (27) suggested the Department define the term "current market rate" and that it be identified and published by the Department when the QAP is considered final and not subject to change until that Development is placed in service. Commenter (27) suggested the market rate be defined as the greater of the 10-year U.S. Treasury rate plus 500 basis points or 8.5%. Commenter (20) requested clarification on how a Development would be treated if the Unit of General Local Government who makes the commitment ceases to loan funds or can't live up to its obligation - events that are out of the Developer's control. Specifically, would the Development not be eligible to receive IRS Forms 8609 or without having received these points it would have resulted in another Development from the region receiving the award? Commenters (20) and (23)

requested the calculation of the contribution be based on Low Income units and exclude market rate units in a Development since the Department should only be looking at encouraging the extra funding on the Low Income units. Commenter (27) suggested that at a minimum, origination fees should be "equal to" or less than 2% and requested clarification on whether the new provision in this scoring item is meant to exclude loans made by Housing Finance Agencies with an interlocal agreement with the local government entity. Commenter (27) further suggested this scoring item should just revert to the 2011 QAP language with reductions in the required amount of support for the various point levels as proposed in the 2012 Draft QAP and supported Staff's suggestion at the Board meeting that loan commitments and interlocal agreements be submitted at the time of the HTC Commitment. Commenter (32) suggested this scoring item be expanded to include criteria for Developments that do not need a commitment of funds from a Unit of General Local Government in order to encourage Developments that don't need the funds to be financially feasible from competing for limited local resources with those Developments that do need such funds. Commenter (32) suggested the following criteria be added for points under this scoring item "1. Projects not receiving financial assistance or in-kind contribution from a Local government entity and can demonstrate financial viability in deferring no more than 25% of the developer fee - 17 points and 2. Projects not receiving financial assistance or in-kind contribution from a local government entity and can demonstrate financial viability in deferring no more than 35% of the developer fee - 11 points."

STAFF RESPONSE: Staff agreed with Commenter (5) that clarification is necessary but believes that the suggested language may allow for much larger areas than intended. Therefore, Staff recommended the last sentence of the opening paragraph of this scoring item be revised as follows, which maintains the intention for the funding to be truly local: "Funding must be from a Unit of General Local Government or a Governmental Instrumentality with headquarters within the same county as or a contiguous county to the proposed Development." In response to the addition of language regarding tax exemptions suggested by Commenter (5), state law often provides for tax exemptions and tax exemptions not provided for under state law would be very difficult to calculate and would be very speculative; therefore Staff did not recommend the change. With regard to existing rental subsidies by Commenter (5), the purpose of this scoring item is to encourage new funding and support from the local government which is not provided by an existing subsidy agreement; therefore Staff did not recommend the change. In response to comments regarding the market rate, Staff intends to rely on the expertise of the funding entity to define the market rate and whether the committed rate meets this requirement. Market rates can fluctuate dramatically and believes that defining the market rate ahead of time would be overly restrictive. In response to whether 8609s could be issued if funding is not ultimately obtained, the Applicant is encouraged to notify the Department prior to closing to avoid any issues at the time of cost certification. The Board would have the ability to hear any extenuating circumstances. In response to limiting the calculation of funds per Unit to just include low income Units, the levels provided for are significantly reduced from the prior year and Staff believes that leveraging additional funds for the entire Development is a priority of the Board. Staff agreed with Commenter (27) regarding clarification of origination fees and modified the language to reflect the origination fees must be equal to or less than 2% of the loan amount. In response to Commenter (32) Staff believes the intent of this scoring item in statute is to incentivize Developments that need the additional local funding for financial feasibility and can secure such funding and believes the suggested change by the Commenter would violate the statutory provision.

BOARD RESPONSE: The Board recommended reducing the below market interest rate from 150 basis points to 100 basis points; modify the source of funds to apply only to low income units in the Development and not total units; and modify the language for the location of the Unit of General Local Government from "headquarters in the same county or a contiguous county" to the "jurisdiction as established in accordance with the statutory requirements."

§50.9(b)(6) - Selection Criteria - Community Support from State Representative or State Senator. (1)

COMMENT SUMMARY: Commenter (1) supported the formal identification of a process to evaluate the fair housing implications of Quantifiable Community Participation (QCP) and Input other than QCP; however, encouraged the Department to extend this process to this scoring item as well. Commenter (1) also suggested the public and/or Applicants be allowed to request the formal evaluation of letters submitted under this scoring item.

STAFF RESPONSE: Any information submitted to the Department regarding an Application is subject to an open records request and can be viewed by the public at any time upon request. Additionally, as part of the Application and Award process, the Department can receive challenges on information submitted as part of an Application which would be evaluated by the Department. Staff recommended no changes based on this comment.

BOARD RESPONSE: Accepted Staff's recommendation.

§50.9(b)(7) - Selection Criteria - The Rent Levels of the Units (1), (5), (10), (11), (14), (27)

COMMENT SUMMARY: Commenter (1) suggested that the proposed changes to this scoring item lowers the bar for points for 30% units outside the major cities when the Department should be raising the bar across the state. Commenter further suggested that if applications for smaller Developments are overreaching just to claim the points then they should be determined to be infeasible during the underwriting evaluation and not rewarded with lower standards. Commenter offered that if the Department maintain this language, that it be modified to identify the excluded areas by AMI. Commenter (5) supported the change to allow a lesser percentage of units at 30% and 50% AMGI for Developments not located in the MSAs of Houston, Dallas, Fort Worth, San Antonio and Austin; however, the current language would require a Development located in a place designated as Rural, but within one of the MSAs listed to do a higher percentage of deep rent targeting in order to achieve the maximum points. Commenters (5) and (27) suggested that while the maximum point value for this scoring item has increased so has the number of 30% and 50% AMGI units and suggested that such change will ultimately affect the financial feasibility of the transaction. Commenters (5) and (27) suggested subparagraph (A) be revised to reflect Developments proposed to be located in non-Rural Areas in the MSA and that clause (ii) of subparagraph (A) be revised from 6 to 7 points. Commenter (10) suggested the current language does not reflect the intent of the Board, specifically; the language has been revised to reflect an additional 5% of the units at 50% AMGI in order to achieve the maximum points for this item. Commenter (11) suggested reverting back to the maximum of 12 points for this scoring item, as it was

in the 2011 QAP. Commenters (11) and (14) suggested, similar to Commenter (5), that there are areas that qualify as rural that are also located in MSAs and requested subparagraph (A) be revised to reflect urban Developments located in the MSA.

STAFF RESPONSE: In regions of the state where deeper income targeting may prevent the Development from being financially feasible, lowering the levels of targeting for Rural Areas of the state may open up new areas of the state for development due to increased feasibility. Staff agreed with Commenters (5), (11) and (14) that clarification for this scoring item is needed and proposed subparagraph (A) be revised to read as follows: "For Developments proposed to be located in an area of the MSA of Houston, Dallas, Fort Worth, San Antonio or Austin that is not in a Rural Area, an Application may qualify to receive:..." With regards to Commenters (5), (10), (11) and (27) on the point increase and additional 50% AMGI units, this concern is only with regard to urban areas. While the maximum number of points has increased by 2 points, an Applicant can still achieve last year's maximum points by doing the same amount of deep rent targeting; therefore, Staff does not recommend the change.

BOARD RESPONSE: Accepted Staff's recommendation.

§50.9(b)(8) - Selection Criteria - Costs of the Development by Square Foot (2), (8), (11), (18), (20), (27)

COMMENT SUMMARY: Commenter (2) supported the changes made to this scoring item, specifically, for elevator served buildings with four or more stories; the interior qualifies for net rentable area. Commenter (8) suggested that historic preservation developments using historic tax credits be able to deduct the amount of historic tax credit proceeds shown in the development sources from the development's hard cost, prior to making the costs per square foot calculation. Commenter (18) suggested the points for this scoring item be awarded based on eligible basis costs rather than total hard costs and further suggested that while Staff has interpreted §2306.6710 to award points based on the cost of the development per square foot, the Texas Administrative Law provides agencies the discretion to interpret statutory language that is general and ambiguous. Commenter (18) stated that while the Department has never awarded points based on the total development cost (including soft costs) per square foot, one possible interpretation of statute is that all costs must be considered; however, the Department has reasonably exercised its discretion in interpreting this statutory provision to focus on hard costs in particular. Commenters (11) and (18) argued that the Department similarly has the discretion to focus on hard costs that are included in eligible basis and suggested the following sentence be added to this scoring item: "The calculation does not include costs excluded from Eligible Basis in the development cost schedule." Commenter (18) suggested that the Department release a database of historical cost certification data and cited §2306.6710 as the requirement to do so and further suggested the Department define Direct Hard Costs or use such a phrase as "total construction costs excluding site work" for the lower cost limits. Commenters (11), (20) and (27) had a similar comment regarding the defined term and suggested the Department use Direct Construction Costs.

STAFF RESPONSE: With regard to Commenter (8), the equity value of the historic tax credit is speculative because both the amount of cost eligible for the credit and the pricing of any credit purchased are just estimates. Additionally, the Department has limited resources to evaluate the costs specifically attributed to historic rehabilitation basis. In response to Commenter (18) and the database for historical cost certification data, the Real Estate Analysis division has historically examined direct construction cost comparisons to that of Staff's underwriting analysis in a given Application Round. Additionally, Staff compares costs on previous Developments that were similarly constructed as the proposed Application as well as previous Developments by the same Developer for cost comparison purposes. Staff believes that relying on a database for historical cost certification data for current Applications would not be reflective of true development costs and could yield skewed results since such database would be based on outdated data and to the amount of differentiation in architectural design. In underwriting Applications in this regard, Staff relies on Marshall & Swift for such analysis. However, Staff does attempt to identify and compare the costs of similar developments in the cost certification process when Marshall & Swift differs significantly from an Applicant's estimates. In response to the clarification requested by Commenters (11), (18), (20) and (27) on the undefined term "Direct Hard Costs" Staff made the following revision where appropriate in this section: "...ninety-five dollars ($95) per square foot (and direct construction cost, also referred to as building costs in §1.32(e)(4) of this title do not exceed $80 per square foot) for Qualified Elderly and Elevator Served Development, single family design, and Supportive Housing Developments and Developments located in a Central Business District unless located in a "First Tier County" in which case their costs do not exceed $97 per square foot (and direct construction cost, also referred to as building costs in §1.32(e)(4) of this title do not exceed $82 per square foot);..." With regard to only considering costs included in Eligible Basis, Staff has concerns that further restricting the cost per square foot to only include Eligible Basis is distinctly different than construction costs and may conflict with the statutory requirement for this scoring item.

BOARD RESPONSE: Accepted Staff's recommendation.

§50.9(b)(9) - Selection Criteria - Tenant Services (5), (11), (14), (27)

COMMENT SUMMARY: Commenter (5) disagreed with the movement of the list of tenant services from the QAP to the Definitions and Amenities for Housing Program Activities rule. Commenters (5), (11) and (27) suggested that the increase in the number of maximum points resulting in an increase in the number of services required will increase operating costs, particularly for smaller Developments. Commenters (5) and (27) recommended the maximum point value be reduced to 8 points and the number of services required to achieve these points be lowered on a sliding scale for smaller Developments based on the following: "total Units equal 16, (2 points) is required; total Units are 17 to 40, (3 points) are required; total Units are 41 to 76, (4 points) are required; total Units are 77 to 99, (5 points) are required; total Units are 100 to 149, (6 points) are required; total Units are 150 to 199, (7 points) are required; or total Units are 200 or more, (8 points) are required." Commenter (14) suggested that smaller Developments do not have the necessary volume of residents to be able to attract the same scope of services as larger Developments and suggested such Developments be treated on a sliding scale, similar to that of common amenities. Commenters (11) and (14) suggested the following language be added at the end of the paragraph for this scoring item: "...To provide for consistency with the Threshold requirements that create a sliding scale for amenities based on Development size, Developments with 60 or fewer Units will receive 2 points for each point item and Developments with 61 to 120 Units will receive 1.5 points for each point item." Commenter (11) suggested that, in addition to the proposed

revision above, that Developments with 121 or more units will receive 1 point for each item.

STAFF RESPONSE: In response to Commenter (5) on the movement of the list of services, the list was moved to a general section of the rules to provide for use by all multifamily Department programs. With regards to the change in point value, the maximum points for this item must be higher than those available for the next scoring item in order to comply with statute. Therefore, Staff recommended no change based on these comments. In response to Commenters (5), (11), (14) and (27) regarding the sliding scale of services for smaller Developments, the services list has been expanded and clarified and Applicants can choose from a wide array of services to fit the size of the Development, Target Population, and budget. Additionally, while the maximum point value has been increased, it is entirely up to the Applicant which services, taking into account the corresponding point values, could be offered at the Development. Staff recommended no change based on these comments. However, Staff modified the language in this section slightly to reflect that by electing points for this item the Applicant is certifying that the Development will provide the services, appropriate for the tenants, and that adequate space will be available for the services.

BOARD RESPONSE: Accepted Staff's recommendation.

§50.9(b)(11)(C) - Selection Criteria - Additional Evidence of Preparation to Proceed (1), (2), (4), (5), (11), (14), (23), (24), (27), (30)

COMMENT SUMMARY: Commenters (1), (11) and (30) disagreed with the proposed language in this section, specifically, that the worst-scoring applications from prior Application Rounds be rewarded merely for aging. The Commenter suggested this punishes new entrants into the program and hampers the Department's ability to identify the best Application for an award. Between the time the application was not competitive enough for an award to when they re-submit, the Applicant can utilize the time to work on the Application in order to score additional points in the process. Similarly, Commenters (23) and (27) requested the removal of this paragraph in this section. Commenter (2) suggested that instead of 2 points for Applications submitted in prior Application Rounds, such points should be awarded to Applications that were tied in their subregion in the prior Application Round. Commenter (4) suggested the maximum number of points for this scoring item be reduced from 7 points to 5 points which would allow new Applicants to compete equitably with Applications submitting in prior years. Commenter (4) believed the current language penalizes new Applicants who spend time and money to submit an Application for the first time on viable transactions. Commenter (5) supported the addition of the scoring item; however, requested requirements be added that addresses what features of an Application must be the same as previously submitted in order to qualify for the points, for example, number of units is the same, site is the same as the previous Application, etc. Commenters (11), (23) and (24) requested the same clarification regarding what characteristics of the site may change, including whether the same Applicant must re-submit the Application. Commenters (11) and (14) requested clarification to this scoring item relating to the definition of prior Application Rounds; specifically, whether this is any two rounds since the beginning of the program or does it need to be the most recent two rounds. Commenter (11) also requested clarification on whether this includes Pre-application or only Application submittals. Commenter (30) requested clarification on what should be included in a Civil Engineering Study.

STAFF RESPONSE: Staff understands the concern that a new Application cannot achieve the highest score and recommended subparagraph (B) be revised to allow up to 4 points instead of 2 points to address the Commenter's concern. In response to Commenter (1), Staff believes that a Development that made it through a prior round without getting an award would have the ability to improve their score on their own; however, in many instances they are blocked by economic issues affecting their score. Moreover, transactions that are able to resubmit have the greatest chance of being more fully formed and have had to keep their transaction intact particularly with regard to acquisition and support. In response to Commenters (5), (11), (23) and (24) regarding characteristics of the site, Staff believes that generally as long as there is some overlap of the original Development Site, the same number of Units and at least one Affiliate of the previous Applicant is an Affiliate of the current Applicant then such Application would be eligible for the points under this item. Staff incorporated such requirements accordingly. In response to Commenter (30), the minimum requirements of the Civil Engineering Study are included in this section. Additionally, Staff has limited the re-submission of the Application to those submitted in the preceding 3 Application Rounds and furthermore believes it should be limited to only Application re-submittals and recommended the scoring item has been clarified accordingly.

BOARD RESPONSE: Accepted Staff's recommendation.

§50.9(b)(12) - Selection Criteria - Leveraging of Private, State and Federal Resources (1), (2), (4), (5), (9), (10), (11), (18), (20), (24), (26), (27)

COMMENT SUMMARY: Commenters (1) and (2) suggested that while this scoring item requires 30% AMGI units in order to qualify for the points, it doesn't specify a minimum number of such units. Commenter (1) suggested a minimum of 5% of the units at 30% AMGI in order to qualify for the points. Commenter (2) suggested this scoring item be revised to read as follows: "The purpose of this scoring item is to provide an incentive for the leveraging of financial resources, when economically feasible, for a Development that proposes to serve a specified percentage of households at or below 30% of AMGI. Applications may qualify to receive 7 points for a Development located outside a Qualified Census Tract and 6 points for a Development located inside a Qualified Census Tract. To receive points under this item, the Development must have at least 10% of the total Units restricted for occupancy by households at or below 30% AMGI. Funding sources used for points under paragraph (5) of this subsection may not be used for this point item. Division of the same funds that originate from a local government source into separate loans or grants does not result in eligibility under this paragraph and paragraph (5) of this subsection. Funding sources must be part of the permanent sources of funds for the Development. (A) If in the form of a long term loan (greater than 10 years), or grant funds that are structured as a long term loan to the Development Owner, must bear an annual interest rate of 1% or less. Funding must be provided by one or more Third Parties; (B) If total subsidy funding from private, state and federal resources for the Development are greater than 10% of Total Housing Development Costs and at least 10% of the units are restricted for occupancy by households at or below 30% AMGI, then 4 points will be awarded; (C) If total subsidy funding from private, state and federal resources for the Development are greater than 15% of Total Housing Development Costs and at least 15% of the units are

restricted for occupancy by households at or below 30% AMGI, then 6 points will be awarded for a Development located inside a Qualified Census Tract, and 7 points for a Development located outside a Qualified Census Tract; (D) Examples of sources of funds that may qualify include federal HOME or CDBG funds awarded by the State or a local government, Federal Home Loan Bank Affordable Housing Program grants, TIF or TERZ funding allocated for affordable housing, and private foundation grants; (E) Funding to support ongoing operations, including rental subsidies, or other sources not directly offsetting the Total Housing Development Cost are not eligible for points under this paragraph. Qualifying funds awarded through local entities may qualify for points if the original source of the funds is from a private, state or federal source. If qualifying funds awarded through local entities are used for this item, a statement from the local entity must be provided that identifies the original source of funds; (F) The Development must have already applied for funding from the funding entity(ies). Evidence to be submitted with the Application must include a copy of a letter from the funding entity indicating that the application was received and that the terms for available funding meet the requirements of subparagraph (A) of this paragraph; (G) At the time the executed Commitment is required to be submitted, the Applicant or Development Owner must provide evidence of a commitment approved by the Governing Body of the entity for the sufficient financing to the Development." Commenters (4), (20) and (24) requested that the market interest rate be defined in the final QAP so that Applicants can move forward with underwriting and site acquisition and further requested this be set at a reasonable level (i.e. 8%) where the conventional banks could meet the requirement and not just a few lenders. Commenter (11) similarly requested the market interest rate be defined and suggested the following: "Market Interest Rate shall be the greater of the 10 year U.S. Treasury rate plus 500 basis points as of the Application date or 8.5%. This rate will be published and fixed by the Department prior to the opening of the Application Round." Commenter (5) suggested the same funding source be allowed to qualify under Unit of General Local Government funding scoring item and this scoring item as well stating those Developments that are able to secure substantial sources of financing other than housing tax credit equity and conventional debt should be allowed access to both scoring items related to leveraging of funding. Commenters (9) and (11) requested a definition of primary funding source and whether it requires a majority percentage of the total funding. Commenters (9), (10) and (11) requested clarification on the number of 30% units required in order to clarify for points under this scoring item. Commenters (9), (10) and (11) suggested the first lien language is problematic and that if the definition of primary funding source is met, the lien position should not be dictated by the Department. Commenter (2) also suggested the first lien language is going to be difficult, specifically when there's no hard debt on a Development. In this situation the first lien will most likely be city funds which if you're already using for the Commitment of Funding from a Unit of General Local Government scoring item will not qualify additionally under this scoring item. Commenter (2) further suggested that the grants on Developments with no hard debt will always be made to the sponsor and then sponsor will loan them to the partnership which will make the first lien position difficult to achieve. Commenter (9) also suggested that at the time of the HTC Commitment the requirement to provide a commitment for this funding should be a conditional commitment based on final underwriting. According to Commenters (2) and (9) timing will make it impossible to get through underwriting with the Federal Home Loan Bank until there is a HTC Commitment in hand and given their cycle(s) for funding. Commenter (9) further suggested that if there is concern over whether the Applicant will ultimately receive the funding then the commitment could be required at 10% test. Commenter (10) suggested that the Federal Home Loan Bank had eliminated their fall round of funding which would make achieving this as a funding source for this item difficult. Commenter (9) requested that CDBG disaster funding also be added to the list as an eligible source and Commenters (11) and (18) requested that HUD-insured 221(d)(4) new construction and 223(f) acquisition/rehabilitation loan products be added. Commenters (11) and (20) suggested the points associated with this item revert back to 1 point and stated it has been revised into a more confusing item with more variables and subjective language that will take time to determine how Applicants will meet the criteria as proposed. Commenter (26) suggested this section be revised to reflect the due date for the commitment of such funds to the time of Carryover and further stated that public testimony was provided from an active lender requesting more time for their commitment. Similarly, Commenter (27) expressed concerns over the ability to secure a commitment from the funding entity by the time the HTC Commitment is submitted to the Department and further stated there simply is not enough time for lenders to complete their due diligence and go to loan committee in order to be in a position to submit a commitment simultaneously with the HTC Commitment. Commenter (11) requested clarification that sources may be substituted from Application to Commitment.

STAFF RESPONSE: In response to Commenters (1), (2), (9), (10) and (11), Staff recommended minimum of 5% of the total units at 30% of AMFI. Staff has also made other clarifying changes; some of which were suggested by various Commenters and recommended this scoring item be revised to read as follows: "The purpose of this scoring item is to provide an incentive for the leveraging of financial resources, when economically feasible, for a Development that proposes to serve a specified percentage of households at or below 30% of AMGI. Applications may qualify to receive 7 points for a Development located outside of a Qualified Census Tract and 6 points for a Development located inside a Qualified Census Tract. To receive points under this item, the Development must have at least 5% of the total Units restricted for occupancy by households at or below 30% of AMGI. Funding sources used for points under paragraph (5) of this subsection may not be used for this point item. Division of the same source into separate loans or grants does not result in eligibility under this paragraph and paragraph (5) of this subsection. Multiple sources may be combined to qualify under this item. "(A) If in the form of a loan, funding must be the primary source of debt with a first lien position and a minimum loan term of fifteen (15) years. Loans that are not first lien but are the largest source(s) of funding, not including equity generated from Housing Tax Credits, other federal tax credits, or funds used under paragraph (5) of this subsection also qualify. Origination fees cannot exceed 2% of the loan amount(s). Funding must be provided by a Third Party except when the funds are federally sourced and passed-through a Government Instrumentality. All loan funds qualifying for consideration under this section must provide an economic benefit over a market rate transaction (i.e. cannot buy down the rate by increasing upfront interest costs)."; "(B) Permanent grant funding not secured by a deed of trust may be used, provided the grant funding is the largest source of funding not including equity generated from Housing Tax Credits, or other federal tax credits, or funds used under paragraph (5) of this subsection. Funding must be provided by a Third Party ex-

cept when the funds are federally sourced and passed-through a Government Instrumentality."; "(C) Examples of sources of funds that may qualify include those listed under clauses (i) - (vi) of this subparagraph. A Certification from the lender as of the date of such certification that the loan would meet this provision is required. (i) HOPE VI; (ii) Capital Grant Funds; (iii) Community Investment Program (Federal Home Loan Bank); (iv) Affordable Housing Program (Federal Home Loan Bank); (v) HOME Investment Partnerships Program; (vi) Community Development Block Grant (CDBG); (vii) HUD-insured mortgage loans; or (viii) other sources of grants or loans that provide for a 150 basis point savings over the market interest rate for comparable terms."; "(D) Funding for ongoing operations, including rental subsidies, or other sources not directly offsetting the Total Housing Development Cost are not eligible for points under this paragraph. Qualifying funds awarded through local entities may qualify for points if the original source of the funds is from a private, state or federal source. If qualifying funds awarded through local entities are used for this item, a statement from the local entity must be provided that identifies the original source of funds."; "(E) The Development must have already applied for funding from the funding entity. Evidence to be submitted with the Application must include a copy of the commitment of funds with terms meeting the requirements of subparagraphs (A) - (C) of this paragraph or a letter from the funding entity indicating that the application was received and that the terms for available funding meet the requirements of subparagraphs (A) - (C) of this paragraph." "(F) At the time of the Carryover Documentation Delivery Date, the Applicant or Development Owner must provide evidence of a commitment approved by the funding entity for the sufficient financing to the Department. An Applicant may substitute the qualifying source under this item between the time of Application and Carryover." In response to Commenters (4), (11), (20) and (24) regarding the market rate, Staff intends to rely on the expertise of the funding entity to define the market rate and whether the committed rate meets this requirement. Market rates can fluctuate dramatically and believes that defining the market rate ahead of time would be overly restrictive. In response to Commenter (5) regarding use of the same funds counted under paragraph (5), Staff believes that counting the same source under both of these scoring items would violate the statutory scoring priorities. In response to Commenters (11), (26) and (27) Staff recommended language requiring a commitment at the time of Carryover and clarifies that substitutions of the funding source from Application to Carryover is allowed. Additionally, Staff would like to clarify that the purpose of the point differential for Developments located outside a QCT as opposed to inside a QCT is to prevent concentration of HTC units within a QCT.

BOARD RESPONSE: The Board recommended reducing the below market interest rate from 150 basis points to 100 basis points.

§50.9(b)(13) - Selection Criteria - Community Input other than Quantifiable Community Participation (1)

COMMENT SUMMARY: Commenter (1) supported the formal identification of a process to evaluate the fair housing implications of Input other than QCP; however, finds it odd that the Department should outsource this process to the Texas Workforce Commission since the Department has more subject matter expertise useful to evaluating the fair housing implications of such input; however, the Commenter withholds the judgment of the Texas Workforce Commissions performance. Commenter (1) also suggested the public and/or Applicants be allowed to request the formal evaluation of letters submitted under this scoring item.

STAFF RESPONSE: The Texas Workforce Commission is the designated state agency to deal with the US Department of Housing and Urban Development on Fair Housing complaints. Any information submitted to the Department regarding an Application is subject to an open records request and can be viewed by the public at any time upon request. Additionally, as part of the Application and Award process, the Department can receive challenges on information submitted as part of an Application which would be evaluated by the Department. Staff recommended no changes based on this comment.

STAFF COMMENT: Staff made a technical change to this section and modified the points referenced from 16 points to 18 points to be consistent with Board action in modifying the point structure for scoring paragraph (2) for Quantifiable Community Participation.

BOARD RESPONSE: Accepted Staff's recommendation.

§50.9(b)(14) - Selection Criteria - Pre-application Participation Incentive Points (11), (27)

COMMENT SUMMARY: Commenter (27) questioned why Staff changed the 5% point variance to 7 points which appears to be a reduction in the amount of difference permitted in the score variation from Pre-application to Application. Commenters (11) and (27) requested that should the number remain, it should be changed to 9 points which is more comparable to the 5% methodology.

STAFF RESPONSE: Staff agreed and recommended a change to 9 points.

BOARD RESPONSE: Accepted Staff's recommendation.

§50.9(b)(15) - Selection Criteria - Developments in Census Tracts with Limited Existing HTC Developments (1)

COMMENT SUMMARY: Commenter (1) supported the Department's intent to de-concentrating tax credit Developments; however, believed the proposed language is overly broad and suggested that some census tracts don't have tax credit Developments because it's a bad idea to build housing there. Commenter (1) suggested the following alternative language for this scoring item: "(A) If the proposed Development is located in a census tract in which, if the Development was placed in service, the percentage of HTC Units per occupied housing unit would be below 2% (4 points); or (B) If the proposed Development is located in a census tract in which, if the Development was placed in service, the percentage of HTC Units per occupied housing unit would be below 2% and the proposed Development is located in a census tract in which there are no other existing HTC Developments that serve the same Target Population (6 points)."

STAFF RESPONSE: While Staff understands the Commenter's concerns, Staff believes that natural market limitations and the Department's underwriting process will discourage Applications in areas that are not appropriate for development. Additionally, Staff believes that this language is overly complicated and the intent of the item is to be a pure gage of concentration. Staff recommended no changes based on this comment.

BOARD RESPONSE: Accepted Staff's recommendation.

§50.9(b)(16) - Development Location (11), (26)

COMMENT SUMMARY: Commenter (11) suggested the Application be allowed to qualify under subparagraph (E) if they are

also receiving points under paragraph (5) of this subsection. Commenter (26) suggested this scoring item be reduced to 1 point and suggested the point structure of the QAP dictates the location of a Development over jurisdictional or area needs. Because General Population Developments are excluded in certain jurisdictions due to higher income tests yet obtaining neighborhood support, the suggested change would still get High Opportunity Areas the recognition but General Population Developments, particularly for larger families where a severe need exists, are not overly penalized.

STAFF RESPONSE: An Application that reflects points under Unit of General Local Government Funding, it would appear, would automatically qualify for points under this scoring item which Staff believes would violate the statutory scoring priorities. In response to Commenter (26), providing additional incentives for High Opportunity Areas is a priority for the Department. Additionally, Staff has clarified that Applications submitted under the At-Risk Set-Aside are not eligible for points under this item. The priority for At-Risk is preservation of existing affordability rather than location.

STAFF COMMENT: Staff made a technical change to this section that clarifies the former names of the Growth Zones in that such areas might have previously been known as Empowerment Zones, Enterprise Communities or Renewal Communities. Additionally, Staff clarified that the designations of the Economically Distressed Areas comes from the Water Development Board and not the Secretary of HUD.

BOARD RESPONSE: The Board recommended modifying the point differential for Qualified Elderly Developments in a High Opportunity Area from 2 points to 3 points and maintained the 4 points for all other Developments.

§50.9(b)(18) - Length of Affordability Period (2), (30)

COMMENT SUMMARY: Commenter (2) supported the language that Rehabilitation Developments do not qualify for these points and stated because they qualify under a new scoring item Repositioning of Existing Developments (worth 3 points) they would have a major scoring advantage over New Construction Developments. Commenter (30) suggested Staff should rely on the Property Condition Assessment (PCA) to determine the extent to which a Rehabilitation Development would qualify for points under this scoring item and stated the PCA is responsible for determining the Effective Age of the Product and the Remaining Useful Life of the Product. If the Remaining Useful Life is indicated to outlast the compliance and the extended use period and if lenders/investors are requiring extensive studies to determine if the Development will last through the financing term provided (which typically exceeds the compliance and extended use periods) then such Development should be eligible for these points.

STAFF RESPONSE: Staff does not agree with Commenter (30). The expectation that the Rehabilitation of an existing Development will be sufficient to extend the useful life for more than 30 years is not realistic, particularly given that many of the applications for Rehabilitation are for developments already more than 30 years old. Staff recommended no changes based on this comment.

BOARD RESPONSE: Accepted Staff's recommendation.

§50.9(b)(19) - Selection Criteria - Site Characteristics (3), (5), (8), (27)

COMMENT SUMMARY: Commenter (3) suggested an alternative scoring item be established for rural and American Indian HTC Developments. Encouraging development in proximity to services makes sense in urban areas; however, it punishes Native American tribes in particular that are not located in an already developed area. Commenter (3) further stated that many Native American tribes believe in the sacredness of land and they do not want to live in proximity to one another, but prefer to live in scattered site developments near community gathering places. Commenter (5) suggested that while increasing the number of services is an acceptable change, the requirement that only one amenity from each section is allowed should be deleted. Commenter (5) recommended that the Development must have one amenity from three different categories after which more than one amenity in each category may be counted and suggested "only one service of each type listed in subparagraphs (A) - (O) of this paragraph will count towards the points" be deleted and replaced with "Applicants must score one (1) point in three (3) different categories listed in subparagraphs (A) - (O) before they can receive points in a duplicate category." Commenter (5) further suggested that since a hospital is more favorable than a medical facility and is a different amenity than a physician office, language should be changed that makes these two separate options. Commenter (8) suggested the language for proximity to public transportation be changed back to one-quarter mile rather than the proposed one-half mile and cited the increase wasn't necessary since the one-quarter mile wasn't difficult to meet. Commenter (27) suggested the minimum number of amenities should be 4 instead of 6 and stated that communities and neighborhoods support tax credit developments not only for the housing and jobs that they provide, but also to promote the development of retail facilities and other economic development. Commenter (27) further suggested that the closer to the amenities a Development is, the more expensive the land and suggested that perhaps being near 6 amenities should qualify the Development as a High Opportunity Area.

STAFF RESPONSE: In response to Commenters (5), (8), and (27), in prior years, the amenities were required to be within one quarter mile of the Development Site. Staff has increased this distance to one-half mile but believes that an increase in the number of amenities should be required as well. Staff recommended the one-half mile remain in this scoring item to be consistent with other distance requirements relating to public transportation in the QAP, specifically, that of High Opportunity Area. In response to Commenter (3), the Board has not established a priority to provide specific incentives for Developments located on tribal land. Additionally, Developments under the Rural Set-Aside compete against other Developments in Rural Areas. Therefore, developments in Rural Areas are not at a scoring disadvantage to Developments in urban areas. Staff recommended no changes based on these comments.

BOARD RESPONSE: Accepted Staff's recommendation.

§50.9(b)(20) - Selection Criteria - Repositioning of Existing Developments (9), (27), (30)

COMMENT SUMMARY: Commenter (9) suggested that the introduction of this new scoring item, along with the exclusion of Rehabilitation Developments from qualifying under the Length of the Affordability Period, will result in Rehabilitation Developments not scoring as well as New Construction Developments. Commenter (9) also suggested it is bad policy to exclude Rehabilitation Developments from selecting points for extending the affordability period. Commenter (27) questioned why this scoring item is limited to Developments originally built between 1980 and 1990 and suggested it should apply to any market rate devel-

opment that can feasibly be rehabilitated to increase the stock of good, quality affordable housing and should not be limited to Developments built within a ten year window. Commenter (30) similarly suggested that instead of arbitrarily going by the age of the Development, the Remaining Useful Life of the Product should be considered especially since the market analysis is used to project rents, an appraiser to project expenses and rents and an environmental consultant to confirm environmental conditions. Commenter (27) questioned why the scoring item requires an intentional lease-down or relocation to another property and stated that significant rehabilitations can be accomplished without such requirements.

STAFF RESPONSE: Staff believes that incentivizing Applications proposing Rehabilitation to extend the affordability period beyond 30 years is overly ambitious and places additional burden for future funding for capital needs throughout the affordability period. In response to Commenters (27) and (30), this item was contemplated to address existing housing stock that was created during a relative boom in the apartment industry in Texas, though many of those units were affordable by market conditions rather than government regulation. This scoring criterion provides incentive to rehabilitate and reposition these boom era developments. Staff recommended no changes based on this comment; however, Staff removed the word "Rehabilitation" in subparagraph (C) which was redundant.

BOARD RESPONSE: Accepted Staff's recommendation.

§50.9(b)(23) - Selection Criteria - Community Revitalization or Historic Preservation. (23), (27), (33)

COMMENT SUMMARY: Commenters (23) and (33) suggested clarification regarding when the proof of historic designation is required in order to qualify for this scoring item and requested the following revision to this section: "The Applicant will be required to show proof of the Historic designation and Historic Tax Credits at Cost Certification." Commenter (27) questioned why Consolidated Plans and Economic Development Plans or city-wide plans do not qualify for points under this item. Such plans do indicate how and where a community wants to target funds for improvements or revitalization.

STAFF RESPONSE: Staff agreed with the proposed revision by Commenter (23) and made the suggested change. In response to Commenter (27), Staff did not believe Consolidated Plans or other city-wide plans target a specific geographical area with respect to the needs of the community in which the proposed Development is located, but rather speaks to where they would generally encourage federal funding be invested. Staff recommended no change based on this comment.

BOARD RESPONSE: Accepted Staff's recommendation.

§50.9(b)(24) - Selection Criteria - Right of First Refusal. (12)

COMMENT SUMMARY: Commenter (12) suggested paragraphs (A) - (F) are duplicative and not necessary for inclusion in the QAP and suggested this section be amended to remove references to specific dates and to whom the Right of First Refusal may be given since the Department already has Right of First Refusal provisions in its Qualified Contract Policy which is designed to account for these requirements. Commenter (12) recommended the last sentence in the opening paragraph of this section be revised to reflect the following: "Development Owner may qualify for this point by providing the right of first refusal in accordance with the Housing Tax Credit (HTC) Program Qualified Contract Policy as described in Title 10, Part 1, Chapter 1, Subchapter A, Section 1.9 of the Texas Administrative Code."

STAFF RESPONSE: Staff agreed with Commenter (12) and recommended this scoring item be revised and reduced to the following: "Applications may qualify to receive 1 point for this item. (§2306.6725(b)(1); §42(m)(1)(C)(viii)) The purpose of this scoring item is to allow for consideration for tenant or nonprofit ownership at the end of the Compliance Period. Evidence that Development Owner agreed to provide a right of first refusal to purchase the Development upon or following the end of the Compliance Period in accordance with §2306.6726 and the Department's rules related to Right of First Refusal and Qualified Contract in §1.9 of this title."

BOARD RESPONSE: Accepted Staff's recommendation.

§50.9(c) - Selection Criteria - Penalties. (5)

COMMENT SUMMARY: Commenter (5) suggested that since a penalty is assessed regardless of whether an extension was requested the language referencing a subsequent request for an extension is unnecessary. Commenter (5) believed the language almost suggested that if you miss the deadline but do not subsequently ask for an extension the penalty points are not assessed.

STAFF RESPONSE: Staff agreed with the comment and recommended paragraph (1) read as follows: "If the Applicant or Affiliate failed to meet the original Carryover submission or 10% Test deadline(s) or has requested an extension of the Carryover submission deadline, the 10% Test deadline (relating to either submission or expenditure)...."

BOARD RESPONSE: Accepted Staff's recommendation.

§50.10(c) - Board Decisions - Forward Commitments. (1)

COMMENT SUMMARY: Commenter (1) expressed concern that the Board has begun a tradition of regularly circumnavigating the formal QAP process as it relates to forward commitments. While Board discretion is needed in this program, Commenter (1) encouraged the Board recognize the slippery slope and subjective appearance of heavy use of the forward commitment process and reserve such process for limited, isolated cases not address in the structure of the Qualified Allocation Plan.

STAFF RESPONSE: While a specific language change was not provided by the Commenter, the Department recognizes the limited and extraordinary circumstances justifying the use of forward commitments and that such use is solely at the discretion of the Board. Staff recommended no change based on this comment.

BOARD RESPONSE: Accepted Staff's recommendation.

GOVERNOR RESPONSE: Paragraph (2) of this section regarding the Board's discretionary factors for Board decisions was removed as well as paragraph (c) relating to forward commitments.

§50.10(e) - Board Decisions - Challenges Regarding Applications. (5)

COMMENT SUMMARY: Commenter (5) suggested the language in this section, specifically, the date by which the Department will post challenges to the website and by which it will notify Applicants has been pushed back and requested the 2011 language be reinstated citing that such change could delay the finalization of Application scores and create additional difficulty for Staff to make their determinations so late in the Application Round.

STAFF RESPONSE: While Staff appreciates the consideration for its review process, it believes the change as reflected in the published draft will create an easier tracking mechanism relating to the posting of the various challenges based on when they were received. Staff recommended no change based on this comment.

BOARD RESPONSE: Accepted Staff's recommendation.

§50.11 - Tax Exempt Bond Developments.

STAFF COMMENT: Technical corrections were made to this section which clarified that the application is assembled based on parts and not volumes of documentation.

§50.12 - Post Award Activities.

GOVERNOR'S RESPONSE: This section was modified to remove references to forward commitments.

§50.13(b) - Application Reevaluation - Amendment of Application (27)

COMMENT SUMMARY: Commenter (27) questioned the purpose of the change which appears to be a very significant change and suggested there should be a point at which Developments should not be subject to being re-underwritten.

STAFF RESPONSE: Section 42 of the Code requires that an Application be underwritten at the time of Application, carryover, and cost certification. The prior language was not consistent with this federal requirement. Additionally, given the need to address the sizing of credit at cost certification, Staff believes it is prudent to allow significant changes to be addressed prior to cost certification. Staff clarified that changes to the Developer, Guarantor, or Person used for experience require the Department's approval. This is a clarification in line with existing practice to review these changes for issues including previous participation and compliance with the credit limit in §50.5(c). Staff recommended the following sentence be added to the end of paragraph (1) "Changes to the Developer, Guarantor, or Person used for experience constitute a change requiring an amendment and may be approved by the Executive Director."

BOARD RESPONSE: Accepted Staff's recommendation.

§50.13(d) - Application Reevaluation - Ownership Transfers. (20), (27)

COMMENT SUMMARY: Commenter (20) suggested this section be modified to reflect that approval for a transfer be limited to the Developer only and not the Development specifically and stated that this clarity will ensure that any Development ownership can be transferred to a qualified ownership entity regardless of what state the Development may be in relative to the QAP or other Department rules. Commenter (27) stated the sufficiency of the transferee's experience seems to have been deleted from this section and suggested that if such requirement isn't covered elsewhere then it seems to be conflict with the experience requirements in Threshold for new Applications.

STAFF RESPONSE: In response to Commenters (20) and (27), Staff added language describing the sections of the QAP that must be complied with in order to transfer a property which includes the eligibility and experience of the transferee and specifically includes §§50.4(a), 50.5(c), and 50.8(4). The Development itself is not required to be in compliance with all sections of the current QAP. However, Staff believes the Department has a responsibility to ensure that a transferee has the capacity and experience to bring any noncompliant tax credit property into compliance upon transfer and in a timely manner.

BOARD RESPONSE: Accepted Staff's recommendation.

§50.13(e) - Application Reevaluation - Sale of Certain Tax Credit Properties. (12)

COMMENT SUMMARY: Commenter (12) suggested this section is not necessary given the standards for implementation for a Right of First Refusal are identified in the Qualified Contract Policy and recommended the following revision to the language in the opening paragraph of this section. The suggested language, according to the Commenter, would remove undue complexity in the QAP and allow the Department more flexibility in dealing with subsequent sales and transfers at the end of the Compliance Period. The Commenter recommended the section read as follows: "The Development Owner may qualify for this point by providing the Right of First Refusal in accordance with the Housing Tax Credit (HTC) Program Qualified Contract Policy as described in Title 10, Part 1, Chapter 1, Subchapter A, §1.9 of the Texas Administrative Code."

STAFF RESPONSE: Staff agreed with the commenter and deleted this section in its entirety since it is addressed in 10 TAC Chapter 1, Subchapter A, §1.9.

BOARD RESPONSE: Accepted Staff's recommendation.

§50.13(h) - Application Reevaluation - Compliance Monitoring and Material Noncompliance.

STAFF COMMENT: This section was removed as it is addressed in other Department rules.

BOARD RESPONSE: Accepted Staff's recommendation.

§50.17(c) - Department Responsibilities (5)

COMMENT SUMMARY: Commenter (5) supported the language related to the availability of site demographics data 4 months prior to the opening of the Application Acceptance Period and the use of prior year data.

STAFF RESPONSE: Staff appreciates the positive feedback. Staff recommended no change based on this comment.

BOARD RESPONSE: Accepted Staff's recommendation.

The Board approved the final order adopting the new sections on November 10, 2011.

As provided for in §2306.6724(c) of the Texas Government Code, the Governor has modified and approved the 2012 QAP. The modifications to the QAP as approved by the Governing Board of the Department for submittal to the Governor include deletion of the discretionary factors the Board may consider in their decision-making of low income housing tax credit allocations as set forth in §50.10(a)(2), deletion of the provision for the granting of forward commitments of low income housing tax credits set forth in §50.10(c) and conforming deletion of references to forward commitments, and refinements to §50.16 to provide that when taking action to grant a waiver of any provision of the QAP the Board must act unanimously and must have information to enable it to assess the impact of any such waiver(s) on the score of the requestor vis á vis competing applicants. The 2012 QAP, as submitted, reflects all modifications by the Governor and the 2012 QAP, as modified, has been approved in its entirety by the Governor in accordance with §2306.6724(c) of the Texas Government Code.

The new sections are adopted pursuant to the authority of Chapter 2306 of the Texas Government Code, which provides the Department with the authority to adopt rules governing the administration of the Department and its programs.

§50.1. General Program Information.

(a) Purpose and Authority. The rules in this chapter apply to the allocation by the Texas Department of Housing and Community Affairs (the "Department") of Housing Tax Credits authorized by applicable federal income tax laws. Pursuant to Chapter 2306, Subchapter DD, of the Texas Government Code, the Department is authorized to make Housing Tax Credit Allocations for the State of Texas. As required by §42(m)(1) of the Code, the Department developed this Qualified Allocation Plan (QAP) which is set forth in this chapter. Sections in this chapter establish procedures for applying for and obtaining an allocation of Housing Tax Credits, along with ensuring that the proper Threshold Criteria, Selection Criteria, priorities and preferences are followed in making such allocations. Notwithstanding the fact that these rules may not contemplate unforeseen situations that may arise, the Department would expect to apply a reasonableness standard to the evaluation of Applications for Housing Tax Credits.

(b) General Rule of Construction. Any requirement to meet code, ordinance, etc. is deemed to be met if an appropriate waiver has been lawfully obtained and is being met.

(c) Unless the context indicates otherwise, a reference to a Development Owner, Developer, General Contractor or Guarantor includes all Persons controlled by or under common Control with any such Person.

§50.2. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise. Any capitalized terms not specifically mentioned in this section shall have the meaning as defined in Chapter 2306 of the Texas Government Code, §42 of the Internal Revenue Code, §1.1 of this title (relating to Definitions and Amenities for Housing Program Activities), and repeated in the Tax Credit (Procedures) Manual.

(1) Applicable Percentage--The percentage used to determine the amount of the Housing Tax Credit for any Development (New Construction, Reconstruction, and/or Rehabilitation), as defined more fully in the Code, §42(b).

(A) For purposes of the Application, the Applicable Percentage will be projected at:

(i) nine percent (9%) if the Development is proposed to be placed in service prior to December 31, 2013 and such timing is deemed appropriate by the Department or if the ability to claim the full 9% credit is extended by the U.S. Congress;

(ii) forty (40) basis points over the current applicable percentage for 70% present value credits, pursuant to §42(b) of the Code for the month in which the Application is submitted to the Department; or

(iii) fifteen (15) basis points over the current applicable percentage for 30% present value credits, unless fixed by Congress, pursuant to §42(b) of the Code for the month in which the Application is submitted to the Department.

(B) For purposes of making a credit recommendation at any other time, the Applicable Percentage will be based in order of priority on:

(i) the percentage indicated in the Agreement and Election Statement, if executed; or

(ii) the actual applicable percentage as determined by the Code, §42(b), if all or part of the Development has been placed in service and for any buildings not placed in service the percentage will be the actual percentage as determined by the Code, §42(b) for the most current month; or

(iii) the percentage as calculated in subparagraph (A) of this paragraph if the Agreement and Election Statement has not been executed and no buildings have been placed in service.

(2) Application Acceptance Period--That period of time during which Applications may be submitted to the Department.

(3) Area Median Gross Income (AMGI)--Area median gross household income, as determined for all purposes under and in accordance with the requirements of §42 of the Code.

(4) Carryover Allocation--An allocation of current year tax credit authority by the Department pursuant to the provisions of §42(h)(1)(C) of the Code and U.S. Treasury Regulations, §1.42-6.

(5) Carryover Allocation Document--A document issued by the Department, and executed by the Development Owner, pursuant to §50.12(e) of this chapter (relating to Post Award Activities).

(6) Certificate of Reservation--The notice given by the Texas Bond Review Board (TBRB) to an issuer reserving a specific amount of the state ceiling for a specific issue of bonds.

(7) Central Business District or Downtown District--The area designated by a city with a population of 50,000 or more as that city's Central Business District or Downtown Area and which includes one or more commercial buildings of ten (10) stories or more.

(8) Code--The Internal Revenue Code of 1986, as amended from time to time, together with any applicable regulations, rules, rulings, revenue procedures, information statements or other official pronouncements issued thereunder by the U.S. Department of the Treasury or the Internal Revenue Service (IRS).

(9) Competitive Housing Tax Credits--Tax credits available from the State Housing Credit Ceiling.

(10) Determination Notice--A notice issued by the Department to the Development Owner of a Tax-Exempt Bond Development which specifies the Department's determination as to the amount of tax credits that the Development may be eligible to claim pursuant to §42(m)(1)(D) of the Code.

(11) Development Site--The area, or if scattered site, areas, on which the Development is proposed to be located.

(12) Economically Distressed Area--A county that contains an area that meets the criteria for an economically distressed area under §17.92(1), Texas Water Code, and has adopted and enforces the model rules under §16.343, Texas Water Code.

(13) Eligible Basis--With respect to a building within a Development, the building's Eligible Basis pursuant to §42(d) of the Code.

(14) Existing Residential Development--Any Development Site which contains existing residential Units at the time the Application is submitted to the Department.

(15) High Opportunity Area--A Development that is proposed to be located in an area that includes, at a minimum, subparagraphs (A) and (B) of this paragraph along with either subparagraph (C) or (D) of this paragraph:

(A) in a census tract which has a median income that is above median for that county (as designated in the Housing Tax Credit

Site Demographic Characteristics Report for the current Application Round) as of the first day of the Application Acceptance Period; and

(B) in a census tract that has a 15% or less poverty rate (as designated in the Housing Tax Credit Site Demographic Characteristics Report for the current Application Round) or, for Regions 11 and 13 with a 35% or less poverty rate;

(C) within a half-mile of an accessible transit stop for public transportation if such transportation is available in the municipality or county in which the Development is located; or

(D) in an elementary school attendance zone that has an academic rating, as of the beginning of the Application Acceptance Period, of "Exemplary" or "Recognized," or comparable rating if the rating system changes by the same date as determined by the Texas Education Agency. An elementary attendance zone does not include elementary schools with district-wide possibility of enrollment or no defined attendance zones, sometimes known as magnet schools. However, districts with district-wide enrollment and only one elementary school are acceptable.

(16) Housing Credit Allocation--An allocation by the Department to a Development Owner for a specific Application of Housing Tax Credits in accordance with the provisions of this chapter.

(17) Housing Credit Allocation Amount--With respect to a Development or a building within a Development, the amount the Department determines to be necessary for the financial feasibility of the Development and its viability as a Development throughout the affordability period which the Board allocates to the Development.

(18) Qualified Nonprofit Organization--An organization that meets the requirements of §2306.6706 and §2306.6729 of the Texas Government Code.

(19) Qualified Nonprofit Development--A Development in which a Qualified Nonprofit Organization is to own an interest in the Development directly or through a partnership and materially participate (within the meaning of §469(h) of the Code) in the development and operation of the Development throughout the Compliance Period.

(20) Single Room Occupancy (SRO)--An Efficiency Unit that meets all the requirements of a Unit except that it may, but is not required, to be rented on a month to month basis to facilitate Transitional Housing. Buildings with SRO Units have extensive living areas in common and are required to be Supportive Housing and include the provision for substantial supports from the Development Owner or its agent on site.

(21) State Housing Credit Ceiling--The aggregate amount of Housing Credit Allocations that may be made by the Department during any calendar year, as determined from time to time by the Department in accordance with applicable federal law, including §42(h)(3)(C) of the Code.

(22) Supportive Housing--Residential rental developments intended for occupancy by individuals or households in need of specialized and specific non-medical services in order to maintain independent living. Supportive housing developments generally require established funding sources outside of project cash flow and are expected to be debt free or have no foreclosable or noncash flow debt. The services offered generally address special attributes of such populations as Transitional Housing for homeless and at risk of homelessness, persons who have experienced domestic violence or single parents or guardians with minor children.

(23) Target Population--For purposes of this Qualified Allocation Plan, the designation of types of housing populations shall include those Developments that are entirely Qualified Elderly and those that are entirely Supportive Housing. All others will be considered to serve general populations without regard to any subpopulations.

(24) Tax Credit (Procedures) Manual--The manual produced and amended from time to time by the Department which reiterates the rules and provides guidance for the filing of tax credit related documents.

(25) Tax-Exempt Bond Development--A Development requesting or having been awarded Housing Tax Credits and which receives a portion of its financing from the proceeds of tax-exempt bonds which are subject to the state volume cap as described in §42(h)(4) of the Code, such that the Development does not receive an allocation of tax credit authority from the State Housing Credit Ceiling.

(26) Transitional Housing--A Supportive Housing development that includes living Units with more limited individual kitchen facilities and is:

(A) used exclusively to facilitate the transition of homeless individuals and those at-risk of becoming homeless, to independent living within 24 months; and

(B) is owned by a governmental entity or a qualified non-profit which provides temporary housing and supportive services to assist such individuals in, among other things, locating and retaining permanent housing. The limited kitchen facilities in individual Units must be appropriately augmented by suitable, accessible shared or common facilities.

§50.3. Program Calendar.

All documentation noted in this section must be submitted to the Department offices located at 221 E. 11th Street, Austin, TX 78701, by 5:00 p.m. (CST) by the date indicated. Any deadline not imposed by statute and including those not specifically listed in the Program Calendar may be extended for good cause by the Executive Director for a period of not more than five (5) business days provided; however, that the Applicant requests an extension of the deadline prior to the date of the original deadline. Any extension of non-statutory deadlines made after the original deadline or for longer than five (5) days must be requested pursuant to §50.16(a) of this chapter (relating to Waiver and Amendment of Rules). Extensions for 10% Test, Carryover and Cost Certification shall be made in accordance with §50.13(c) of this chapter (relating to Application Reevaluation).
Figure: 10 TAC §50.3

§50.4. Ineligible Applicants, Applications, and Developments.

(a) The purpose of this section is to identify those situations, in which an Applicant, Application or Development would be considered to be ineligible under the Housing Tax Credit program based on, but not limited to, requirements in §42 of the Internal Revenue Code, Texas Government Code Chapter 2306 and other criteria considered important by the Department. If an Applicant or Application is determined by Staff to be ineligible based on subsections (b) and (c) of this section the Applicant will be sent a notice stating such ineligibility and will be given the opportunity to explain how they believe they are not ineligible. If while the Application is under review the General Contractor or Guarantor is determined by Staff or the Applicant to be ineligible under subsection (b) of this section, the Applicant will be allowed to replace the General Contractor or Guarantor provided such replacement is immediately identified and in place prior to the date by which a Commitment or Determination Notice would be issued provided that the request is made in sufficient time to allow Department Staff to conduct its previous participation review and any other necessary analysis. A proposed replacement and each Principal is required to provide the required previous participation forms.

(b) Ineligible Applicants. An Applicant is ineligible if any Applicant, Development Owner, Developer, General Contractor, Guarantor involved with the Application:

(1) has been or is barred, suspended, or terminated from procurement in a state or Federal program or listed in the List of Parties Excluded from Federal Procurement or Non-Procurement Programs; or (§2306.6721(c)(2))

(2) has been convicted of a state or federal felony crime involving fraud, bribery, theft, misrepresentation of material fact, misappropriation of funds, or other similar criminal offenses within fifteen (15) years preceding the Application deadline; or

(3) at the time of Application is subject to an enforcement or disciplinary action under state or federal securities law or by the NASD; is subject to a federal tax lien; or is the subject of a proceeding in which a Governmental Entity has issued an order to impose penalties, suspend funding, or take adverse action based on an allegation of:

(A) financial misconduct; or

(B) uncured violation of material laws, rules, or other legal requirements governing activities considered relevant by the Governmental Entity; or

(4) has any past due audits and has not submitted those past due audits to the Department in a satisfactory format. A Person is not eligible to receive a Commitment of Housing Tax Credits from the Department if any audit finding or questioned or disallowed cost is unresolved as of June 1 of each year, or for Tax-Exempt Bond Developments or other Applications applying only under other Multifamily Programs (HOME, Housing Trust Fund, etc.) no later than thirty (30) days after Parts 5 and 6 of the Application are submitted; or (§2306.6703(a)(1))

(5) at the time of Application or at any time during the two-year period preceding the date the Application Round begins (or for Tax-Exempt Bond Developments any time during the two-year period preceding the date the Application is submitted to the Department), the Applicant or a Related Party is or has been:

(A) a member of the Board; or

(B) the Executive Director, Chief of Staff, General Counsel, a Deputy Executive Director, the Director of Housing Tax Credits, the Chief of Compliance and Asset Oversight, the Director of Real Estate Analysis, or a manager over Housing Tax Credits employed by the Department or any person exercising such responsibilities regardless of job title; (§2306.6703(a)(2))

(6) the Applicant proposes to replace in less than fifteen (15) years any private activity bond financing of the Development described by the Application, unless:

(A) the Applicant proposes to maintain for a period of thirty (30) years or more 100% of the Development Units supported by Housing Tax Credits as rent-restricted and exclusively for occupancy by individuals and families earning not more than 50% of the Area Median Gross Income, adjusted for family size; and

(B) at least one-third of all the Units in the Development are public housing units or Section 8 Development-based Units; or

(C) the applicable private activity bonds will be redeemed only in an amount consistent with their proportionate amortization; or

(D) if the redemption of the applicable private activity bonds will occur in the first five years of the operation of the Development and complies with §429(h)(4), Internal Revenue Code of 1986:

(i) on the date the Certificate of Reservation is issued, the Texas Bond Review Board determines that there is not a waiting list for private activity bonds in the same priority level established under §1372.0321 of the Texas Government Code or, if applicable, in the same uniform state service region, as referenced in §1372.0231 of the Texas Government Code, that is served by the proposed Development; and

(ii) the applicable private activity bonds will be redeemed according to underwriting, if any, established by the Department; (§2306.6703)

(7) is on the Department's debarred list, including any parts of that list that are derived from the debarred list of the United States Department of Housing and Urban Development (§2306.6721(c)(2)); or

(8) has breached a contract with a public agency and failed to cure that breach; or

(9) misrepresented to a subcontractor the extent to which the Developer has benefited from contracts or financial assistance that has been awarded by a public agency, including the scope of the Developer's participation in contracts with the agency and the amount of financial assistance awarded to the Developer by the agency; or

(10) there is, involving the Application or Applicant, a violation of §2306.6733 of the Texas Government Code; or

(11) has been found by the Board, after holding a hearing before the Board, to warrant ineligibility because of the circumstances surrounding a voluntary or involuntary termination of involvement in a rent or income restricted multifamily Development by a lender, equity provider, or any other owners or investors as a Principal during the previous ten (10) years, however designated, or any combination thereof or having had any litigation to effectuate such exit instituted, and continuing at the time of Application. The Department shall be promptly notified by the Applicant of any such circumstances. The Applicant will provide the Department Staff with such information as it may reasonably request to evaluate the facts and circumstances surrounding such actual or threatened exit and prepare a report to the Executive Director. The information considered and addressed in the report will include, but not be limited to those identified in subparagraphs (A) - (E) of this paragraph. The Executive Director will make a determination, based on the report, whether facts and circumstances are present that would support the institution of formal proceedings to determine eligibility. Any determination of ineligibility under this provision shall be for a period that will not exceed five (5) years. No person shall be made ineligible under this provision except by formal action taken by the Department's Governing Board. Any such matter to be presented for final determination of ineligibility by the Board must include notice from the Department to the affected party not less than fourteen (14) days prior to the scheduled Board meeting. The Executive Director may, but is not required, to issue a formal notice after disclosure if it is determined that the matter does not warrant ineligibility. The Executive Director's report and the Board's decision shall take into account all relevant factors including, but not limited to:

(A) whether the Developer or Principal has invested more of its financial resources in the Development than it has received from or in connection with the Development;

(B) whether such Developer or Principal had the ability to address the facts and circumstances that ultimately led to the actual or threatened exit by other means or whether uncooperative parties or other facts and circumstances beyond its control prevented any other such resolution;

(C) the contributing or causative effect of circumstances beyond such Applicant's, Development Owner's, Developer's or Guarantor's control, such as significant changes in market conditions or a natural disaster;

(D) the compliance history of the Development during the time of the Applicant's, Development Owner's, Developer's or Guarantor's involvement; and

(E) whether such Developer or Principal disclosed to the Department the event of exit as part of the Certification in the current Application.

(c) Ineligible Applications. The Department will terminate an Application for those issues identified in paragraphs (1) - (10) of this subsection. In addition to termination, the Department may debar a Person for one (1) year from the date of debarment, or until the violation causing the debarment has been remedied, whichever term is longer, if the Department determines that any of the issues identified in paragraphs (1) - (8) of this subsection exist and the facts warrant debarment:

(1) the provision of fraudulent information, knowingly falsified documentation, or other intentional or negligent material misrepresentation or omission in the Application or other information submitted to the Department at any stage of the evaluation or approval process; or

(2) the Applicant, Development Owner, Developer, General Contractor, or Guarantor or anyone that exercises common Control in the Development Owner, Developer, General Contractor or Guarantor, or any Affiliate that Controls one or more other rent restricted rental housing properties in the state of Texas administered by the Department is in Material Noncompliance with or has repeatedly violated the LURA or if such Material Noncompliance or repeated violation is identified during the Application review or the program rules in effect for such property as further described in Chapter 60 of this title (relating to Compliance Administration); or (§2306.6721(c)(3))

(3) the Applicant, Development Owner, Developer, General Contractor, or Guarantor or anyone that exercises common Control in the Development Owner, Developer, General Contractor, or Guarantor, or any Affiliate of such entity that is active in the ownership or Control has been a Principal of any entity that failed to make all loan payments to the Department in accordance with the terms of the loan, as amended, or was otherwise in default with any provisions of any loans from the Department; or

(4) the Applicant or the Development Owner that exercises common Control of one or more tax credit properties in the state of Texas has failed to cure any fees described in §50.14 of this chapter (relating to Program Related Fees) seven (7) days prior to the Board meeting at which the decision for the Application is to be made; or

(5) an Applicant or a Related Party and any Person who is active in the construction, Rehabilitation, ownership, or exercises common Control of the proposed Development, including a General Partner or contractor, and a Principal or Affiliate of a General Partner or contractor, or an individual employed as a consultant, lobbyist or attorney by an Applicant or a Related Party, violates §2306.1113 of the Texas Government Code relating to Ex Parte Communication as further described in §50.7 of this chapter (relating to Application Process); or

(6) it is determined by the Department's Executive Director that there is evidence that establishes probable cause to believe that an Applicant, Development Owner, Developer, or any of their employees or agents has violated a state revolving door or other standard of conduct or conflict of interest statute, including §2306.6733 of the Texas Government Code, or a section of Chapter 572 of the Texas Government Code, in making, advancing, or supporting the Application; or

(7) the Applicant, Development Owner, Developer, Guarantor, General Contractor, or any Affiliate of such entity whose previous funding contracts or commitments have been partially or fully deobligated during the twelve (12) months prior to the submission of the Application and through the date of final allocation due to a failure to meet contractual obligations; or

(8) the Applicant, Development Owner, Developer, Guarantor, General Contractor, or any Affiliate of such entity whose pre-development award of non-tax credit funds from the Department has not been repaid in accordance with the terms of repayment for the Development at the time of Carryover Allocation or Bond closing; or

(9) the Application is submitted after the Application submission deadline (time or date); has multiple Parts of the Application missing; is not bookmarked in accordance with the instructions in the Tax Credit (Procedures) Manual; or has a Material Deficiency as defined under §1.1 of this title (relating to Definitions and Amenities for Housing Program Activities); or

(10) for Applications submitted under the State Housing Credit Ceiling, if more than 150% of the credit amount available in the sub-region is requested at the time of the original submission of the Application based on estimates released by the Department on December 1. The Department will consider the amount in the Funding Request of the Application to be the amount of housing tax credits requested.

(d) Ineligible Developments. Those Developments identified in paragraphs (1) - (16) of this subsection are considered ineligible for funding under the Housing Tax Credit Program:

(1) Hospitals, nursing homes, trailer parks, dormitories (or other buildings that will be predominantly occupied by students) or other facilities which are usually classified as transient housing (as provided in the §42(i)(3)(B)(iii) and (iv) of the Code) are not eligible. However, structures formerly used as hospitals, nursing homes or dormitories are eligible for Housing Tax Credits if the Development involves the conversion of the building to a non-transient multifamily residential Development;

(2) A property that provides continual or frequent nursing, medical or psychiatric services. Refer to IRS Revenue Ruling 98-47 for clarification of assisted living;

(3) Any Qualified Elderly Development of two stories or more that does not include elevator service for any Units or living space above the first floor;

(4) Any Qualified Elderly Development with any Units having more than two bedrooms with the exception of up to three employee Units reserved for the use of the manager, maintenance, and/or security officer. These employee Units must be specifically designated as such;

(5) Any Development with any building(s) with four or more stories that does not include an elevator;

(6) Any Qualified Elderly Development proposing more than 70% two-bedroom Units;

(7) Any Development (excluding Supportive Housing Developments) proposed in a Central Business District with more than 70% one bedrooms and/or Efficiency Units or 70% two bedrooms or more than 20% three bedrooms. An Application may reflect a total of Units for a given bedroom size greater than these percentages to the extent that the increase is only to reach the next highest number divisible by four;

(8) Any Development that violates §1.15 of this title (relating to Integrated Housing Rule);

(9) A proposed Rehabilitation (excluding Reconstruction) of an Existing Residential Development that is more than forty (40) years old unless the property is either:

(A) to be rehabilitated with support of historic tax credits;

(B) to be done as adaptive reuse; or

(C) a Development that includes an architect's or engineer's statement confirming that the proposed rehabilitation will be structurally viable for its required affordability period, assuming customary ongoing maintenance;

(10) Any Development located in an Urban Area involving New Construction, Reconstruction or Adaptive Reuse of Units (except for a Qualified Elderly Development, a Development proposed in a Central Business District, a Development composed entirely of single family dwellings, or Supportive Housing Developments) in which any of the designs in subparagraphs (A) - (D) of this paragraph are proposed. For Applications involving a combination of single family detached dwellings and multifamily dwellings, the percentages in this subparagraph do not apply to the single family detached dwellings, but they do apply to the multifamily dwellings. An Application may reflect a total of Units for a given bedroom size greater than the percentages in subparagraphs (A) - (D) of this paragraph to the extent that the increase is only to reach the next highest number divisible by four:

(A) more than 30% of the total Units are one bedroom and/or Efficiency Units; or

(B) more than 55% of the total Units are two bedroom Units; or

(C) more than 40% of the total Units are three bedroom Units; or

(D) more than 5% of the total Units in the Development with four or more bedrooms;

(11) Any Development which is intended to house seniors that is not consistent with the definition of a Qualified Elderly Development;

(12) Any Development that is reasonably believed by Staff not to clearly meet the general public use requirement under Treasury Regulation §1.42-9 unless the Applicant has obtained a private letter ruling that the proposed Development is permitted;

(13) Development Sites with negative characteristics in subparagraphs (A) - (G) of this paragraph will be considered ineligible. If Staff identifies what it believes would constitute an unacceptable negative site feature not covered by the those identified in subparagraphs (A) - (G) of this paragraph Staff may seek Board clarification and, after holding a hearing before the Board, the Board may make a final determination as to whether that feature is unacceptable. Rehabilitation (excluding Reconstruction) Developments with ongoing and existing federal assistance from HUD or TRDO-USDA are exempt. For purposes of this exhibit, the term 'adjacent' is interpreted as sharing a boundary with the Development Site. The distances are to be measured from the nearest boundary of the Development Site to the boundary of the negative characteristic. If none of these negative characteristics exist, the Applicant must sign a certification to that effect. The negative characteristics include:

(A) developments located adjacent to or within 300 feet of junkyards;

(B) developments located adjacent to or within 300 feet of active railroad tracks, unless the Applicant provides evidence that the city/community has adopted a Railroad Quiet Zone or the railroad in question is commuter or light rail (Developments located in a Central Business District are exempt);

(C) developments located adjacent to or within 300 feet of heavy industrial uses such as manufacturing plants, refinery blast zones, etc.;

(D) developments located adjacent to or within 300 feet of a solid waste or sanitary landfills;

(E) developments where the buildings are located within the easement of any overhead high voltage transmission line or inside the engineered fall distance of any support structure for high voltage transmission lines, radio antennae, satellite towers, etc. This does not apply to local service electric lines and poles;

(F) developments where the buildings are located within the accident zones or clear zones for commercial or military airports; or

(G) development is located adjacent to or within 300 feet of a sexually-oriented business. For purposes of this paragraph, a sexually-oriented business shall be defined as stated in §243.002 of the Texas Government Code.

(14) Two Mile Same Year Rule. Staff will not recommend an allocation in the same Application Round if the Developments are, or will be, located less than two linear miles apart as determined by the Department. This limitation applies only to communities contained within counties with populations exceeding one million. For purposes of this chapter, any two sites not more than two linear miles apart are deemed to be "in a single community." (§2306.6711(f)) This restriction does not apply to the allocation of Housing Tax Credits to Developments financed through the Tax-Exempt Bond program, including the Tax-Exempt Bond Development Applications under review and existing Tax-Exempt Bond Developments in the Department's portfolio. (§2306.67021)

(15) Unacceptable Sites. Developments will be ineligible if the Development is located on a site that is determined to be unacceptable by the Department, based on the evaluation factors identified in the Site Evaluation form, augmented by any other inspections or other documented findings of the Department. The Department will advise the Applicant if it makes an initial finding that a proposed site is unacceptable and provide the applicant with a reasonable opportunity to address any identified concerns. If in the Department's reasonable judgment the Applicant is not able to address adequately the Department's concerns regarding the site, the Department Staff will issue a determination that the site is unacceptable. If not appealed in accordance with §50.10(c) of this chapter (relating to Board Decisions), this determination becomes final.

(16) Mandatory Development Amenities. All New Construction, Reconstruction or Adaptive Reuse Units must provide each and all of the amenities in subparagraphs (A) - (M) of this paragraph. Rehabilitation Developments must provide the amenities in subparagraphs (C) - (M) of this paragraph unless expressly identified as not required. (§2306.187) Supportive Housing Developments are not required to provide the amenities in subparagraph (B), (E), (F) or (G) of this paragraph; however, access must be provided to a comparable amenity in a common area. Deviations for good cause, by which one or more of the foregoing will not be provided, must be approved prior to award and the request for such deviation must be included in the Application. The Executive Director may issue such approvals. Requests not approved may be appealed to the Board in accordance with

§50.10(c) of this chapter. These amenities must be at no charge to the tenants.

(A) All New Construction Units must be wired with RG-6/U COAX or better and CAT3 phone cable or better, wired to each bedroom, dining room and living room;

(B) Laundry Connections;

(C) Blinds or window coverings for all windows;

(D) Screens on all operable windows;

(E) Disposal and Energy-Star rated dishwasher (not required for TRDO-USDA; Rehabilitation Developments exempt from dishwasher if one was not originally in the Unit);

(F) Energy-Star rated refrigerator;

(G) Oven/Range;

(H) Exhaust/vent fans (vented to the outside) in bathrooms;

(I) At least one Energy-Star rated ceiling fan per Unit;

(J) Energy-Star rated lighting in all Units which may include compact fluorescent bulbs;

(K) Plumbing fixtures (toilets and faucets) must meet design standards at 30 TAC §290.252 (relating to Design Standards);

(L) All Units must have central heating and air-conditioning (Packaged Terminal Air Conditioners meet this requirement for SRO Units in Supportive Housing Developments only); and

(M) Adequate parking spaces consistent with local code, unless there is no local code, in which case the requirement would be 1.5 spaces per Unit for non-Qualified Elderly Developments and one (1) space per Unit for Qualified Elderly.

§50.5. Site and Development Restrictions.

(a) The purpose of this section is to identify specific restrictions on a proposed Development submitted under the State Housing Credit Ceiling or Tax Exempt Bond Developments, as applicable.

(b) Floodplain. Any Development proposing New Construction or Reconstruction and located within the one-hundred (100) year floodplain as identified by the Federal Emergency Management Agency (FEMA) Flood Insurance Rate Maps must develop the site so that all finished ground floor elevations are at least one foot above the flood plain and parking and drive areas are no lower than six inches below the floodplain, subject to more stringent local requirements. If no FEMA Flood Insurance Rate Maps are available for the proposed Development, flood zone documentation must be provided from the local government with jurisdiction identifying the one-hundred (100) year floodplain. No buildings or roads that are part of a Development proposing Rehabilitation (excluding Reconstruction) with the exception of Developments with existing and ongoing federal funding assistance from HUD or TRDO-USDA, will be permitted in the one-hundred (100) year floodplain unless they already meet the requirements established in this subsection for New Construction, or if the Unit of General Local Government has undertaken mitigation efforts and can establish that the property is no longer within the one-hundred (100) year floodplain.

(c) Credit Amount. (§2306.6711(b)) An Applicant may not request more than $2 million in annual tax credits for any given Application. The Department shall not allocate more than $3 million of tax credits in any given Application Round to any Applicant, Developer, Affiliate or Guarantor (unless the Guarantor is also the General Contractor, and is not a Principal of the Applicant, Developer or Affiliate of the Development Owner). Tax-Exempt Bond Development Applications are not subject to this limitation and Tax-Exempt Bond Development Applications will not count towards the total limit on tax credits per Applicant. Competitive Housing Tax Credits approved by the Board during the current calendar year are applied to the credit cap limitation for the current Application Round. In order to evaluate this $3 million limitation, nonprofit entities, public housing authorities, publicly traded corporations, individual board members, and executive directors must provide the documentation required in the Application with regard to this requirement. All entities that share a Principal are Affiliates. For purposes of determining the $3 million limitation of tax credits, a Person is not deemed to be an Applicant, Developer, Affiliate or Guarantor solely because it:

(1) raises or provides equity;

(2) provides "qualified commercial financing";

(3) is a Qualified Nonprofit Organization or other not-for-profit entity that is providing solely loan funds, grant funds or social services;

(4) receives fees as a Development Consultant or Developer that do not exceed 10% of the Developer Fee (or 20% for Qualified Nonprofit Developments) to be paid or $150,000, whichever is greater; or

(5) is acting as a General Contractor providing experience or is providing a required construction guarantee because of that role.

(d) Limitations on the Size of Developments.

(1) The minimum Development size will be 16 Units.

(2) Developments in Rural Areas involving any New Construction or Adaptive Reuse (excluding New Construction of non-residential buildings) will be limited to 80 Units. Rehabilitation Developments (excluding Reconstruction) do not have a limitation as to the number of Units.

(3) Urban Developments involving any New Construction or Adaptive Reuse (excluding New Construction of non-residential buildings), in the Competitive Housing Tax Credit Application Round will be limited to 252 total Units, wherein the maximum Department administered Units will be limited to 200 Units. Tax-Exempt Bond Developments will be limited to 252 restricted and total Units. These maximum Unit limitations also apply to those Developments which involve a combination of Rehabilitation, Reconstruction, and New Construction. Only Developments that consist solely of acquisition/Rehabilitation or Rehabilitation may exceed the maximum Unit restrictions.

(4) For Applications that are proposing an additional phase to an existing tax credit Development of the same type; that are otherwise adjacent to an existing tax credit Development of the same type; or that are proposing a Development of the same type on a contiguous site to another Application awarded in the same program year, the combined Unit total for the existing and proposed Developments may not exceed the maximum allowable Development size set forth in this subsection unless:

(A) the first phase of the Development has been completed and has maintained occupancy of at least 90% for a minimum six (6) month period as reflected in the submitted rent roll; or

(B) a resolution from the Governing Body of the city or county, in which the proposed Development is located, dated no more than one (1) year old from the date the Application is submitted. Such resolution must state that the Governing Body has reviewed a market study which supports the need for additional Units. The resolution must

be submitted to the Department by the Resolution Delivery Date as indicated in §50.3 of this chapter (relating to Program Calendar); or

(C) the proposed Development is intended to provide replacement of previously existing affordable Units on the Development Site or that were originally located within a one mile radius from the Development Site; provided, however, the combined number of Units in the proposed Development may not exceed the number of Units being replaced. Documentation of such replacement units must be provided.

(e) Developments Proposing to Qualify for a 30% increase in Eligible Basis. Staff will evaluate Applications for a 30% increase in Eligible Basis provided they meet the criteria identified in paragraph (1) or (2) of this subsection and Staff will recommend a 30% increase in Eligible Basis unless a 30% increase in Eligible Basis would cause the development to be over sourced, as evaluated by the Real Estate Analysis division, in which case a credit amount necessary to fill the gap in financing will be recommended (paragraph (2) of this subsection does not apply to Tax-Exempt Bond Applications).

(1) The Development is located in a Qualified Census Tract (QCT) (as determined by the Secretary of HUD) that has less than 30% Housing Tax Credit Units per households in the tract as established by the U.S. Census Bureau for the most recent Decennial Census. Developments located in a QCT that has in excess of 30% Housing Tax Credit Units per households in the tract are not eligible to qualify for a 30% increase in Eligible Basis, which would otherwise be available for the Development Site pursuant to §42(d)(5)(C) of the Code, unless the Development is proposing only Reconstruction or Rehabilitation (excluding New Construction of non-residential buildings). Applicants must submit a copy of the census map clearly showing that the proposed Development is located within a QCT. The 11 digit census tract number must be clearly marked on the map. These ineligible Qualified Census Tracts are outlined in the Housing Tax Credit Site Demographic Characteristics Report for the current Application Round; or

(2) The Development meets one of the criteria described in subparagraphs (A) - (E) of this paragraph (pursuant to the authority granted by H.R. 3221):

(A) any Rural Development;

(B) developments proposing entirely Supportive Housing and that such Development is expected to be debt free or have no foreclosable or non-cash flow debt;

(C) developments proposed to be located in a Central Business District as defined in §50.2(7) of this chapter (relating to Definitions);

(D) Developments proposed in a High Opportunity Area as defined in §50.2(15) of this chapter; or

(E) any non-Qualified Elderly Development not located in a QCT that receives local HOME, CDBG or other funds distributed or administered by the local jurisdiction provided that such funding amounts are equal to at least $2,000 per Unit and is removed from Eligible Basis.

§50.6. Allocation and Award Process.

(a) The purpose of this section is to identify the statutory set-asides for Applications competing under the State Housing Credit Ceiling, the methodology by which awards under the Ceiling are made as well as the general process for Housing Tax Credit Allocations.

(b) Regional Allocation Formula. This formula, developed by the Department, establishes separate targeted tax credit amounts for Rural Areas and Urban Areas within each of the Uniform State Service Regions. Each Uniform State Service Region's targeted tax credit amount will be published on the Department's website. The regional allocation for Rural Areas is referred to as the Rural Regional Allocation and the regional allocation for Urban Areas is referred to as the Urban Regional Allocation. Developments qualifying for the Rural Regional Allocation must meet the Rural Development definition. The Regional Allocation target will reflect that at least 20% of the State Housing Credit Ceiling for each calendar year shall be allocated to Developments in Rural Areas with a minimum of $500,000 for each Uniform State Service Region. (§2306.111(d)(3) and §2306.1115)

(c) Allocation Set-Asides. An Applicant may elect to compete in as many of the following Set-Asides for which the proposed Development qualifies: (§2306.111(d))

(1) Nonprofit Set-Aside. At least 10% of the State Housing Credit Ceiling for each calendar year shall be allocated to Qualified Nonprofit Developments which meet the requirements of §42(h)(5) of the Code. Qualified Nonprofit Organizations must have the Controlling interest in the Development Owner applying for this Set-Aside. If the Application is filed on behalf of a limited partnership, the Qualified Nonprofit Organization must be the Managing General Partner. If the Application is filed on behalf of a limited liability company, the Qualified Nonprofit Organization must be the controlling Managing Member. Additionally, a Qualified Nonprofit Development submitting an Application in the nonprofit Set-Aside must have the nonprofit entity or its nonprofit Affiliate or subsidiary be the Developer or a co-Developer as evidenced in the development agreement. An Applicant that meets the requirements to be in the Qualified Non-Profit Set-Aside is deemed to be applying under that set-aside unless their Application specifically includes an affirmative election to not be treated under that set-aside and a certification that they do not expect to receive a benefit in the allocation of tax credits as a result of being affiliated with a nonprofit. The Department reserves the right to request a change in this determination and/or not recommend credits for those unwilling to switch if insufficient Applications in the Nonprofit Set-Aside are received; (§2306.6729 and §2306.6706(b))

(2) USDA Set-Aside. At least 5% of the State Housing Credit Ceiling for each calendar year shall be allocated to Rural Developments which are financed through TRDO-USDA. (§2306.111(d)(2)) If an Application in this Set-Aside involves Rehabilitation it will be attributed to and come from the At-Risk Development Set-Aside; if an Application in this Set-Aside involves New Construction it will be attributed to and come from the applicable Uniform State Service Region. Developments financed through TRDO-USDA's §538 Guaranteed Rural Rental Housing Program, in whole or in part, will not be considered under this Set-Aside. Any Rehabilitation or Reconstruction of an existing §515 Development that retains the §515 loan and restrictions will be considered under the At-Risk Development and TRDO-USDA Set-Asides, unless such Development is also financed through TRDO-USDA's §538 Guaranteed Rural Rental Housing Program. Commitments of Competitive Housing Tax Credits issued by the Board in the current program year will be applied to each Set-Aside, Rural Regional Allocation, Urban Regional Allocation and/or TRDO-USDA Set-Aside for the current Application Round as appropriate;

(3) At-Risk Set-Aside. At least 15% of the State Housing Credit Ceiling for each calendar year will be allocated under the At-Risk Development Set-Aside and will be deducted from the State Housing Credit Ceiling prior to the application of the regional formula required under subsection (b) of this section. Through this Set-Aside, the Department, to the extent possible, shall allocate credits to Applications involving the preservation of Developments identified as At-Risk Developments. (§2306.6714) Up to 5% of the State Credit Ceiling associated with this Set-Aside may be given priority to Rehabilitation

Developments funded with TRDO. An At-Risk Development is a Development that: (§2306.6702)

(A) Has received the benefit of a subsidy in the form of a below-market interest rate loan, interest rate reduction, rental subsidy, Section 8 housing assistance payment, rental supplement payment, rental assistance payment, or equity incentive under at least one of the following federal laws, as applicable:

(i) Section 221(d)(3) and (5), National Housing Act (12 U.S.C. §17151);

(ii) Section 236, National Housing Act (12 U.S.C. §1715z-1);

(iii) Section 202, Housing Act of 1959 (12 U.S.C. §1701q);

(iv) Section 101, Housing and Urban Development Act of 1965 (12 U.S.C. §1701s);

(v) The Section 8 Additional Assistance Program for housing Developments with HUD-Insured and HUD-Held Mortgages administered by the United States Department of Housing and Urban Development;

(vi) The Section 8 Housing Assistance Program for the Disposition of HUD-Owned Projects administered by the United States Department of Housing and Urban Development;

(vii) Sections 514 - 516, Housing Act of 1949 (42 U.S.C. §§1484 - 1486);

(viii) Section 42, of the Internal Revenue Code of 1986 (26 U.S.C. §42); or

(ix) Section 538, Housing Act of 1949 only if the Development involves the Rehabilitation of an existing property that has received and will continue to receive as part of the financing of the Development federal assistance provided under §515 of the Housing Act of 1949; and

(B) Is subject to the following conditions:

(i) The stipulation to maintain affordability in the contract granting the subsidy is nearing expiration (expiration will occur within two (2) calendar years of July 31 of the year the Application is submitted); or

(ii) The federally insured mortgage on the Development is eligible for prepayment or is nearing the end of its mortgage term (the term will end within two calendar years of July 31 of the year the Application is submitted);

(C) An Application for a Development that includes the demolition of the existing Units which have received the financial benefit described in subparagraph (A) of this paragraph will not qualify as an At-Risk Development unless the redevelopment will include the same site;

(D) Developments must be at risk of losing affordability from the financial benefits available to the Development and must retain or renew all possible financial benefit if available, and at least maintain existing affordability to qualify as an At-Risk Development;

(E) Nearing expiration on a requirement to maintain affordability includes Developments eligible to request a qualified contract under §42 of the Code. Evidence must be provided in the form of a copy of the recorded LURA, the first years' IRS Forms 8609 for all buildings showing Part II completed and, if applicable, documentation from the original application regarding the right of first refusal;

(F) An amendment submitted to the Department while the Application is under review that would enable the Development to qualify as an At-Risk Development will not be accepted.

(d) Redistribution of Credits. (§2306.111(d)) If any amount of Housing Tax Credits remain after the initial commitment of Housing Tax Credits among the Set-Asides, Rural Regional Allocation and Urban Regional Allocation, the Department may redistribute the credits amongst the different regions and Set-Asides based on the need to most closely achieve regional allocation goals and the level of demand exhibited in the Uniform State Service Regions during the Application Round. However, if there are any tax credits set aside for Developments in a Rural Area in a specific Uniform State Service Region that remain after the allocation under subsection (e) of this section, those tax credits shall be made available in any other Rural Area in the state, first, and then to Developments in Urban areas of any uniform state service region. (§2306.111(d)(3)) As described in subsection (c)(1) and (2) of this section, no more than 90% of the State's Housing Credit Ceiling for the calendar year may go to Developments which are not Qualified Nonprofit Developments. If credits will be transferred from a Uniform State Service Region which does not have enough qualified Applications to meet its regional credit distribution amount, then those credits will be apportioned to the other Uniform State Service Regions.

(e) Methodology for Award Recommendations under the State Housing Credit Ceiling to the Board. The Department will assign, as herein described, Developments for review for financial feasibility by the Department's Real Estate Analysis Division. In general these will be those Applications identified as most competitive and that meet the requirements of Eligibility and Threshold. However, an Application may be reviewed by the Real Estate Analysis Division prior to the completion of the Eligibility and Threshold reviews. The procedure identified in paragraphs (1) - (6) of this subsection will also be used in making recommendations to the Board:

(1) Applications with the highest scores in the TRDO-USDA Allocation until the minimum requirements stated in subsection (c)(2) of this section are attained. If an Application in this Set-Aside involves Rehabilitation it will be attributed to, and come from the, At-Risk Set-Aside; if an Application in this Set-Aside involves New Construction it will be attributed to and come from the applicable Uniform State Service Region;

(2) Applications with the highest scores in the At-Risk Set-Aside Statewide until the minimum requirements stated in subsection (c)(3) of this section are attained;

(3) Remaining funds within each Uniform State Service Region will then be selected based on the highest scoring Developments in each of the 26 sub-regions, regardless of Set-Aside, in accordance with the requirements under subsection (b) of this section, without exceeding the credit amounts available for a Rural Regional Allocation and Urban Regional Allocation in each region. To the extent that Applications in the TRDO-USDA Set-Asides are not competitive enough within their respective Set-Aside, they will also be able to compete, with no Set-Aside preference, within their appropriate sub-region;

(4) If there are any tax credits set-aside for Developments in a Rural Area in a specific Uniform State Service Region that remain after allocation under paragraph (3) of this subsection those tax credits shall then be made available in any other Rural Area in the state to the Application in the most underserved Rural sub-region as compared to the Region's Rural Allocation. This rural redistribution will continue until at least 20% of the funds available to the state are allocated to Rural Areas. (§2306.111(d)(3)) This will be referred to as the Rural collapse;

(5) If there are any tax credits remaining in any sub-region after the Rural collapse, in the Rural Regional Allocation or Urban Regional Allocation, they then will be combined and made available to the Application in the most underserved sub-region as compared to the sub-region's allocation. This will be referred to as the statewide collapse;

(6) Staff will ensure that at least 10% of the State Housing Credit Ceiling is allocated to Qualified Nonprofit Organizations to satisfy the Nonprofit Set-Aside. If 10% is not met through the existing competitive process, then the Department will add the highest scoring Application by a Qualified Nonprofit Organization statewide until the 10% Nonprofit Set-Aside is met and this set-aside will take precedence over selection for the Rural Regional Allocation and Urban Regional Allocation. Funds for the Rural Regional Allocation or Urban Regional Allocation within a region, for which there are no eligible feasible Applications, will be redistributed as provided in subsection (d) of this section. If the Department determines that an allocation recommendation would cause a violation of the $2 million limit described in §50.5(c) of this chapter (relating to Site and Development Restrictions), the Department will make its recommendation by selecting the Development(s) that most effectively satisfy the Department's goals in meeting Set-Aside and regional allocation goals. Based on Application rankings, the Department shall continue to underwrite Applications until the Department has processed enough Applications satisfying the Department's underwriting criteria to enable the allocation of all available Housing Tax Credits according to regional allocation goals and Set-Aside categories. To enable the Board to establish a waiting list, the Department shall underwrite as many additional Applications as necessary to ensure that all available Competitive Housing Tax Credits are allocated within the period required by law. (§2306.6710(a) - (f); §2306.111)

(f) Tie Breaker Factors.

(1) In the event that two or more Applications receive the same number of points in any given Set-Aside category, Rural Regional Allocation or Urban Regional Allocation, or Rural or state collapse and each of the tied Applicants are practicable and economically feasible, the Department will utilize the factors in this paragraph, in the order they are presented, to determine which Development will receive a preference in consideration for a tax credit Commitment.

(A) Applications located in a census tract that has the lowest average of units per capita, supported by Housing Tax Credits, including those supported by Tax Exempt Bonds, at the time the Application Round begins will win the first tie breaker.

(B) The amount of requested tax credits per person assisted calculated at 1.5 persons per Bedroom (Efficiency Units will be considered to have one Bedroom for the purposes of this provision) as of the date of Application submission. The lower credits per Bedroom will win this second tie breaker.

(C) Each scoring item for the tied Applications will be compared in descending order until an item is identified where one Applicant's score is greater than the score of the tied Applicants and the Applicant with the highest score on that item will win this third tie breaker.

(2) This paragraph identifies how ties will be handled when dealing with the restrictions on location identified in §50.8(2)(B) of this chapter (relating to Threshold Criteria), and in dealing with any issues relating to capture rate calculation. When two Tax-Exempt Bond Developments would violate one of these restrictions, and only one Development can be selected, the Department will utilize the Certificate of Reservation docket number issued by the Texas Bond Review Board (TBRB) in making its determination. When two Competitive Housing Tax Credits Applications in the Application Round would violate one of these restrictions, and only one Development can be selected, the Department will utilize the tie breaker identified in paragraph (1) of this subsection. When a Tax-Exempt Bond Development and a Competitive Housing Tax Credit Application in the Application Round would both violate a restriction, the following determination will be used:

(A) Tax-Exempt Bond Developments that receive their Certificate of Reservation from the TBRB on or before April 30 of the current program year will take precedence over the Housing Tax Credit Applications in the current Application Round;

(B) Housing Tax Credit Applications approved by the Board for tax credits in July of the current program year will take precedence over the Tax-Exempt Bond Developments that received their Certificate of Reservation from the TBRB on or between May 1 and July 31 of the current program year; and

(C) After July 31, a Tax-Exempt Bond Development with a Certificate of Reservation from the TBRB will take precedence over any Housing Tax Credit Application from the current Application Round on the waiting list. However, if no Certificate of Reservation has been issued by the date the Board approves an allocation to a Development from the waiting list of Applications in the current Application Round then the waiting list Application will be eligible for its allocation.

(g) Staff Recommendations. (§2306.1112 and §2306.6731) In accordance with the QAP and other applicable Department rules, the Department Staff shall make its recommendations to the Executive Award and Review Advisory Committee for that committee to recommend to the Board. That committee, in making its recommendations, is not constrained to whether the proposed award meets legal and regulatory requirements and may, as it deems appropriate provide information about other factors and concerns. The committee, if it is not unanimous, shall report opposing minority views.

§50.7. Application Process.

(a) The purpose of this section is to outline the process by which Housing Tax Credit Applications are accepted and reviewed by the Department.

(b) General. The application process has two parts, a pre-application which is voluntary but creates an opportunity for a greater score on the required Application and applies only to Applications submitted under the State Housing Credit Ceiling and an Application which is mandatory. An Applicant that does not provide an Application on or before the deadlines provided herein is not eligible to be placed on the list of eligible Applicants to which awards of tax credits may be made. Pre-applications and Applications submitted to the Department are subject to restrictions in paragraphs (1) and (2) of this subsection.

(1) Ex Parte Communications. (§2306.1113) An ex parte communication occurs, when an Applicant initiates substantive contact (other than permitted social contact) with a board member, or vice versa, in a setting other than a duly posted and convened public meeting, in any manner not specifically permitted by §2306.1113(b). Such action is prohibited. For Applicants seeking funding after initial awards have been made, such as waiting list Applicants, the ex parte communication prohibition remains in effect. The ex parte provision does not prohibit the Board from participating in social events at which a Person with whom communications are prohibited may, or will be present, provided that all matters related to the Applications be considered by the Board will not be discussed.

(2) Administrative Deficiency Process. The purpose of the Administrative Deficiency process is to allow the Applicant an opportunity to provide clarification, correction or non-material missing in-

formation (i.e. not rising to the level of a Material Deficiency) to resolve inconsistencies in the original Application. Staff will request the missing information via an Administrative Deficiency and will make a recommendation to award points provided the information submitted in response to the Administrative Deficiency is submitted in the time frames specified therein and addresses the issues to the reasonable satisfaction of Staff.

(A) Administrative Deficiencies for Applications submitted under the State Housing Credit Ceiling and Rural Rescue Applications. If an Application contains Administrative Deficiencies which, in the determination of the Department Staff, require clarification, correction or the request of non-material missing information to resolve inconsistencies in the original Application the Department Staff may request such information in the form of an Administrative Deficiency. Because the review for Eligibility, Selection, Threshold Criteria, Quantifiable Community Participation (QCP) and review for financial feasibility by the Department's Real Estate Analysis Division may occur separately, Administrative Deficiency requests may be made during any of these reviews. The Department Staff will request the information in the form of an e-mail, or if an e-mail address is not provided in the Application, by facsimile, and a telephone call (only if there has not been confirmation of the receipt of the e-mail within twenty-four (24) hours) to the Applicant and one other party identified by the Applicant in the Application advising that such a request has been transmitted. If Administrative Deficiencies are not resolved to the satisfaction of the Department by 5:00 p.m. on the fifth business day following the date of the deficiency notice, then (5 points) shall be deducted from the Selection Criteria score for each additional day the deficiency remains unresolved. If Administrative Deficiencies are not resolved by 5:00 p.m. on the seventh business day following the date of the deficiency notice, then the Application shall be terminated. The time period for responding to a deficiency notice begins at the start of the business day following the deficiency notice date. Deficiency notices may be sent to an Applicant prior to or after the end of the Application Acceptance Period and may also be sent in response to reviews on post award submissions. An Applicant may not change or supplement any part of an Application in any manner after the filing deadline, and may not add any Set-Asides, increase the requested credit amount, revise the Unit mix (both income levels and bedroom mixes), or adjust their self-score except in response to a direct request from the Department to do so as a result of an Administrative Deficiency or by approved amendment of an Application after a commitment or allocation of tax credits as further described in §50.13(b) of this chapter (relating to Application Reevaluation). (§2306.6708(b); §2306.6708) To the extent that the review of Administrative Deficiency documentation during the review alters the score assigned to the Application, Applicants will be re-notified of their final adjusted score.

(B) Administrative Deficiencies for Tax Exempt Bond Applications. If an Application contains deficiencies which, in the determination of the Department Staff, require clarification, correction, or non-material missing information to resolve inconsistencies in the original Application the Department Staff may request such information in the form of an Administrative Deficiency. Because the review for Eligibility, Threshold Criteria, and review for financial feasibility by the Department's Real Estate Analysis Division may occur separately, Administrative Deficiency requests may be made during any of these reviews. The Department Staff will request the information in a deficiency notice in the form of an e-mail, or if an e-mail address is not provided in the Application, by facsimile, and a telephone call (only if there has not been confirmation of the receipt of the e-mail within twenty-four (24) hours) to the Applicant and one other party identified by the Applicant in the Application advising that such a request has been transmitted. All Administrative Deficiencies shall be resolved to the satisfaction of the Department within five (5) business days. Failure to resolve all outstanding deficiencies by 5:00 p.m. on the fifth business day following the date of the deficiency notice will result in a penalty fee of $500 for each business day the deficiency remains unresolved. Applications with unresolved deficiencies after 5:00 p.m. on the tenth day following the date of the deficiency notice will be terminated. The Applicant will be responsible for the payment of fees accrued pursuant to this paragraph regardless of any termination pursuant to §50.4 of this chapter (relating to Ineligible Applicants, Applications, and Developments). The time period for responding to a deficiency notice begins at the start of the business day following the deficiency notice date. Deficiency notices may be sent to an Applicant prior to or after the end of the Application Acceptance Period and may also be sent in response to reviews on post award submissions. The Application will not be presented to the Board for consideration until all outstanding fees have been paid.

(c) Pre-application Submission. The purpose of the pre-application process is to enable Applicants interested in pursuing the Application to assess generally who else is interested in submitting Applications and the nature of their proposed Development. Based on an understanding of the potential competition they can make a better and more informed decision whether they wish to proceed to prepare and submit an Application.

(1) As used herein a "complete pre-application" means a pre-application that meets all of the Department's criteria for an Application with all required information and exhibits provided pursuant to the Tax Credit (Procedures) Manual.

(2) The pre-application must be submitted in accordance with the Application Acceptance Period and Pre-application Final Delivery Date as identified in §50.3 of this chapter (relating to Program Calendar).

(3) To submit the complete pre-application the Applicant must deliver one (1) CD-R containing a PDF copy and Excel copy of the complete pre-application to the Department prior to the Pre-application Final Delivery Date.

(4) The pre-application must be a single file and individually bookmarked as presented in the order as required in the Tax Credit (Procedures) Manual.

(5) If a pre-application is not submitted to the Department on or before the applicable deadline indicated in §50.3 of this chapter, the Applicant will be deemed to have not made a pre-application.

(6) The required pre-application fee as described in §50.14 of this chapter (relating to Program Related Fees) must be submitted with the pre-application in order for the pre-application to be accepted by the Department.

(7) Only one pre-application may be submitted by an Applicant for each site. Prior to the pre-application deadline Applicants may withdraw their pre-application and subsequently file a new pre-application utilizing the original pre-application fee that was paid as long as no evaluation was performed by the Department.

(8) Department review at this stage is limited, and not all issues of eligibility and threshold are reviewed at pre-application. Acceptance by Staff of a pre-application does not ensure that an Applicant satisfies all Application eligibility, threshold or documentation requirements. The Department is not responsible for notifying an Applicant of potential areas of ineligibility or threshold deficiencies at the time of pre-application. The rejection of a pre-application shall not preclude an Applicant from submitting an Application with respect to a particular Development at the appropriate time.

(d) Pre-application Threshold Criteria. The Pre-application Threshold Criteria include:

(1) submission of a pre-application;

(2) legal description of the Development Site; and

(3) evidence in the form of a certification that all of the notifications required under this paragraph have been made. (§2306.6704)

(A) The Applicant must request a list of Neighborhood Organizations on record with the county and state whose boundaries include the proposed Development Site:

(i) No later than the Pre-application Neighborhood Organization Request Date identified in §50.3 of this chapter, the Applicant must e-mail, fax or mail with registered receipt (email or fax to be "receipt confirmed") a completed "Neighborhood Organization Request" letter as provided in the pre-application to the local elected official for the city and county where the Development is proposed to be located. If the Development is located in an area that has district based local elected officials, or both at-large and district based local elected officials, the request must be made to the city council member or county commissioner representing that district; if the Development is located in an area that has only at-large local elected officials, the request must be made to the mayor or county judge for the jurisdiction. If the Development is not located within a city or is located in the Extra Territorial Jurisdiction (ETJ) of a city, the county local elected official must be contacted. In the event that local elected officials refer the Applicant to another source, the Applicant must request Neighborhood Organizations from that source in the same format;

(ii) If no reply letter is received from the local elected officials by the Pre-application Response to Neighborhood Organization Request Date, then the Applicant must certify to that fact in the pre-application;

(iii) The Applicant must list in the pre-application all Neighborhood Organizations on record with the county or state whose boundaries include the proposed Development Site as provided by the local elected officials, or that the Applicant has knowledge of (regardless of whether the organization is on record with the county or state) as of the pre-application submission.

(B) Not later than the date the pre-application is submitted, notification must be sent to all of the following individuals and entities by e-mail, fax or mail with registered receipt return or similar tracking mechanism in the format required in the "Pre-application Notification Template" provided in the pre-application. Developments located in an ETJ of a city are not required to notify city officials, however, are required to notify county officials. Evidence of notification is required in the form of a certification provided in the pre-application, although it is encouraged that Applicants retain proof of delivery of the notifications, to the persons or entities prescribed in clauses (i) - (ix) of this subparagraph, in the event that the Department requires proof of notification. Evidence of proof of delivery is demonstrated by signed receipt for mail or courier delivery and confirmation of receipt by the recipient for facsimile and electronic mail. Officials to be notified are those officials in office at the time the pre-application is submitted.

(i) Neighborhood Organizations on record with the state or county whose boundaries include the proposed Development Site;

(ii) Superintendent of the school district containing the Development;

(iii) Presiding officer of the board of trustees of the school district containing the Development;

(iv) Mayor of any municipality containing the Development;

(v) All elected members of the Governing Body of any municipality containing the Development;

(vi) Presiding officer of the Governing Body of the county containing the Development;

(vii) All elected members of the Governing Body of the county containing the Development;

(viii) State senator of the district containing the Development; and

(ix) State representative of the district containing the Development.

(C) Each such notice must include, at a minimum, all of the following:

(i) the Applicant's name, address, individual contact name and phone number;

(ii) the Development name, address, city and county;

(iii) a statement informing the entity or individual being notified that the Applicant is submitting a request for Housing Tax Credits with the Texas Department of Housing and Community Affairs;

(iv) whether the Development proposes New Construction, Reconstruction, Adaptive Reuse, or Rehabilitation;

(v) the type of Development being proposed (single family homes, duplex, apartments, townhomes, high-rise etc.); and

(vi) the approximate total number of Units and approximate total number of low-income Units.

(D) Pre-applications not meeting the Pre-application Threshold Criteria identified in this subsection will be terminated and the Applicant will receive a written notice to that effect. The Department shall not be responsible for the Applicant's failure to meet the Pre-application Threshold Criteria and any failure of the Department's Staff to notify the Applicant of such inability to satisfy the Pre-application Threshold Criteria shall not confer upon the Applicant any rights to which it would not otherwise be entitled.

(e) Pre-application Results. Only pre-applications which have satisfied all of the Pre-application Threshold Criteria requirements set forth in subsection (d) of this section and §50.9(b)(14) of this chapter (relating to Selection Criteria), will be eligible for pre-application points. The order and scores of those Developments released on the Pre-application Submission Log do not represent a Commitment on the part of the Department or the Board to allocate tax credits to any Development and the Department bears no liability for decisions made by Applicants based on the results of the Pre-application Submission Log. Inclusion of a Development on the Pre-application Submission Log does not ensure that an Applicant will receive points for a pre-application.

(f) Application Submission. An Applicant requesting a Housing Credit Allocation or a Determination Notice must submit an Application in order to be considered for Housing Tax Credits.

(1) As used herein a "complete application" means an Application that meets all of the Department's criteria for an Application with all required information and exhibits provided pursuant to the Tax Credit (Procedures) Manual.

(2) For Applications submitted under the State Housing Credit Ceiling, the Application must be submitted by the Full Application Delivery Date as identified in §50.3 of this chapter. The Full Application Delivery Date for Tax-Exempt Bond Developments is triggered by the Certificate of Reservation issued by the Texas Bond Review Board and is further defined in §50.11 of this chapter (relating to Tax-Exempt Bond Developments).

(3) To submit the complete application the Applicant must deliver one (1) CD-R containing a PDF copy and Excel copy of the complete application to the Department.

(4) The Application must be a single file and individually bookmarked in the order as required by the Tax Credit (Procedures) Manual.

(5) If an Application is not submitted to the Department on or before the applicable deadline indicated in paragraph (2) of this subsection, the Applicant will be deemed to have not made an Application.

(6) The required Application fee as described in §50.14 of this chapter must be submitted with the Application in order for the Application to be accepted by the Department.

(7) Only one Application may be submitted for a site in an Application Round. While the Application Acceptance Period is open, an Applicant may withdraw an Application and subsequently file a new Application utilizing the original Pre-application Fee that was paid as long as no evaluation was performed by the Department.

(g) Evaluation Process. Applications submitted for consideration (including Tax Exempt Bond Developments) will be reviewed according to the eligibility, threshold and for competitive applications under the State Housing Credit Ceiling, for Selection Criteria. An Application, during any of these stages of review, may be determined to be ineligible as further described in §50.4 of this chapter. Applicants will be notified in these instances.

(h) Underwriting Evaluation. The Department shall underwrite an Application to determine the financial feasibility of the Development and an appropriate allocation of Housing Tax Credits. In making this determination, the Department will use §1.32 of this title (relating to Underwriting Rules and Guidelines). The Department may have an external party perform the underwriting evaluation to the extent it determines appropriate. The expense of any external underwriting evaluation shall be paid by the Applicant prior to the commencement of the aforementioned evaluation.

(i) Compliance Evaluation. After the Department has determined which Developments will be reviewed for financial feasibility, those same Developments will be reviewed for evaluation of the compliance status in accordance with Chapter 60 of this title (relating to Compliance Administration), and will be evaluated in detail for eligibility under §50.4 of this chapter.

(j) Site Evaluation. Site conditions may be evaluated through a physical site inspection by the Department or its agents. Such inspection will evaluate the Development Site. The evaluations shall be based on the condition of the surrounding neighborhood, including appropriate environmental and aesthetic conditions and proximity to retail, medical, recreational, educational facilities, and employment centers. The site's appearance to prospective tenants and its accessibility via the existing transportation infrastructure and public transportation systems shall be considered. "Unacceptable" sites include, without limitation, those containing a non-mitigable environmental factor that may adversely affect the health and safety of the residents. For Developments applying under the TRDO-USDA Set-Aside, the Department may rely on the physical site inspection performed by TRDO-USDA.

(k) Application Process for Rural Rescue Applications under the Credit Ceiling.

(1) Submission Requirements. Rural Rescue Applications may be submitted during the Rural Rescue Application Submission Period as identified in §50.3 of this chapter. A complete Application must be submitted at least sixty (60) days prior to the date of the Board meeting at which the Applicant would like the Board to act on the proposed Development. Applications must include the full Application Fee as further described in §50.14 of this chapter. Applicants must submit documents in accordance with the Tax Credit (Procedures) Manual.

(A) Applications will be processed on a first-come, first-served basis. Applications unable to meet all Administrative Deficiency and underwriting requirements within thirty (30) days of the request by the Department, will remain under consideration, but will lose their submission status and the next Application in line will be moved ahead in order to expedite those Applications ready to proceed. Applications for Rural Rescue will be processed and evaluated as described in this paragraph. Applications will be reviewed to ensure that the Application is eligible as a rural "rescue" Development as described in paragraph (2) of this subsection.

(B) Prior to the Development being recommended to the Board, TRDO-USDA shall provide the Department with a copy of the physical site inspection report performed by TRDO-USDA, if applicable.

(2) Eligibility and Threshold Review. All Rural Rescue Applications will be reviewed pursuant to §50.8 and §50.9 of this chapter. Additional eligibility requirements include the criteria listed in subparagraphs (A) - (C) of this paragraph. Applications found to be ineligible will be notified.

(A) Applications must be funded through TRDO-USDA;

(B) Applications must be able to provide evidence that the loan:

(i) has been foreclosed and is in the TRDO-USDA inventory; or

(ii) is being foreclosed; or

(iii) is being accelerated; or

(iv) is in imminent danger of foreclosure or acceleration; or

(v) is for an Application in which two adjacent parcels are involved, of which at least one parcel qualifies under clauses (i) - (iv) of this subparagraph and for which the Application is submitted under one ownership structure, one financing plan and for which there are no market rate units; and

(C) Applicants must be identified as in compliance with TRDO-USDA regulations with all other properties.

(3) Selection Criteria Review. All Rural Rescue Applications will be evaluated against the Selection Criteria pursuant to §50.9 of this chapter and a score will be assigned to the Application. The minimum score for Selection Criteria as identified in §50.9(b) of this chapter is not required to be achieved to be eligible.

(4) Credit Ceiling and Applicability of this chapter. All Rural Rescue Applicants will receive their credit allocation out of the following program year Credit Ceiling and therefore, will be subject to the rules and guidelines identified in the Qualified Allocation Plan (QAP) of that program year. However, because the QAP for the following program year will not be in effect during the time period that the Ru-

ral Rescue Applications can be submitted, Applications submitted and eligible under the Rural Rescue Set-Aside will be considered to have satisfied the requirements of the following program years' QAP by having satisfied the requirements of the QAP for the current program year, to the extent permitted by statute.

(5) Procedures for Recommendation to the Board. Consistent with subsection (d) of this section, Staff will make its recommendation to the Committee. The Committee will make Commitment recommendations to the Board. Staff will provide the Board with a written, documented recommendation which will address at a minimum the financial and programmatic viability of each Application and a breakdown of which Selection Criteria were met by the Applicant. The Board will make its decision based on §50.10(a) of this chapter (relating to Board Decisions).

(6) Limitation on Allocation. No more than $350,000 in credits will be committed from the current State Housing Credit Ceiling. To the extent Applications are received that exceed the maximum limitation; Staff will prepare the award for Board consideration noting for the Board that the award would require a waiver of this limitation.

§50.8. Threshold Criteria.

The purpose of this section is to identify the mandatory requirements that must be submitted at the time of the original Application submission unless specifically indicated otherwise. If any of the Threshold Criteria indicated below are not resolved, clarified or corrected to the satisfaction of the Department, through the Administrative Deficiency process, the Application will be terminated.

(1) Submission of the Application. Includes the entire Uniform Application and any other supplemental forms which may be required by the Department and in the format prescribed by the Department. (§2306.1111)

(2) Governing Body Resolutions. The following resolutions, if applicable to the proposed Development, must be submitted by the Resolutions Delivery Date as indicated in §50.3 of this chapter (relating to Program Calendar) and may not be more than one year old from the beginning of the Application Acceptance Period or for Tax-Exempt Bond Developments from the date Parts 1 - 4 are submitted to the Department.

(A) Twice the State Average. If the Development is located in a municipality, or if located completely outside a municipality, a county, that has more than twice the state average of units per capita supported by Housing Tax Credits or private activity bonds at the time the Application Round begins (or for Tax-Exempt Bond Developments at the time the Certificate of Reservation is issued by the Texas Bond Review Board) the Applicant must obtain prior approval of the Development from the Governing Body of the appropriate municipality or county containing the Development. Such approval must reference this rule and authorize an allocation of Housing Tax Credits for the Development; (§2306.6703(a)(4))

(B) One Mile Three Year Rule. If the Applicant proposes to construct a Development proposing New Construction or Adaptive Reuse (excluding New Construction of non-residential buildings) that is located one linear mile (measured by a straight line on a map) or less from a Development that: (§2306.6703(a)(3))

(i) serves the same type of household as the new Development, regardless of whether the Development serves families, elderly individuals, or another type of household; and

(ii) has received an allocation of Housing Tax Credits or private activity bonds for any New Construction at any time during the three-year period preceding the date the Application Round begins (or for Tax-Exempt Bond Developments the three-year period preceding the date Parts 1 - 4 are submitted); and

(iii) has not been withdrawn or terminated from the Housing Tax Credit Program;

(iv) an Application is not ineligible under this paragraph if:

(I) the Development is using federal HOPE VI funds received through the United States Department of Housing and Urban Development; locally approved funds received from a public improvement district or a tax increment financing district; funds provided to the state under the Cranston-Gonzalez National Affordable Housing Act (42 U.S.C. §§12701 et seq.); or funds provided to the state and participating jurisdictions under the Housing and Community Development Act of 1974 (42 U.S.C. §§5301 et seq.); or

(II) the Development is located in a county with a population of less than one million; or

(III) the Development is located outside of a metropolitan statistical area; or

(IV) the Governing Body, of the Unit of General Local Government where the Development is to be located has by vote specifically allowed the construction of a new Development located within one linear mile or less from a Development described under clause (i) of this subparagraph.

(v) In determining when an existing Development received an allocation as it relates to the application of the three-year period, the Development will be considered from the date the Board took action on approving the allocation of tax credits. In dealing with ties between two or more Developments as it relates to this rule, refer to §50.6(f) of this chapter (relating to Allocation and Award Process).

(C) Developments in Certain Census Tracts. Staff will not recommend and the Board will not allocate Housing Tax Credits for a Competitive Housing Tax Credit or Tax-Exempt Bond Development located in a census tract that has more than 30% Housing Tax Credit Units per total households in the census tract as established by the U.S. Census Bureau for the most recent Decennial Census unless:

(i) the Development is in a Place whose population is less than 100,000;

(ii) the Applicant proposes only Reconstruction or Rehabilitation (excluding New Construction of non-residential buildings); or

(iii) submits to the Department an approval of the Development referencing this rule in the form of a resolution from the Governing Body of the appropriate municipality or county containing the Development. These ineligible census tracts are outlined in the Housing Tax Credit Site Demographic Characteristics Report for the current Application Round.

(3) Rehabilitation Costs. Developments involving Rehabilitation must establish a scope of work that will substantially improve the interiors of all Units and exterior deferred maintenance, at a minimum, and will involve at least $25,000 per Unit in direct construction cost, also referred to as building costs in §1.32(e)(4) of this title (relating to Underwriting Rules and Guidelines), and site work. If financed with TRDO-USDA the minimum is $19,000 and for Tax-Exempt Bond Developments, less than twenty-five (25) years old, the minimum is $15,000 per Unit.

(4) Experience Requirement. The purpose of the experience requirement is for someone in the Development to demonstrate they have experience in development. Evidence must be provided in

the Application that meets the criteria as stated in subparagraph (A) of this paragraph. An Applicant may submit their experience documentation prior to the Application deadline and the Department will attempt to review and respond within thirty (30) days of submission regarding approval of the experience requirement. Experience of multiple parties may not be aggregated.

(A) A Principal of the Developer, Development Owner, General Partner or General Contractor must establish that they have experience in the development of 150 units or more. Acceptable documentation to meet this requirement shall include:

(i) an experience certificate issued by the Department in the past three (3) years; or

(ii) any of the items in subclauses (I) - (IX) of this clause:

(I) American Institute of Architects (AIA) Document (A102) or (A103) 2007 - Standard Form of Agreement between Owner & Contractor;

(II) AIA Document G704--Certificate of Substantial Completion;

(III) AIA Document G702--Application and Certificate for Payment;

(IV) Certificate of Occupancy;

(V) IRS Form 8609 (only one per development is required);

(VI) HUD Form 9822;

(VII) Development agreements;

(VIII) Partnership agreements; or

(IX) other documentation satisfactory to the Department verifying that the Development Owner's General Partner, partner (or if Applicant is to be a limited liability company, the managing member), General Contractor, Developer or their Principals have the required experience.

(B) For purposes of this requirement any individual attempting to use the experience of another individual must demonstrate they have or had the authority to act on their behalf that substantiates the minimum 150 unit requirement.

(i) The names on the forms and agreements in subparagraph (A)(ii) of this paragraph must tie back to the Development Owner's General Partner, partner (or if Applicant is to be a limited liability company, the managing member), Developer or their Principals as listed in the Application.

(ii) Experience may not be established for a Person who at any time within the preceding three years has been involved with affordable housing that has been in material non-compliance under the Department's rules or for affordable housing in another state, has been the subject of issued IRS Form 8823 citing non-compliance that has not been or is not being corrected with reasonable due diligence.

(iii) If a Principal is determined by the Department to not have the required experience, an acceptable replacement for that Principal must be identified prior to the date the award is made by the Board.

(iv) Notwithstanding the foregoing, no person may be used to establish such required experience if that Person or an Affiliate of that Person would not be eligible to be an Applicant themselves.

(5) Certifications. The "Certification Form" provided in the Application confirming:

(A) a certification of the basic common amenities selected for the Development. All Developments must meet at least the minimum threshold of points based on the total number of Units in the Development. These points are not associated with the Selection Criteria points in §50.9(b) of this chapter (relating to Selection Criteria). The amenities selected must be made available for the benefit of all tenants and must be made available throughout normal business hours. If fees in addition to rent are charged for amenities, then the amenity may not be included among those provided to satisfy the threshold requirement. All amenities must meet accessibility standards. Spaces for activities must be sized appropriately to serve the Target Population of the Development. Applications for non-contiguous scattered site housing, excluding non-contiguous single family sites, will have the threshold test applied based on the number of Units per individual site, and will have to identify in the LURA which amenities are at each individual site. The complete list of amenities can be found in §1.1 of this title (relating to Definitions and Amenities for Housing Program Activities).

(i) Applications must meet a minimum threshold of points:

(I) Total Units equal 16, (1 point) is required;

(II) Total Units are 17 to 40, (4 points) are required;

(III) Total Units are 41 to 76, (7 points) are required;

(IV) Total Units are 77 to 99, (10 points) are required;

(V) Total Units are 100 to 149, (14 points) are required;

(VI) Total Units are 150 to 199, (18 points) are required; or

(VII) Total Units are 200 or more, (22 points) are required.

(ii) Unit Amenities (Tax Exempt Bond Developments Only). The Development must include enough amenities to meet the minimum threshold of (14 points). The amenity and quality feature shall be for every Unit at no extra charge to the tenant as certified to in the Application. The amenities and corresponding point structure is provided in §1.1 of this title. The amenities will be required to be identified in the LURA. Applications involving scattered site Developments must have a specific amenity located within each Unit to count for points. Rehabilitation Developments will start with a base score of (3 points) and Supportive Housing Developments will start with a base score of (5 points).

(B) A certification that the Development will meet the minimum threshold for size of Units as provided in clauses (i) - (v) of this subparagraph. These minimum requirements are not associated with the points in §50.9(b)(4) of this chapter. Developments proposing Rehabilitation (excluding Reconstruction) or Supportive Housing Developments will not be subject to the requirements of this subparagraph.

(i) five hundred-fifty (550) square feet for an Efficiency Unit;

(ii) six hundred-fifty (650) square feet for a one Bedroom Unit that is not in a Qualified Elderly Development; 550 square feet for a one Bedroom Unit in a Qualified Elderly Development;

(iii) nine hundred (900) square feet for a two Bedroom Unit that is not in a Qualified Elderly Development; 700 square feet for a two Bedroom Unit in a Qualified Elderly Development;

(iv) one thousand (1,000) square feet for a three Bedroom Unit; and

(v) one thousand, two-hundred (1,200) square feet for a four Bedroom Unit.

(C) A certification that the Development will adhere to the Texas Property Code relating to security devices and other applicable requirements for residential tenancies, and will adhere to local building codes or, if no local building codes are in place, then to the most recent version of the International Building Code.

(D) A certification that the Applicant is and will remain in compliance with state and federal laws, including but not limited to, fair housing laws, including Chapter 301, Property Code, Title VIII of the Civil Rights Act of 1968 (42 U.S.C. §§3601 et seq.), the Fair Housing Amendments Act of 1988 (42 U.S.C. §§3601 et seq.); the Civil Rights Act of 1964 (42 U.S.C. §§2000a et seq.); the Americans with Disabilities Act of 1990 (42 U.S.C. §§12101 et seq.); the Rehabilitation Act of 1973 (29 U.S.C. §§701 et seq.); Fair Housing Accessibility; the Texas Fair Housing Act; and that the Development is designed consistent with the Fair Housing Act Design Manual produced by HUD, the Code Requirements for Housing Accessibility 2000 (or as amended from time to time) produced by the International Code Council and the Texas Accessibility Standards. (§2306.257; §2306.6705(7))

(E) A certification that the Applicant has read and understands the Department's fair housing educational materials posted on the Department's website as of the beginning of the Application Acceptance Period.

(F) A certification that the Applicant will attempt to ensure that at least 30% of the construction and management businesses with which the Applicant contracts in connection with the Development are Minority Owned Businesses, and that the Applicant will submit a report at least once in each 90-day period following the date of the Commitment until the Cost Certification is submitted, in a format prescribed by the Department and provided at the time a Commitment is received, on the percentage of businesses with which the Applicant has contracted that qualify as Minority Owned Businesses. (§2306.6734)

(G) Pursuant to §2306.6722 of the Texas Government Code, any Development supported with a Housing Tax Credit allocation shall comply with the accessibility standards that are required under §504, Rehabilitation Act of 1973 (29 U.S.C. §794), and specified under 24 C.F.R. Part 8, Subpart C. The Applicant must provide a certification from the Development engineer, an accredited architect or Department-approved Third Party accessibility specialist, that the Development will comply with the accessibility standards that are required under §504, Rehabilitation Act of 1973 (29 U.S.C. §794), and specified under 24 C.F.R. Part 8, Subpart C, and this subparagraph. (§2306.6722 and §2306.6730)

(H) For Developments involving New Construction (excluding New Construction of non-residential buildings) where some Units are two-stories or single family design and are normally exempt from Fair Housing accessibility requirements, a minimum of 20% of each Unit type (i.e., one bedroom, two bedroom, three bedroom) must provide an accessible entry level and all common-use facilities in compliance with the Fair Housing Guidelines, and include a minimum of one bedroom and one bathroom or powder room at the entry level. A similar certification will also be required after the Development is completed from an inspector, architect, or accessibility specialist.

(I) A certification that the Development Owner agrees to establish a reserve account consistent with §2306.186 of the Texas Government Code and as further described in §1.37 of this title (relating to Reserve for Replacement Rules and Guidelines).

(J) A certification that the Applicant, Developer, or any employee or agent of the Applicant has not formed a Neighborhood Organization for purposes of §50.9(b)(2) of this chapter, has not given money or a gift to cause the Neighborhood Organization to take its position of support or opposition, nor has provided any assistance to a Neighborhood Organization outside of the assistance allowed under §50.9(b)(2)(A)(viii) of this chapter to meet the requirements under §50.9(b)(2) of this chapter as it relates to the Applicant's Application or any other Application under consideration in the current Application Round.

(K) A certification that the Development will operate in accordance with the requirements pertaining to rental assistance in Chapter 60 of this title (relating to Compliance Administration).

(L) A certification that the Development Owner will contract with a Management Company throughout the Compliance Period that will perform criminal background checks on all adult tenants, head and co-head of households.

(M) A certification that the Development Owner will affirmatively market to veterans through direct marketing or contracts with veteran's organizations. The Development Owner will be required to identify how they will affirmatively market to veterans and report to the Department in the annual housing report on the results of the marketing efforts to veterans. Exceptions to this requirement must be approved by the Department.

(N) A certification as to whether the Applicant, Development Owner, Developer or Guarantor involved with the Application has not voluntarily or involuntarily had their involvement in a rent or income restricted multifamily Development terminated by a lender, equity provider, or other investors or owners as a Principal during the previous ten (10) years, however designated, or any combination thereof or if any litigation to effectuate such exit has been instituted and is continuing at the time of Application. If such a termination of involvement occurred the facts and circumstances shall be fully disclosed. If an Applicant or Developer signs the certification and fails to disclose a discloseable matter and the Department learns at a later date that an exit did take place as described, then the Application may be terminated and any Allocation made will be rescinded. The disclosure of an exit does not, in and of itself, result in the Applicant or Application being deemed ineligible. Only if the Executive Director determines that the disclosed matter warrants ineligibility, a report of the matter and that recommendation shall be presented to the Board for a final determination. The Board may impose reasonable constraints, including time constraints, as a part of its determination. Any such matter to be presented for final determination of ineligibility by the Board must include notice from the Department to the affected party not less than fourteen (14) days prior to the scheduled Board meeting. The Executive Director may, but is not required, to issue a formal notice after disclosure if it is determined that the matter does not warrant ineligibility.

(6) Architectural Drawings. While full size design or construction documents are not required, the drawings must have an accurate and legible scale and show the dimensions. All Developments involving New Construction, or conversion of existing buildings not configured in the Unit pattern proposed in the Application as well as all other Developments unless specifically stated otherwise, must provide all of the items identified in subparagraphs (A) - (C) of this paragraph.

(A) A site plan which:

(i) is consistent with the number of Units and Unit mix specified in the "Rent Schedule" provided in the Application;

(ii) is consistent with the number of buildings and building type/unit mix specified in the "Building/Unit Configuration" provided in the Application;

(iii) identifies all residential and common buildings;

(iv) clearly delineates the flood plain boundary lines and shows all easements;

(v) indicates possible placement of detention/retention pond(s) (if applicable); and

(vi) indicates the location of the parking spaces;

(B) Building floor plans and elevations for each type of residential building and each common area building clearly depicting the height of each floor, a percentage estimate of the exterior composition and square footage of the common areas. Adaptive Reuse Developments, are only required to provide building plans delineating each Unit by number, type and area consistent with those in the "Rent Schedule" and pictures of each elevation of the existing building depicting the height of each floor and percentage estimate of the exterior composition. For Rehabilitation Developments in which the Unit configurations are not being altered then building floor plans are not required; however, photographs of elevations must be submitted and if elevations are proposed to be altered then after renovation drawings must be submitted; and

(C) Unit floor plans for each type of Unit. The Net Rentable Areas these Unit floor plans represent should be consistent with those shown in the "Rent Schedule" and "Building/Unit Configuration" provided in the Application. Adaptive Reuse Developments, are only required to provide Unit floor plans for each distinct typical Unit type (i.e. one-bedroom, two-bedroom) and for all Unit types that vary in Net Rentable Area by 10% from the typical Unit.

(7) Development Costs.

(A) The Development Cost Schedule, as provided in the Application, must include the contact information for the person providing the cost estimate for the Hard Costs.

(B) If offsite costs are included in the budget as a line item, or embedded in the site acquisition contract, or referenced in the utility provider letters, then the supplemental form "Off Site Cost Breakdown" must be provided.

(C) If projected site work costs (excluding ineligible demolition costs) include unusual or extraordinary items or exceed $9,000 per Unit, then the Applicant must provide a detailed cost breakdown prepared by a Third Party engineer, and a letter from a certified public accountant allocating which portions of those site costs should be included in Eligible Basis and which ones may be ineligible.

(8) Readiness to Proceed.

(A) Site Control. Evidence that the Development Owner has and will have at all times while the Application or any Commitment or Determination Notice is pending the ability to compel legal title to a developable interest in the Development Site, i.e., site control. If by the timeframes required in this chapter or any extension thereof as approved by the Department, Applicant fails to have the ability to compel legal title to such a developable interest, that Applicant shall be ineligible for participation in the next Application Round. This is an appealable matter. If the evidence is not in the name of the Development Owner, then the documentation should reflect an expressed ability to transfer the rights to the Development Owner. All of the sellers of the proposed Property for the thirty-six (36) months prior to the first day of the Application Acceptance Period and their relationship, if any, to members of the Development team must be identified at the time of Application (not required at pre-application). One of the following items described in clauses (i) - (iii) of this subparagraph must be provided:

(i) a recorded warranty deed with corresponding executed settlement statement, unless required to submit items under clause (iv) of this subparagraph; or

(ii) a contract for lease (the minimum term of the lease must be at least forty-five (45) years) which is valid for the entire period the Development is under consideration for tax credits; or

(iii) a contract for sale, an exclusive option to purchase or a lease which is valid for the entire period the Development is under consideration for tax credits. For Tax Exempt Bond Development Applications, site control must be valid through December 1 of the prior program year with option to extend through March 1 of the current program year (Applications submitted for lottery) or ninety (90) days from the date of the Certificate of Reservation with the option to extend through the scheduled TDHCA Board meeting at which the award of Housing Tax Credits will be considered (Applications not submitted for lottery). The potential expiration of Site Control does not warrant the Application being presented to the TDHCA Board prior to the scheduled meeting. Proof of consideration, as specified in the contract, must be submitted and the expiration date and closing date deadline must be identified.

(iv) If the acquisition can be characterized as an identity of interest transaction, as described in §1.32 of this title then the Applicant will be required to meet the documentation requirements as further described in §1.32 of this title.

(B) Zoning. Evidence from the appropriate local municipal authority that satisfies one of clauses (i) - (iii) of this subparagraph. Documentation may be from more than one department of the municipal authority and must have been prepared and executed not more than six (6) months prior to the close of the Application Acceptance Period. (§2306.6705(5))

(i) For New Construction, Adaptive Reuse or Reconstruction Developments, a letter from the chief executive officer of the Unit of General Local Government or another local official with appropriate jurisdiction stating that the Development is located within the boundaries of a Unit of General Local Government that has no zoning or for Developments located in Harris County the letter must state the Development is consistent with local housing policy adopted by the Unit of General Local Government within which the Development is located or that such Unit of General Local Government has no zoning or formally adopted local housing policy.

(ii) For New Construction, Adaptive Reuse or Reconstruction Developments, a letter from the chief executive officer of the Unit of General Local Government or another local official with appropriate jurisdiction stating that:

(I) The Development is permitted under the provisions of the zoning ordinance that applies to the location of the Development; or

(II) the Applicant is in the process of seeking the appropriate zoning and has signed and provided to the Unit of General Local Government a release agreeing to hold the Unit of General Local Government and all other parties harmless in the event that the appropriate zoning is denied. (§2306.6705(5)(B)) Documentation of final approval of appropriate zoning must be submitted to the Department with the Commitment or Determination Notice. No extensions may be

requested to the deadline for submitting evidence of final approval of appropriate zoning.

(iii) For Rehabilitation Developments, documentation of current zoning is required. If the property is currently conforming but with an overlay that would make it a non-conforming use as presently zoned, a letter from the chief executive officer of the Unit of General Local Government or another local official with appropriate jurisdiction which addresses the items in subclauses (I) - (IV) of this clause:

(I) a detailed narrative of the nature of non-conformance;

(II) the applicable destruction threshold;

(III) Owner's rights to reconstruct in the event of damage; and

(IV) Penalties for noncompliance.

(C) Financing Requirements.

(i) Evidence of all necessary interim and permanent financing sufficient to fund the proposed Total Housing Development Cost less any other funds requested from the Department and any other sources documented in the Application. Any local, state or federal financing identified in this section which restricts household incomes at any AMGI lower than restrictions required pursuant to this chapter must be identified in the "Rent Schedule" and the local, state or federal income restrictions must include corresponding rent levels that do not exceed 30% of the income limitation in accordance with §42(g) of the Code. The income and corresponding rent restrictions will be imposed by the Housing Tax Credit LURA and monitored throughout the extended use period. Such evidence must be consistent with the sources and uses of funds represented in the Application and shall be provided in one or more of the following forms described in subclauses (I) - (IV) of this clause:

(I) Financing is in place as evidenced by:

(-a-) a valid and binding loan agreement; and

(-b-) deed(s) of trust in the name of the Development Owner as grantor; or

(-c-) for TRDO-USDA §515 Developments involving, an executed TRDO-USDA letter indicating TRDO-USDA has received a notification of the tax credit Application; or

(II) term sheet for the interim and permanent loans issued by a lending institution or mortgage company that is actively and regularly engaged in the business of lending money which is addressed to the Development Owner and includes the following as identified in items (-a-) - (-d-) of this subclause:

(-a-) has been executed by the lender; and

(-b-) a minimum loan term of fifteen (15) years with at least a thirty (30) year amortization; and

(-c-) an expiration date; and

(-d-) all the terms and conditions applicable to the financing including the mechanism for determining the Interest rate, if applicable, and the anticipated interest rate, any required Guarantors, and anticipated developer fees paid during construction and anticipated deferred developer fees. Such a commitment may be conditional upon the completion of specified due diligence by the lender and upon the award of tax credits; or

(III) any federal, state or local gap financing, whether of soft or hard debt, must be identified at the time of Application as evidenced by:

(-a-) a term sheet from the lending agency which clearly describes the amount and terms of the funding must be submitted. If applying for points under §50.9(b)(5) of this chapter then documentation must be submitted as required by the deadlines stated therein; and

(-b-) evidence of a complete and receipted application for funding from another Department program must be obtained no later than March 1 (or for Tax Exempt Bond Developments at the time Parts 1 - 4 are submitted). The Department funding must be on a concurrent funding period with current tax credit Application Round; and

(IV) if the Development will be financed through more than 5% of Development Owner contributions, provide a letter from a Third Party CPA verifying the capacity of the Development Owner to provide the proposed financing with funds that are not otherwise committed together with a letter from the Development Owner's bank or banks confirming that sufficient funds are available to the Development Owner. Documentation must have been prepared and executed not more than six (6) months prior to the close of the Application Acceptance Period;

(ii) a written narrative describing the financing plan for the Development, including any non-traditional financing arrangements; the use of funds with respect to the Development; the funding sources for the Development including construction, permanent and bridge loans, rents, operating subsidies, and replacement reserves; and the commitment status of the funding sources for the Development. This information must be consistent with the information provided throughout the Application; and (§2306.6705(1))

(iii) provide a term sheet from a syndicator that, at a minimum, provides an estimate of the amount of equity dollars expected to be raised for the Development in conjunction with the amount of Housing Tax Credits requested for allocation to the Development Owner, including pay-in schedules, anticipated developer fees paid during construction and anticipated deferred developer fees, syndicator consulting fees and other syndication costs. No syndication costs should be included in the Eligible Basis. (§2306.6705(2) and (3))

(D) Title Commitment or Policy. The Application shall include a copy of:

(i) the current title policy (or title status report if on Tribal Land) including a legal description which shows that the ownership (or leasehold) of the Development Site is vested in the name of the Development Owner; or

(ii) a complete, current title commitment with the proposed insured matching the name of the Development Owner and the title of the Development Site vested in the name of the seller or lessor as indicated on the sales contract, option or lease;

(iii) if the title policy, title status report, or commitment is more than six (6) months old as of the day the Application Acceptance Period closes, then a letter from the title company/Bureau of Indian Affairs indicating that nothing further has transpired on the policy, title status report or commitment must be provided.

(9) Notifications. Evidence in the form of a certification that the Applicant met the requirements and deadlines identified in subparagraphs (A) - (C) of this paragraph. Notification must not be older than three (3) months from the first day of the Application Acceptance Period. (§2306.6705(9)) If evidence of these notifications was submitted with the pre-application for the same Application and satisfied the Department's review of Pre-application Threshold, then no additional notification is required at Application. However, re-notification is required by tax credit Applicants who have submitted a change in the Application, whether from pre-application to Application or as a result of an Administrative Deficiency that reflects a total Unit increase of

greater than 10%, a total increase of greater than 10% for any given level of AMGI, or a change to the Target Population being served. For Applications submitted for Tax-Exempt Bond Developments or Applications not applying for Tax Credits, but applying only under other Multifamily Programs (HOME, Housing Trust Fund, etc.), notifications and proof thereof must not be older than three (3) months prior to the date Parts 5 and 6 of the Application are submitted.

(A) The Applicant must request a list of Neighborhood Organizations on record with the county and state whose boundaries include the proposed Development Site from local elected officials:

(i) no later than the Full Application Neighborhood Organization Request Date as identified in §50.3 of this chapter, the Applicant must e-mail, fax or mail with registered receipt a completed "Neighborhood Organization Request" letter as provided in the Application to the local elected official for the city and county where the Development is proposed to be located. If the Development is located in an area that has district based local elected officials, or both at-large and district based local elected officials, the request must be made to the city council member or county commissioner representing that district; if the Development is located an area that has only at-large local elected officials, the request must be made to the mayor or county judge for the jurisdiction. If the Development is not located within a city or is located in the ETJ of a city, the county local elected official must be contacted. In the event that local elected officials refer the Applicant to another source, the Applicant must request Neighborhood Organizations from that source in the same format;

(ii) if no reply letter is received from the local elected officials by the Full Application Response to Neighborhood Organization Request Date, then the Applicant must certify to that fact in the certification form provided in the Application;

(iii) the Applicant must list all Neighborhood Organizations on record with the county or state whose boundaries include the proposed Development Site as outlined by the local elected officials, or that the Applicant has knowledge of (regardless of whether the organization is on record with the county or state) as of the submission of the Application, in the certification form provided in the Application.

(B) No later than the date the Application is submitted, notification must be sent to all of the following individuals and entities by e-mail, fax or mail with registered receipt return or similar tracking mechanism e-mail, fax or mail with registered receipt in the format required in the "Application Notification Template" provided in the Application. Developments located in an ETJ of a city are not required to notify city officials, however, are required to notify county officials. Evidence of notification is required in the form of a certification provided in the Application, although it is encouraged that Applicants retain proof of delivery of the notifications, to the persons or entities prescribed in clauses (i) - (ix) of this subparagraph, in the event that the Department requires proof of notification. Evidence of proof of delivery is demonstrated by signed receipt for mail or courier delivery and confirmation of receipt by recipient for facsimile and electronic mail. Officials to be notified are those officials in office at the time the Application is submitted.

(i) Neighborhood Organizations on record with the state or county whose boundaries include the proposed Development Site as identified in subparagraph (A)(iii) of this paragraph;

(ii) Superintendent of the school district containing the Development;

(iii) Presiding officer of the board of trustees of the school district containing the Development;

(iv) Mayor of the Governing Body of any municipality containing the Development;

(v) All elected members of the Governing Body of any municipality containing the Development;

(vi) Presiding officer of the Governing Body of the county containing the Development;

(vii) All elected members of the Governing Body of the county containing the Development;

(viii) State senator of the district containing the Development; and

(ix) State representative of the district containing the Development.

(C) Each such notice must include, at a minimum, all of the following as identified in clauses (i) - (vi) of this subparagraph:

(i) the Applicant's name, address, individual contact name and phone number;

(ii) the Development name, address, city and county;

(iii) a statement informing the entity or individual being notified that the Applicant is submitting a request for Housing Tax Credits with the Texas Department of Housing and Community Affairs (TDHCA);

(iv) statement of whether the Development proposes New Construction, Reconstruction, Adaptive Reuse or Rehabilitation;

(v) the type of Development being proposed (single family homes, duplex, apartments, townhomes, high-rise etc.); and

(vi) the approximate total number of Units and approximate total number of low-income Units.

(10) Development's Proposed Ownership Structure.

(A) A chart which clearly illustrates the complete organizational structure of the final proposed Development Owner and of any Developer or Guarantor, providing the names and ownership percentages of all Persons having an ownership interest in the Development Owner or the Developer or Guarantor, as applicable, whether directly or through one or more subsidiaries. Nonprofit entities, public housing authorities, publicly traded corporations, individual board members, and executive directors must be included in this exhibit and trusts must list all beneficiaries that have the legal ability to control or direct activities of the trust and are not just financial beneficiaries.

(B) Evidence that each entity shown on the organizational chart described in subparagraph (A) of this paragraph that has ownership interest in the Development Owner, Developer or Guarantor, has provided a copy of the completed and executed Previous Participation and Background Certification Form to the Department. Nonprofit entities, public housing authorities and publicly traded corporations are required to submit documentation for the entities involved. Documentation for individual board members and executive directors, any Person receiving more than 10% of the Developer fee and Units of General Local Government are all required to submit this document. The form must include a list of all developments that are, or were, previously under ownership or Control of the Applicant and each Principal, including any Person providing the required experience. All participation in any TDHCA funded or monitored activity, including non-housing activities, as well as housing tax credit developments or other programs administered by other states using state or federal programs must be disclosed and authorize the parties overseeing such assistance to release compliance histories to the Department.

(C) The documentation relating to the experience requirement, as further described under paragraph (4) of this section, is submitted that reflects a Person that appears in the organizational chart provided in subparagraph (A) of this paragraph.

(11) Development's Projected Income and Operating Expenses.

(A) All Applications must include a 15-year pro forma estimate of operating expenses and supporting documentation used to generate projections (operating statements from comparable properties);

(B) If rental assistance, an operating subsidy, an annuity, or an interest rate reduction payment is proposed to exist or continue for the Development, any related contract or other agreement securing those funds or proof of application for such funds must be provided, which at a minimum identifies the source and annual amount of the funds, the number of Units receiving the funds, and the term and expiration date of the contract or other agreement; (§2306.6705(4))

(C) Applicant must provide documentation from the source of the "Utility Allowance" estimate used in completing the Rent Schedule provided in the Application. This exhibit must clearly indicate which utility costs are included in the estimate;

(D) Occupied Developments undergoing Rehabilitation must also submit the items described in clauses (i) - (vi) of this subparagraph;

(i) The items in subclauses (I) and (II) of this clause are required unless the current property owner is unwilling to provide the required documentation. In that case, submit a signed statement as to the Applicant's inability to provide all documentation as described:

(I) submit at least one of the following identified in items (-a-) - (-d-) of this subclause:

(-a-) historical monthly operating statements of the subject Development for twelve (12) consecutive months ending not more than three (3) months from the first day of the Application Acceptance Period;

(-b-) the two (2) most recent consecutive annual operating statement summaries;

(-c-) the most recent consecutive six (6) months of operating statements and the most recent available annual operating summary;

(-d-) all monthly or annual operating summaries available; and

(II) a rent roll not more than six (6) months old as of the first day the Application Acceptance Period, that discloses the terms and rate of the lease, rental rates offered at the date of the rent roll, Unit mix, and tenant names or vacancy;

(ii) a written explanation of the process used to notify and consult with the tenants in preparing the Application; (§2306.6705(6))

(iii) for Qualified Elderly Developments, identification of the number of existing tenants qualified under the Target Population elected under this title;

(iv) a relocation plan outlining relocation requirements and a budget with an identified funding source; (§2306.6705(6))

(v) compliance with the Uniform Relocation Act, if applicable; and

(vi) if applicable, evidence that the relocation plan has been submitted to the appropriate legal or governmental agency. (§2306.6705(6))

(12) Applications involving Nonprofit General Partners and Qualified Nonprofit Developments. All Applications under the State Housing Credit Ceiling involving a §501(c)(3) or (4) nonprofit General Partner, and which meet the Nonprofit Set-Aside in §42(h)(5) of the Code, must submit all of the documents described in this subparagraph and indicate the nonprofit status on the carryover documentation and IRS Forms 8609. (§2306.6706) Applications under the State Housing Credit Ceiling that include an affirmative election to not be treated under the set-aside and a certification that they do not expect to receive a benefit in the allocation of tax credits as a result of being affiliated with a nonprofit only need to submit the information in subparagraphs (A) and (B) of this paragraph. Tax-Exempt Bond Applications only need to submit the information in subparagraphs (A) and (B) of this paragraph. Applications involving a nonprofit that is not a §501(c)(3) or (4) only need to disclose the basis of their nonprofit status. A participating nonprofit, regardless of whether it is applying under the Nonprofit Set-Aside (for Applications under the State Housing Credit Ceiling) may be reported to the Internal Revenue Service as being involved if such request is by the Internal Revenue Service.

(A) An IRS determination letter which states that the nonprofit organization is a §501(c)(3) or (4) entity;

(B) The "Nonprofit Participation Exhibit" as provided in the Application;

(C) A Third Party legal opinion stating:

(i) that the nonprofit organization is not affiliated with or Controlled by a for-profit organization and the basis for that opinion; and

(ii) that the nonprofit organization is eligible, as further described, for a Housing Credit Allocation from the Nonprofit Set-Aside pursuant to §42(h)(5) of the Code and the basis for that opinion; and

(iii) that one of the exempt purposes of the nonprofit organization is to provide low-income housing; and

(iv) that the nonprofit organization prohibits a member of its board of directors, other than a chief Staff member serving concurrently as a member of the board, from receiving material compensation for service on the board; and

(v) that the Qualified Nonprofit Development will have the nonprofit entity or its nonprofit Affiliate or subsidiary be the Developer or co-Developer as evidenced in the development agreement; and

(D) a copy of the nonprofit organization's most recent financial statement as prepared by a Certified Public Accountant; and

(E) evidence in the form of a certification that a majority of the members of the nonprofit organization's board of directors principally reside:

(i) in this state, if the Development is located in a Rural Area; or

(ii) not more than ninety (90) miles from the Development, if the Development is not located in a Rural Area.

(13) Authorization to Release Credit Information. The Authorization to Release Credit Information form may be requested, at the discretion of the Department, for any General Partner, Developer or Guarantor and other Affiliates of the Applicant.

(14) Supplemental Threshold Reports. The reports as required in this section must be prepared by a qualified Third party and

must meet the requirements stated in subparagraphs (A) - (F) of this paragraph. The Environmental Site Assessment, Property Condition Assessment and Appraisal (if applicable) must be submitted on or before the Third Party Report Delivery Date as identified in §50.3 of this chapter. The Market Analysis Report must be submitted on or before the Market Analysis Delivery Date as identified in §50.3 of this chapter. If the entire report is not received by that date, the Application will be terminated and will be removed from consideration. A searchable electronic copy of the report in the format of a single file containing all information and exhibits clearly labeled with the report type, Development name, and Development location are required.

(A) A Phase I Environmental Site Assessment (ESA) Report (required for all Developments):

(i) dated not more than twelve (12) months prior to the first day of the Application Acceptance Period. In the event that a Phase I Environmental Site Assessment on the Development is more than twelve (12) months old prior to the first day of the Application Acceptance Period, the Applicant must supply the Department with an updated letter or updated report dated not more than three (3) months prior to the first day of the Application Acceptance Period from the Person or organization which prepared the initial assessment confirming that the site has been re-inspected and reaffirming the conclusions of the initial report or identifying the changes since the initial report;

(ii) prepared in accordance with §1.35 of this title (relating to Environmental Site Assessment Rules and Guidelines);

(iii) developments whose funds have been obligated by TRDO-USDA will not be required to supply this information; however, the Applicants of such Developments are hereby notified that it is their responsibility to ensure that the Development is maintained in compliance with all state and federal environmental hazard requirements; and

(iv) if the report includes a recommendation that an additional assessment be performed then a statement from the Applicant must be submitted with the Application indicating those additional assessments and recommendations will be performed prior to closing. If the assessments require further mitigating recommendations then evidence indicating the mitigating recommendations have been carried out must be submitted at cost certification.

(B) A comprehensive Market Analysis Report (required for all Developments):

(i) prepared by a Qualified Market Analyst approved by the Department in accordance with the approval process outlined in §1.33 of this title (relating to Market Analysis Rules and Guidelines);

(ii) dated not more than six (6) months prior to the first day of the Application Acceptance Period. In the event that a Market Analysis is more than six (6) months old prior to the first day of the Application Acceptance Period, the Applicant must supply the Department with an updated Market Analysis from the Person or organization which prepared the initial report; however, the Department will not accept any Market Analysis which is more than twelve (12) months old as of the first day of the Application Acceptance Period;

(iii) prepared in accordance with the methodology prescribed in §1.33 of this title;

(iv) included in the Application submission is an executed engagement letter by the Qualified Market Analyst stating that the required exhibit has been commissioned to be performed and that the delivery date will be no later than the Market Analysis Delivery Date as identified in §50.3 of this chapter. In addition to the submission of the engagement letter with the Application, a map must be submitted that reflects the Qualified Market Analyst's intended market area; and

(v) for Applications in the TRDO-USDA Set-Aside proposing acquisition and Rehabilitation with residential structures at or above 80% occupancy at the time of Application Submission, the appraisal, required for Rehabilitation Developments and Identity of Interest transactions prepared in accordance with §1.34 of this title (relating to Appraisal Rules and Guidelines), will satisfy the requirement for a Market Analysis; however, the Department may request additional information as needed. (§2306.67055; §42(m)(1)(A)(iii))

(C) A Property Condition Assessment (PCA) Report (required for Rehabilitation and Adaptive Reuse Developments):

(i) dated not more than six (6) months prior to the first day of the Application Acceptance Period. In the event that a PCA is more than six (6) months old prior to the first day of the Application Acceptance Period, the Applicant must supply the Department with an updated PCA from the Person or organization which prepared the initial report; however the Department will not accept any PCA which is more than twelve (12) months old as of the first day of the Application Acceptance Period;

(ii) prepared in accordance with §1.36 of this title (relating to Property Condition Assessment Guidelines); and

(iii) for Developments which require a capital needs assessment from TRDO-USDA, the capital needs assessment may be substituted and may be more than six (6) months old, as long as TRDO-USDA has confirmed in writing that the existing capital needs assessment is still acceptable and it meets the requirements of §1.36 of this title.

(D) An appraisal report (required for Rehabilitation Developments and Identity of Interest transactions pursuant to §1.34 of this title):

(i) dated not more than six (6) months prior to the first day of the Application Acceptance Period. In the event that an appraisal is more than six (6) months old prior to the first day of the Application Acceptance Period, the Applicant must supply the Department with an updated appraisal from the Person or organization which prepared the initial report; however the Department will not accept any appraisal which is more than twelve (12) months old as of the first day of the Application Acceptance Period;

(ii) prepared in accordance with the §1.34 of this title; and

(iii) for Developments that require an appraisal from TRDO-USDA, the appraisal may be more than six (6) months old, as long as TRDO-USDA has confirmed in writing that the existing appraisal is still acceptable.

(E) Inserted at the front of each of these reports must be a transmittal letter from the individual preparing the report that states that the Department is granted full authority to rely on the findings and conclusions of the report. The transmittal letter must also state the report preparer has read and understood the Department rules specific to the report found at §§1.33 - 1.36 of this title.

(F) All Applicants acknowledge by virtue of filing an Application that the Department is not bound by any opinion expressed in the report. The Department may determine from time to time that information not required in the Department's Rules and Guidelines will be relevant to the Department's evaluation of the need for the Development and the allocation of the requested Housing Credit Allocation Amount. The Department may request additional information from the report provider or revisions to the report to meet this need. In instances

of non-response by the report provider, the Department may substitute in-house analysis.

§50.9. Selection Criteria.

(a) The purpose of this section is to identify the scoring criteria used in evaluating and ranking Applications submitted under the State Housing Credit Ceiling. The criteria identified below include those items required under Chapter 2306 of the Texas Government Code, §42 of the Internal Revenue Code and other criteria considered important by the Department.

(b) All Applications, with the exception of TRDO-USDA Applications, must receive a final score totaling a minimum of 130, not including any points awarded or deducted pursuant to paragraphs (2) and (6) of this subsection to be eligible for an allocation of Housing Tax Credits. Unless otherwise stated, do not round calculations.

(1) Financial Feasibility. (§2306.6710(b)(1)(A)) Applications may qualify to receive a maximum of (28 points) for this item. The purpose of this scoring item, as the highest prioritized item under Chapter 2306 of the Texas Government Code, is to provide an incentive for Applications based on the financial feasibility of the Development based on the supporting financial data as required in the Application. Receipt of feasibility points under this paragraph does not ensure that an Application will be considered feasible during the feasibility evaluation by the Real Estate Analysis Division, and, conversely, a Development may be found feasible during the feasibility evaluation by the Real Estate Analysis Division even if it did not receive all possible points under this paragraph. To qualify for the points, the supporting financial data in the Application must include:

(A) a fifteen (15) year pro forma prepared by the permanent or construction lender:

(i) specifically identifying each of the first five (5) years and every fifth year thereafter;

(ii) specifically identifying underlying assumptions including, but not limited to general growth factor applied to income and expense; and

(iii) indicating that the Development maintains a minimum 1.15 debt coverage ratio throughout the initial fifteen (15) years proposed for all third party lenders that require scheduled repayment; and

(B) a statement in the term sheet, or other form deemed acceptable by the Department, indicating that the lender's assessment, based on considerations that included the Development's underwriting pro forma, finds that the Development will be feasible for fifteen (15) years.

(C) For Developments maintaining existing financing from TRDO-USDA, a current note balance must be provided or other form of documentation of the existing loan deemed acceptable by the Department to meet the requirements of this section.

(2) Quantifiable Community Participation. (§2306.6710(b)(1)(B); §2306.6725(a)(2)) The purpose of this scoring item is to encourage community participation from Neighborhood Organizations whose boundaries contain the proposed Development Site with consideration for those areas that may not have any Neighborhood Organizations. Points will be awarded based on written statements of support or opposition from Neighborhood Organizations on record with the state or county in which the Development is to be located and whose boundaries contain the proposed Development Site. It is possible for points to be awarded or deducted based on written statements from organizations that were not identified by the process utilized for notification purposes under §50.8(9) of this chapter (relating to Threshold Criteria) if the organization provides the information and documentation required in subparagraphs (A) and (B) of this paragraph. It is also possible that Neighborhood Organizations that were initially identified as appropriate organizations for purposes of the notification requirements will subsequently be determined by the Department not to meet the requirements for scoring. If an organization is determined not to be qualified under this paragraph, the organization may qualify under paragraph (13)(B) of this subsection and will be reviewed by Staff accordingly even if points under paragraph (13)(B) of this subsection were not selected in the Self-Scoring Form. If an Application receives points under subparagraph (B)(i)(II) or (III) of this paragraph then they may also qualify for points under paragraph (13)(B) of this subsection provided that documentation required under that scoring item is submitted.

(A) Submission Requirements. Each Neighborhood Organization may submit the form as included in the QCP Neighborhood Information Packet that represents the organization's input. In order to receive a point score, the form must be received, by the Department, or postmarked, if mailed by the U.S. Postal Service, no later than the Quantifiable Community Participation Delivery Date as identified in §50.3 of this chapter (relating to Program Calendar). Forms received after the deadline will be summarized for the Board's information and consideration, but will not affect the score for the Application. The form must:

(i) state the name and location of the proposed single Development;

(ii) certify that the letter is signed by two officials or board members of the Neighborhood Organization with the authority to sign on behalf of the Neighborhood Organization, and include:

(I) the street and/or mailing addressee(s) for the signers of the letter;

(II) day and evening phone number(s) for the signers of the letter;

(III) email addresses and/or facsimile number(s) for the signers of the letter and one additional contact for the organization; and

(IV) a written description and map of the organization's geographical boundaries;

(iii) certify that the organization has boundaries, and that the boundaries in effect on or before the Full Application Delivery Date identified in §50.3 of this chapter contain the proposed Development Site;

(iv) certify that the organization meets the definition of "Neighborhood Organization"; defined as an organization of persons living near one another within the organization's defined boundaries that contain the proposed Development Site and that has a primary purpose of working to maintain or improve the general welfare of the neighborhood (§2306.004(23-a)). For purposes of this section, "persons living near one another" means two or more separate residential households. "Neighborhood Organizations" include homeowners associations, property owners associations, and resident councils in which the council is commenting on the Rehabilitation or Reconstruction of the property occupied by the residents. "Neighborhood Organizations" do not include broader based "community" organizations;

(v) include documentation showing that the organization is on record as of the Full Application Delivery Date with the state or the county in which the Development is proposed to be located. The receipt of the QCP form that meets the requirements of this subsection and further outlined in the QCP Neighborhood Information

Packet will constitute being on record with the State. The Department is permitted to issue an Administrative Deficiency notice for this registration process and, if satisfied, the organization will still be deemed to be timely placed on record with the state;

(vi) a Neighborhood Organization must provide notice, of at least seventy-two (72) hours, to persons eligible to join or participate in the affairs of the organization;

(vii) while a formal meeting is not required, the organization is encouraged to hold a meeting, that complies with its bylaws, to which all the members of the organization are invited to consider and/or have a membership vote on whether the organization should support, oppose, or be neutral on the proposed Development. The organization is also encouraged to meet with the Developer or Applicant to discuss the proposed Development; and

(viii) the form from the Neighborhood Organization for the purposes of this subsection must be submitted to the Department by the Neighborhood Organization and not the Applicant. This documentation must be submitted independent of the Application. Furthermore, while the Applicant may assist the Neighborhood Organization in the Administrative Deficiency process or any other request from the Department as it relates to this item, the Administrative Deficiency Notice from the Department will be issued to the Neighborhood Organization with a copy to the Applicant; however, the Deficiency response must be submitted to the Department directly by the Neighborhood Organization.

(B) Scoring. The input must clearly and concisely state each reason for the Neighborhood Organization's support for or opposition to the proposed Development.

(i) The score awarded for each letter for this exhibit will be based on the following:

(I) support letters will receive (24 points). Support letters must make a direct statement of support. Support by inference (i.e. "The city supports the Development and we support the city" will not suffice; or

(II) letters that do not meet the requirements of this section, letters that do not provide a reason for support or opposition, letters that are unclear even after correspondence with the Department or Applications for which no letters are received will receive a score of (14 points);

(III) applications for which no Neighborhood Organizations exist will receive a score of (18 points);

(IV) opposition letters (must state at least one reason for opposition) will receive (0 points);

(V) if an Application receives multiple eligible letters, the average score of all eligible letters will be applied to the Application.

(ii) The Department may investigate a matter and contact the Applicant and Neighborhood Organizations to clarify if it is unclear whether the letter is a letter of support, opposition, or neutrality and to confirm compliance with procedural matters such as organization, existence, and being on record.

(iii) The Department highly values quality public input addressed to the merits of a Development. Input that identifies matters that are specific to the neighborhood, the proposed site, the proposed Development, or Developer are valued. If a proposed Development is permitted by the existing or pending zoning or absence of zoning, concerns addressed by the allowable land use that are related to any multifamily development may generally be considered to have been addressed at the local level through the land use planning process. Input concerning positive efforts or the lack of efforts by the Applicant to inform and communicate with the neighborhood about the proposed Development is highly valued. If the Neighborhood Organization refuses to communicate with the Applicant the efforts of the Applicant will not be considered negative. Input that evidences unlawful discrimination against classes of persons protected by Fair Housing law or the scoring of which the Department determines to be contrary to the Department's efforts to affirmatively further fair housing will not be considered. If the Department receives input that could reasonably be suspected to implicate issues of non-compliance under the Fair Housing Act, Staff will refer the matter to the Texas Workforce Commission for investigation, but such referral will not, in and of itself, cause Staff or the Department to terminate consideration of the Application. Staff will report all such referrals to the Board and summarize the status of any such referrals in any recommendations.

(3) The Income Levels of Tenants of the Development. (§§2306.111(g)(3)(B) and (E); 2306.6710(b)(1)(C) and (e); and §42(m)(1)(B)(ii)(I)) The purpose of this scoring item is to encourage deep income targeting with Units set aside for households at 30% and/or 50% of AMGI. Applications may qualify to receive up to (22 points) for qualifying under only one of subparagraph (A) or (B) of this paragraph. To qualify for these points, the household incomes must not be higher than permitted by the AMGI level (must round to the next highest whole Unit, no less than one Unit). The Development Owner, upon making selections for this exhibit, will set aside Units at the levels of AMGI and will maintain the percentage of such Units continuously over the compliance and extended use period as specified in the LURA. These income levels require corresponding rent levels that do not exceed 30% of the income limitation in accordance with §42(g) of the Internal Revenue Code.

(A) For Developments proposed to be located in an area of the MSA of Houston, Dallas, Fort Worth, San Antonio or Austin that is not a Rural Area, an Application may qualify to receive:

(i) twenty-two (22) points if at least 40% of the Low-Income Units in the Development are set-aside with incomes at or below a combination of 50% and 30% of AMGI in which at least 5% of the Low-Income Units are at or below 30% of AMGI;

(ii) twenty (20) points if at least 60% of the Low-Income Units in the Development are set-aside with incomes at or below 50% of AMGI; or

(iii) eighteen (18) points if at least 10% of the Low-Income Units in the Development are set-aside with incomes at or below 30% of AMGI.

(B) For Developments proposed to be located in areas other than those listed in subparagraph (A) of this paragraph, an Application may qualify to receive:

(i) twenty-two (22) points if at least 20% of the Low-Income Units in the Development are set-aside with incomes at or below a combination of 50% and 30% of AMGI in which at least 5% of the Low-Income Units are at or below 30% of AMGI;

(ii) twenty (20) points if at least 30% of the Low-Income Units in the Development are set-aside with incomes at or below 50% of AMGI; or

(iii) eighteen (18) points if at least 5% of the Low-Income Units in the Development are set-aside with incomes at or below 30% of AMGI.

(4) The Size and Quality of the Units (§2306.6710(b)(1)(D); §42(m)(1)(C)(iii)). The purpose of this scoring

item is to promote interior features of the Unit that would serve to improve the quality of life of the resident. Applications may qualify to receive up to (20 points) under both subparagraphs (A) and (B) of this paragraph.

(A) Size of the Units (6 points). The Development must meet the minimum requirements identified in this subparagraph to qualify for points. Six (6) points for this item will be automatically granted for Applications involving Rehabilitation (excluding Reconstruction), Developments receiving funding from TRDO-USDA, or Supportive Housing Developments without meeting these square footage minimums only if requested in the Self Scoring Form. The square feet of all of the Units in the Development, for each type of Unit, must be at least the minimum noted in clauses (i) - (v) of this subparagraph. Changes to an Application during any phase of the review process that decreases the square footage below the minimums noted in clauses (i) - (v) of this subparagraph, will be re-evaluated and may result in a reduction of the Application score.

(i) six-hundred (600) square feet for an Efficiency Unit;

(ii) seven-hundred (700) square feet for a one Bedroom Unit that is not in a Qualified Elderly Development; 600 square feet for a one Bedroom Unit in a Qualified Elderly Development;

(iii) nine-hundred-fifty (950) square feet for a two Bedroom Unit that is not in a Qualified Elderly Development; 750 square feet for a two Bedroom Unit in a Qualified Elderly Development;

(iv) one-thousand-fifty (1,050) square feet for a three Bedroom Unit; and

(v) one-thousand, two-hundred-fifty (1,250) square feet for a four Bedroom Unit.

(B) Quality of the Units (14 points). Applications in which Developments provide specific amenity and quality features in every Unit at no extra charge to the tenant will be awarded points based on the point structure provided in §1.1 of this title (relating to Definitions and Amenities for Housing Program Activities) and as certified to in the Application. The amenities will be required to be identified in the LURA. Applications involving scattered site Developments must have a specific amenity located within each Unit to count for points. Rehabilitation Developments will start with a base score of (3 points) and Supportive Housing Developments will start with a base score of (5 points).

(5) The Commitment of Development Funding by a Unit of General Local Government or Governmental Instrumentality. (§2306.6710(b)(1)(E)) The purpose of this scoring item is to provide an incentive for local support for a proposed Development as demonstrated by the dedication of financial assistance, as described in this section, for the proposed Development. Applications may qualify to receive up to (18 points) under this paragraph. Funding must be from a Unit of General Local Government or a Governmental Instrumentality with jurisdiction, as established in accordance with statute, in the same county as or a contiguous county to the proposed Development.

(A) Submission Requirements. Evidence of the following must be submitted in accordance with the Tax Credit (Procedures) Manual.

(i) The loans, grant(s) or in-kind contribution(s) must be attributed to the total number of Low-Income Units in the Development.

(ii) An Applicant may submit enough sources to substantiate the point request, and all sources must be included in the Sources and Uses form.

(iii) An Applicant may substitute any source in response to an Administrative Deficiency Notice or after the Application has been submitted to the Department.

(iv) In-kind contributions such as donation of land, tax exemptions, or waivers of fees such as building permits, water and sewer tap fees, or similar contributions are only eligible for points if the in-kind contribution provides a tangible economic benefit that results in a quantifiable Total Housing Development Cost reduction to benefit the Development. The quantified value of the Total Housing Development Cost reduction may only include the value during the period the contribution or waiver is received and/or assessed. Donations of land must be under the control of the Applicant, pursuant to §50.8(8)(A) of this chapter to qualify. The value of in-kind contributions may only include the time period as of the beginning of the Application Acceptance Period and the Development's Placed in Service date, with the exception of contributions of land. The full value of land contributions, as established by the appraisal required pursuant §50.8(14)(D) of this chapter will be counted. Contributions in the form of tax exemptions or abatements may only count for points if the contribution is in addition to any tax exemption or abatement required under statute.

(v) To the extent that a Notice of Funding Availability (NOFA) is released and funds are available, funds from TDHCA's HOME Investment Partnerships (HOME) Program will qualify if a resolution, dated on or before the date the Application Acceptance Period ends, is submitted with the Application from the Governing Body of the Unit of General Local Government authorizing the Applicant to act on behalf of the Governing Body of the Unit of General Local Government in applying for HOME Funds from TDHCA for the particular Application. TDHCA's HOME funds may be substituted for a source originally submitted with the Application, provided the HOME funds substituted are from a NOFA released after the Application Acceptance Period ends and a resolution is submitted with the substitution documentation from the Governing Body of the Unit of General Local Government authorizing the Applicant to act on behalf of the Unit of General Local Government in applying for HOME Funds from TDHCA for the particular Application.

(vi) The granting of a new rental support or subsidy with a term of not less than fifteen (15) years; the funding for which is provided directly (not merely as administrator) by the UGLG or an instrumentality thereof.

(vii) If the support is being provided in the form of a below market rate loan, the loan must be at least 100 basis points below the current market rate and have a term of at least three (3) years and origination fees (including other lender fees that are substantially similar) must be equal to or less than 2% of the loan amount. A statement from the Applicant with respect to the loan amount to be applied for and the specific terms requested or to be requested must be submitted.

(viii) Acceptable evidence submitted in the Application would include, by way of example and not by way of limitation, a resolution from the Unit of General Local Government, a letter from its Appropriate Local Official, or an executed agreement with the Unit of General Local Government or Governmental Instrumentality that will be providing the funding. If the funds have been applied for but not awarded, a letter from the funding entity indicating that an application has been received, funding is available and that award results will be announced by August 1 of the current program year is required in the Application. The Application must also include a statement from the Applicant that reflects the requirements of clause (vii) of this subpara-

graph. If, in the instance of a below market rate loan as provided for in clause (vii) of this subparagraph, the application has not yet been made, a letter from the Applicant setting forth when the application will be made must be submitted.

(ix) At the time the executed Commitment is required to be submitted, the Applicant or Development Owner must provide updated evidence of a commitment approved by the Governing Body of the Unit of General Local Government, or its designee or agent, for the Development Funding to the Department. If the funding commitment is not available as of the date the Department's Commitment is to be submitted, the Department will determine if the Application would have been infeasible or noncompetitive without the source of funding. The Commitment will be rescinded and the credits reallocated if the Department determines that the Application would have been infeasible or noncompetitive.

(x) Funding commitments from a Governmental Instrumentality will not be considered final unless the Governmental Instrumentality attests to the fact that any funds committed were not first provided to the Governmental Instrumentality by the Applicant, the Developer, Consultant, Related Party or any individual or entity acting on behalf of the proposed Application, unless the Applicant itself is a Governmental Instrumentality or subsidiary.

(B) Scoring. Points will be determined based on the amount of funds committed to the Development on a per Unit basis, based on the total number of Low-Income Units in the Development.

(i) A total contribution of at least $1,000 (or $500 for Rural Developments or Developments located in non-participating jurisdictions) per Low-Income Unit receives (12 points); or

(ii) A total contribution at least $2,000 (or $1,000 for Rural Developments or Developments located in non-participating jurisdictions) per Low-Income Unit receives (18 points).

(6) Community Support from State Representative or State Senator. (§2306.6710(b)(1)(F); §2306.6725(a)(2)) The purpose of this scoring item is to allow the State Representative and State Senator the opportunity to express their support or opposition for proposed Developments whose boundaries are within their district. Applications may qualify to receive up to (16 points) or have deducted up to (16 points) for this item. Letters must be on the State Representative's or State Senator's letterhead, must be signed by the State Representative or State Senator, identify the specific Development and must clearly state support for or opposition to the specific Development. This documentation will be accepted with the Application or through delivery to the Department from the Applicant or the State Representative or Senator and must be submitted no later than the Input from State Senator or Representative Delivery Date as identified in §50.3 of this chapter. Once a State Representative or State Senator submits a letter it may not be changed or withdrawn; therefore, it is encouraged that letters not be submitted earlier than the specified Delivery Date in order to facilitate consideration of all constituent comment and other relevant input on the proposed Development. State Representatives or Senators to be considered are those State Representatives or Senators in office at the time the letter is submitted. Support letters are (+16 points); neutral letters, or letters that do not specifically refer to the Development, will receive (0 points); Opposition letters (must state reason for opposition) will receive (-16 points). If one letter is received in support and one letter is received in opposition the score would be (0 points). A letter that does not directly express support but expresses it indirectly by inference, (i.e. "the local jurisdiction supports the Development and I support the local jurisdiction") will be treated as a neutral letter.

(7) The Rent Levels of the Units. (§2306.6710(b)(1)(G)) The purpose of this scoring item is to encourage deep rent targeting with Units set aside for households at 30% and/or 50% of AMGI that are in addition to those Units already designated under paragraph (3) of this subsection. Additionally, such Units must come from the 60% of AMGI Units that have not previously been designated under paragraph (3) of this subsection. Applications may qualify to receive up to (14 points) for this item under subparagraph (A) or (B) of this paragraph provided the Application has qualified for points under paragraph (3) of this subsection, relating to Income Levels of Tenants of the Development. An Application may qualify for points under this subsection by providing the additional Low-Income Units at 30% and 50% of AMGI (must round up to the next whole Unit, not less than one Unit):

(A) for Developments proposed to be located in an area of the MSA of Houston, Dallas, Fort Worth, San Antonio or Austin that is not a Rural Area, an Application may qualify to receive:

(i) an Application may receive (2 points) for every 5% of Low-Income Units at rents and incomes at 50% of AMGI; or

(ii) an Application may receive (6 points) for every 2.5% of Low-Income Units at rents and incomes at 30% of AMGI.

(B) for Developments proposed to be located in areas other than those listed in subparagraph (A) of this paragraph, an Application may qualify to receive:

(i) An Application may receive (2 points) for every 2.5% of Low-Income Units at rents and incomes at 50% of AMGI; or

(ii) An Application may receive (6 points) for every 1% of Low-Income Units at rents and incomes at 30% of AMGI.

(8) The Cost of the Development by Square Foot. (§2306.6710(b)(1)(H); §42(m)(1)(C)(iii)) Applications may qualify to receive (12 points) for this item. For this exhibit, costs shall be defined as Hard Cost plus contractor profit, overhead and general requirements, as represented in the Development Cost Schedule. This calculation does not include indirect construction costs. The calculation will be costs per square foot of Net Rentable Area (NRA). For the purposes of this paragraph only, if a building is in a Qualified Elderly Development with an elevator or a Development with one or more buildings any of which have elevators serving four or more floors (Elevator Served Development) the NRA may include elevator served interior corridors. If the proposed Development is a Supportive Housing Development, the NRA may include elevator served interior corridors and may include up to 50 square feet of common area per Unit. As it relates to this paragraph, an interior corridor is a corridor that is enclosed, heated and/or cooled and otherwise finished space. The calculations will be based on the cost listed in the Development Cost Schedule and NRA shown in the Rent Schedule of the Application. Developments qualify for (12 points) if their costs do not exceed:

(A) ninety-five dollars ($95) per square foot (and direct construction cost, also referred to as building costs in §1.32(e)(4) of this title (relating to Underwriting Rules and Guidelines) do not exceed $80 per square foot) for Qualified Elderly and Elevator Served Development, single family design, and Supportive Housing Developments and Developments located in a Central Business District unless located in a "First Tier County" in which case their costs do not exceed $97 per square foot (and direct construction cost, also referred to as building costs in §1.32(e)(4) of this title do not exceed $82 per square foot); or

(B) eighty-five ($85) per square foot (and direct construction cost, also referred to as building costs in §1.32(e)(4) of this title do not exceed $70 per square foot) for all other Developments, unless designated as "First Tier" by the Texas Department of Insurance, in which case their costs do not exceed $87 per square foot (and direct construction cost, also referred to as building costs in §1.32(e)(4) of this title do not exceed $72 per square foot). The First Tier counties

are identified in the Tax Credit (Procedures) Manual. There are also specifically designated First Tier communities in Harris County that are east of State Highway 146, and evidence in the Application must include a map with the Development Site designated clearly within the community. These communities are Pasadena, Morgan's Point, Shoreacres, Seabrook and La Porte.

(9) Tenant Services. (§2306.6710(b)(1)(I) and §2306.6725(a)(1)) The purpose of this scoring item is to provide professional tenant services, tailored for the tenant population that will enhance the quality of life for the residents of the proposed Development. Applications may qualify to receive up to (10 points) for this item. By electing points, the Applicant certifies that the Development will provide a combination of supportive services, which are listed in §1.1 of this title, appropriate for the proposed tenants and that there is adequate space for the intended services. The provision and complete list of supportive services will be included in the LURA. The Owner may change, from time to time, the services offered; however, the overall points as selected at Application must remain the same. No fees may be charged to the tenants for any of the services. Services must be provided on-site or transportation to those off-site services identified on the list must be provided. The same service may not be used for more than one scoring item.

(10) Declared Disaster Areas. (§2306.6710(b)(1)) The purpose of this scoring item is to provide an incentive for the development of affordable housing in declared disaster areas. Applications may receive (8 points), if by the Full Application Delivery Date as identified in §50.3 of this chapter or at any time within the two-year period preceding the date of submission, the proposed Development Site is located in an area declared a disaster under §418.014 of the Texas Government Code.

(11) Additional Evidence of Preparation to Proceed. The purpose of this scoring item is to provide an incentive for a level of due diligence by the Applicant and lender that ultimately should result in better Developments, better site selection, the expeditious construction of Units and less feasibility risk on the financial aspects of the Development. Applications may receive up to (7 points) under subparagraphs (A) - (C) of this paragraph.

(A) Submission of a civil engineering feasibility study that includes, at a minimum, discussion of utility availability and fees, offsite requirements and costs, onsite requirements and costs, ingress and egress requirements, drainage and detention/retention requirements, discussion of required approvals, review process and general timing, and discussion of other necessary fees (permit, impact, drainage, tree, etc). All cost estimates to be as of the date of the study (3 points).

(B) Applicants may qualify to receive up to (4 points) by providing:

(i) for New Construction and Reconstruction, the submission of:

(I) executed architectural and engineering contracts (including structural, Mechanical, Electrical, Plumbing, Civil and landscape) with architect or other Third-Party lead consultant certification showing all total fees (1 point);

(II) a survey or current plat, for the Development Site, as defined by the Texas Society of Professional Surveyors in their Manual of Practice for Land Surveying in Texas;

(-a-) Category 1A: Land Title Survey no older than 6 months prior to the beginning of the Application Acceptance Period (1 point); or

(-b-) Category 1B: Standard Land Boundary Survey no older than twelve (12) months prior to the beginning of the Application Acceptance Period (1 point);

(III) a Geotechnical Report with non-building specific soil borings and general recommendations regarding slab specifications (1 point);

(IV) a civil engineered site plan as by a Third-Party civil engineer, showing all structures, site amenities, parking and driveways, topography, drainage and detention, water and waste water utility distribution, retaining walls and any other typical or required items (1 point);

(ii) for Rehabilitation Developments, the submission of:

(I) Executed architectural and engineering contracts (including structural, Mechanical, Electrical, Plumbing, Civil and landscape as applicable) with an architect or other Third-Party lead consultant certification indicating total fees and all fees paid to date (1 point);

(II) Category 5: As-built survey (an existing survey dated within the last twelve (12) months of the beginning of the Application Acceptance Period qualifies) (1 point);

(III) in addition to the PCA independently identified scope of immediate work, the submission of the Applicant's detailed schedule outlining the unit-by-unit specifications for all interior work and a detailed schedule outlining the building-by-building specifications; each including a line-item preliminary cost estimate, as if constructed as of the date of the Application submission, provided by the General Contractor (1 point);

(IV) Structural and Mechanical, Electrical, Plumbing reports prepared by licensed engineers reconciling all existing conditions to the scope of work identified in subclause (III) of this clause (1 point).

(C) Applications (excluding Pre-applications) that were submitted in the preceding three (3) Application Rounds; however, they were not considered competitive enough to ultimately receive an award may receive up to (2 points). The current Application must include the same number of Units, some overlap of the original Development Site, and at least one Affiliate of the previous Applicant is an Affiliate of the current Applicant. Terminated Applications do not qualify for these points.

(i) The Application, as submitted for the current Application Round, was previously submitted in one prior Application Round (1 point); or

(ii) The Application, as submitted for the current Application Round, was previously submitted in two prior Application Rounds (2 points).

(iii) Documentation must be submitted in the Application that includes the name, location, assigned TDHCA Identification Number and year of submission(s).

(12) Leveraging of Private, State, and Federal Resources. (§2306.6725(a)(3)). The purpose of this scoring item is to provide an incentive for the leveraging of financial resources, when economically feasible, for a Development that proposes to serve a specified percentage of households at or below 30% of AMGI. Applications may qualify to receive (7 points) for a Development located outside of a Qualified Census Tract and (6 points) for a Development located inside a Qualified Census Tract. To receive points under this item, the Development must have at least 5% of the total Units restricted for occupancy by

households at or below 30% of AMGI. Funding sources used for points under paragraph (5) of this subsection may not be used for this point item. Division of the same source into separate loans or grants does not result in eligibility under this paragraph and paragraph (5) of this subsection. Multiple sources may be combined to qualify under this item.

(A) If in the form of a loan, funding must be the primary source of debt with a first lien position and a minimum loan term of fifteen (15) years. Loans that are not first lien but are the largest source(s) of funding, not including equity generated from Housing Tax Credits, other federal tax credits, or funds used under paragraph (5) of this subsection also qualify. Origination fees cannot exceed 2% of the loan amount(s). Funding must be provided by a Third Party except when the funds are federally sourced and passed-through a Government Instrumentality. All loan funds qualifying for consideration under this section must provide an economic benefit over a market rate transaction (i.e. cannot buy down the rate by increasing upfront interest costs).

(B) Permanent grant funding not secured by a deed of trust may be used, provided the grant funding is the largest source of funding not including equity generated from Housing Tax Credits, other federal tax credits, or funds used under paragraph (5) of this subsection. Funding must be provided by a Third Party except when the funds are federally sourced and passed-through a Government Instrumentality.

(C) Examples of sources of funds that may qualify include those listed under clauses (i) - (viii) of this subparagraph. A Certification from the lender as of the date of such certification that the loan would meet this provision is required.

(i) HOPE VI;

(ii) Capital Grant Funds;

(iii) Community Investment Program (Federal Home Loan Bank);

(iv) Affordable Housing Program (Federal Home Loan Bank);

(v) HOME Investment Partnerships Program;

(vi) Community Development Block Grant (CDBG);

(vii) HUD-insured mortgage loans; or

(viii) other sources of grants or loans that provide for a 100 basis point savings over the market interest rate for comparable terms.

(D) Funding for ongoing operations, including rental subsidies, or other sources not directly offsetting the Total Housing Development Cost are not eligible for points under this paragraph. Qualifying funds awarded through local entities may qualify for points if the original source of the funds is from a private, state or federal source. If qualifying funds awarded through local entities are used for this item, a statement from the local entity must be provided that identifies the original source of funds.

(E) The Development must have already applied for funding from the funding entity. Evidence to be submitted with the Application must include a copy of the commitment of funds with terms meeting the requirements of subparagraphs (A) - (C) of this paragraph or a letter from the funding entity indicating that the application was received and that the terms for available funding meet the requirements of subparagraphs (A) - (C) of this paragraph.

(F) At the time of the Carryover Documentation Delivery Date, the Applicant or Development Owner must provide evidence of a commitment approved by the funding entity for the sufficient financing to the Department. An Applicant may substitute the qualifying source under this item between the time of Application and Carryover.

(13) Community Input other than Quantifiable Community Participation. The purpose of this scoring item is to allow community and civic organizations active in the area that includes the proposed Development the opportunity to express their support or opposition. If an Application was awarded (18 or 14 points) under paragraph (2) of this subsection, then that Application may receive up to (6 points) for letters that qualify for points under subparagraph (A), (B) or (C) of this paragraph. An Application may not receive points under more than one of the subparagraphs (A) - (C) of this paragraph. All letters must be submitted within the Application. At no time will the Application receive a score lower than zero (0) for this item.

(A) An Application may receive (2 points) maximum of (6 points) for each letter of support submitted from a community or civic organization that serves the community in which the Development Site is located. Letters of support must identify the specific Development and must state support of the specific Development at the proposed location. The community or civic organization must provide some documentation of its existence in the community in which the Development is located including, but not limited to, listing of services and/or members, brochures, annual reports, etc. Letters of support from organizations that cannot provide reasonable evidence that they are active in the area that includes the location of the Development will not be counted. For purposes of this subparagraph, community and civic organizations do not include neighborhood organizations, governmental entities (excluding Special Management Districts), taxing entities or educational activities. Organizations that were created by a governmental entity or derive their source of creation from a governmental entity do not qualify under this item. For purposes of this item, educational activities include school districts, trade and vocational schools, charter schools and depending on how characterized could include day care centers; a PTA or PTO would qualify. Should an Applicant elect this option and the Application receives letters in opposition, then (2 points) will be subtracted from the score for each letter in opposition, provided that the letter is from an organization serving the community.

(B) An Application may receive (6 points) for a letter of support, from a property owners association created for a master planned community whose boundaries include the Development Site that does not meet the requirements of a Neighborhood Organization for points under paragraph (2) of this subsection.

(C) An Application may receive (6 points) for a letter of support from a Special Management District, whose boundaries, as of the Full Application Delivery Date as identified in §50.3 of this chapter, include the Development Site and for which there is not a Neighborhood Organization on record with the county or state.

(D) Input that evidences unlawful discrimination against classes of persons protected by Fair Housing law or the scoring of which the Department determines to be contrary to the Department's efforts to affirmatively further fair housing will not be considered. If the Department receives input that could reasonably be suspected to implicate issues of non-compliance under the Fair Housing Act, Staff will refer the matter to the Texas Workforce Commission for investigation, but such referral will not, in and of itself, cause Staff or the Department to terminate consideration of the Application. Staff will report all such referrals to the Board and summarize the status of any such referrals in any recommendations.

(14) Pre-application Participation Incentive Points. (§2306.6704) Applicants that submitted a pre-application during the Pre-Application Acceptance Period and meet the requirements of this paragraph will qualify to receive (6 points) for this item. The purpose of this scoring item is to encourage participation in the pre-application process and prevent unnecessary filing costs by promoting transparency in the external assessment of competing Applications. Amendments to the Application subsequent to the award do not affect pre-application points if approved by the Board; however, the Board may take into consideration points received that would be lost as a result of the amendment. To be eligible for these points, the Application must:

(A) be for the identical Development Site, or reduced portion of the Development Site based on the legal description provided at pre-application;

(B) have met the Pre-application Threshold Criteria;

(C) be serving the same Target Population as in the pre-application;

(D) be applying for the same Set-Asides as indicated in the pre-application (Set-Asides can be dropped between pre-application and Application, but no Set-Asides can be added); and

(E) be awarded by the Department an Application score that is not more than (9 points) greater or less than the number of points awarded by the Department at pre-application, with the exclusion of points for support and opposition under paragraphs (2), (6), and (14) of this subsection. The Application score used to determine whether the Application score is (9 points) greater or less than the number of points awarded at pre-application will also include all point losses under §50.7(b)(2)(A) of this chapter (relating to Application Process). An Applicant must choose, at the time of Application either clause (i) or (ii) of this subparagraph:

(i) to request the pre-application points and have the Department cap the Application score at no greater than the (9 points) increase regardless of the total points accumulated in the scoring evaluation. This allows an Applicant to avoid penalty for increasing the point structure outside the (9 points) range from pre-application to Application; or

(ii) to request that the pre-application points be forfeited and that the Department evaluate the Application as requested in the Self-Score Form.

(15) Developments in Census Tracts with Limited Existing HTC Developments. (§2306.6725(b)(2)) The purpose of this scoring item is to encourage a de-concentration of housing tax credit Developments in census tracts, according to the Department's Housing Tax Credit Site Demographic Characteristics Report for the current Application Round. Applications may qualify for up to (6 points) under subparagraph (A) or (B) of this paragraph.

(A) If the proposed Development is located in a census tract in which there are no other existing HTC Developments that serve the same Target Population (4 points); or

(B) If the proposed Development is located in a census tract in which there are no other existing HTC Developments (6 points).

(C) Evidence of the census tract identifying the location of the proposed Development must be submitted in the Application.

(16) Development Location. (§2306.6725(a)(4); §42(m)(1)(C)(i)) Applications (excluding those requesting funds from the At-Risk Set-Aside) may qualify to receive up to (4 points) under subparagraph (A) of this paragraph, with the exception of Qualified Elderly Developments which may receive up to (3 points) under subparagraph (A) of this paragraph, or (4 points) under subparagraph (B) of this paragraph or (1 point) under subparagraph (C), (D) or (E) of this paragraph. The purpose of this scoring item is to promote affordable housing development in traditionally underserved areas that allow access to a variety of services and socioeconomic opportunities that would not otherwise be readily accessible as well as meet legally mandated requirements. Evidence must not be more than six (6) months old from the first day of the Application Acceptance Period. Applicants must submit documentation in the form of a map of the defined area that includes the location of the proposed Development. If qualifying for being in a Colonia, the name of the Colonia must also be identified on the map. An Application may only receive points under one of the subparagraphs (A) - (E) of this paragraph.

(A) The Development is proposed to be located in a High Opportunity Area as defined in §50.2(15) of this chapter (relating to Definitions) ((3 points) for Qualified Elderly Developments or (4 points) for all other Developments).

(B) The Development is proposed to be located in a Central Business District as defined in §50.2(7) of this chapter. The Application must include a letter from the Appropriate Local Official confirming the location of the proposed Development and include the boundaries of the Central Business District (4 points).

(C) A Federal Enterprise Community, a Growth Zone or any other comparable community as designated by HUD, which are typically defined with census tract boundaries. Such locations may have previously been known as Empowerment Zones, Enterprise Communities or Renewal Communities (1 point); or

(D) An Economically Distressed Area as specifically designated by the Texas Water Development Board as of the beginning of the Application Acceptance Period or a Colonia (1 point); or

(E) The Application is not receiving points under paragraph (5) of this subsection and the proposed Development will be located in an area supported by the Governing Body of the appropriate municipality or county containing the Development Site, as evidenced by a resolution or ordinance, submitted with the Application, supporting the location of the Development Site (1 point).

(17) Tenant Populations with Special Housing Needs. (§42(m)(1)(C)(v)) Applications may qualify to receive (4 points) for this item. The purpose of this scoring item is to integrate special housing needs populations into traditional housing tax credit Developments. The Department will award these points to Applications in which at least 5% of the Units are set aside for Persons with Special Needs. For purposes of this section, Persons with Special Needs is defined as persons with alcohol and/or drug addictions, Colonia residents, Persons with Disabilities, victims of domestic violence, persons with HIV/AIDS, homeless populations and migrant farm workers. Throughout the Compliance Period, unless otherwise permitted by the Department, the Development Owner agrees to affirmatively market Units to Persons with Special Needs. In addition, the Department will require a minimum twelve-month period during which Units must either be occupied by Persons with Special Needs or held vacant. The twelve-month period will begin on the date each building receives its Certificate of Occupancy. For buildings that do not receive a Certificate of Occupancy, the twelve-month period will begin on the placed in service date as provided in the Cost Certification manual. After the twelve-month period, the Development Owner will no longer be required to hold Units vacant for households with special needs, but will be required to continue to affirmatively market Units to household with special needs.

(18) Length of Affordability Period. (§§2306.6725(a)(5); 2306.111(g)(3)(C); 2306.185(a)(1) and (c); 2306.6710(e)(2); and 42(m)(1)(B)(ii)(II)) The purpose of this scoring item is to provide an incentive for Applications that will extend the affordability period beyond the extended use period. Rehabilitation (excluding Reconstruction) Developments are not eligible for these points. Applications may qualify to receive up to (4 points). In accordance with the Code, each Development is required to maintain its affordability for a 15-year compliance period and, subject to certain exceptions, an additional 15-year extended use period. Development Owners that are willing to extend the affordability period for a Development beyond the thirty (30) years required in the Code may receive points as follows:

(A) add five (5) years of affordability after the extended use period for a total affordability period of thirty-five (35) years (2 points); or

(B) add ten (10) years of affordability after the extended use period for a total affordability period of forty (40) years (4 points).

(19) Site Characteristics. Development Sites, including scattered sites, may qualify to receive up to (4 points) for this item. The purpose of this scoring item is to encourage affordable rental housing development in proximity to services and amenities that would be considered beneficial to the tenants. Developments Sites must be located within a one mile radius (two-mile radius for Developments competing for a Rural Regional Allocation) of at least six (6) services. A site located within one-half mile of public transportation that is accessible to all residents including Persons With Disabilities and/or located within a community that has another form of transportation, including, but not limited to, special transit service or specialized elderly transportation for Qualified Elderly Developments, will receive full points regardless of the proximity to amenities, as long as the Applicant provides appropriate evidence of the transportation services used to satisfy this requirement. If a Development is providing its own specialized van or funding a comparable service, then this will be a requirement of the LURA. Only one service of each type listed in subparagraphs (A) - (O) of this paragraph will count towards the points. A map must be included identifying the Development Site and the location of the services by name. If the services are not identified by name, points will not be awarded. All services must exist or, if under construction, must be under active construction, post pad by the date the Application is submitted.

(A) Full service grocery store.

(B) Pharmacy.

(C) Convenience Store/Mini-market.

(D) Department or Retail Merchandise Store.

(E) Bank/Credit Union.

(F) Restaurant (including fast food).

(G) Indoor public recreation facilities, such as civic centers, community centers, and libraries.

(H) Outdoor public recreation facilities such as parks, golf courses, and swimming pools.

(I) Medical offices (physician, dentistry, optometry) or hospital/medical clinic.

(J) Public Schools (only eligible for Developments that are not Qualified Elderly Developments).

(K) Senior Center.

(L) Religious Institutions.

(M) Day Care Services (must be licensed - only eligible for Developments that are not Qualified Elderly Developments).

(N) Post Office, City Hall, County Courthouse.

(O) Fire/Police Station.

(20) Repositioning of Existing Developments. Applications may qualify to receive up to (3 points) for this item. The purpose of this scoring item is to provide an incentive for Applications proposing the substantial Rehabilitation of an Existing Residential Development that meet the following criteria:

(A) proposes Rehabilitation (including Reconstruction);

(B) contains residential buildings originally constructed between 1980-1990;

(C) the Application includes a scope of work (excluding Reconstruction) for the interior of the Units that includes an intentional lease-down or relocation of tenants off-site; and

(D) the Development, as of the beginning of the Application Acceptance Period, has no income or rent restrictions recorded in the property records of the county.

(21) Sponsor Characteristics. The purpose of this scoring item is to encourage the material participation of Historically Underutilized Businesses relative to the housing industry in the development and operation of affordable housing. Applications may qualify to receive a maximum of (2 points) for this item. Qualifying under subparagraph (A) of this paragraph shall be worth (1 point) and qualifying under subparagraph (B) of this paragraph shall be worth (2 points). (§42(m)(1)(C)(iv))

(A) The Applicant has submitted a plan to use Historically Underutilized Businesses (HUB) in the development process consistent with the Historically Underutilized Business Guidelines for contracting with the State of Texas. The Applicant will be required to submit a report of the success of the plan as part of the cost certification documentation, in order to receive IRS Forms 8609; or

(B) there is a HUB as certified by the Texas Comptroller of Public Accounts, has at least 51% ownership interest in the General Partner and materially participates in the Development and operation of the Development throughout the Compliance Period. To qualify for these points, the Applicant must submit a certification from the Texas Comptroller of Public Accounts that the Person is a HUB at the close of the Application Acceptance Period.

(22) Economic Development Initiatives. (§2306.127) The purpose of this item is to provide an incentive for proposed Developments located in areas that have adopted initiatives that promote economic development. An Application may qualify to receive (1 point) under subparagraph (A) or (B) of this paragraph.

(A) An economic development initiative adopted by the local government in which the Development Site is located, such as, but not limited to, a Tax Increment Financing (TIF) or Tax Increment Reinvestment Zone (TIRZ). Acceptable evidence will be a letter from the Appropriate Local Official certifying they have authority, stating the economic development initiative that is in place and certifying the date the initiative was adopted by the Unit of General Local Government.

(B) A Designated State Enterprise Zone.

(23) Community Revitalization (§42(m)(1)(C)(iii)) or Historic Preservation. Applications may qualify to receive (1 point) under subparagraph (A) or (B) of this paragraph. The purpose of this scoring

item is to provide an incentive for community transformation (including Qualified Census Tracts) by utilizing already existing capacities and providing long-term improvements to specific geographic areas as well as preserving federal or state designated historic buildings.

(A) Any Development, regardless of whether located in a Qualified Census Tract, that is part of a community revitalization plan. To qualify for these points a letter from the Appropriate Local Official must be submitted affirming that the Development is located within the specific geographic area covered by the plan, that the plan is not a Consolidated Plan or other Economic Development Plan or city-wide plan, the plan has been approved or adopted by ordinance, resolution, or other vote by the Governing Body with jurisdiction over the area covered by the plan (or, if such body has delegated that responsibility to another body by resolution, ordinance, or other vote, the body to which the responsibility was delegated) in a process that allows for public input and/or comment.

(B) The Development includes the use of an existing building that is designated as historic by a federal or state Entity and proposes Rehabilitation (including Reconstruction) or Adaptive Reuse. The Development itself must have the designation; points in this subparagraph are not available for Developments simply located within historic districts or areas that do not have a designation on the building. The Development must include the historic building. Evidence will include proof of the historic designation from the appropriate Governmental Entity. The Applicant will be required to show proof of the Historic designation and Historic Tax Credits at Cost Certification.

(24) Developments Intended for Eventual Tenant Ownership--Right of First Refusal. Applications may qualify to receive (1 point) for this item. (§2306.6725(b)(1); §42(m)(1)(C)(viii)) The purpose of this scoring item is to allow for consideration for tenant or nonprofit ownership at the end of the Compliance Period. Evidence that Development Owner agrees to provide a right of first refusal to purchase the Development upon or following the end of the Compliance Period in accordance with §2306.6726 and the Department's rules related to Right of First Refusal and Qualified Contract in §1.9 of this title (relating to Qualified Contract Policy).

(c) Scoring Criteria Imposing Penalties. (§2306.6710(b)(2)) Staff will recommend to the Board a penalty of up to (5 points) for any of the items listed in paragraphs (1) and (2) of this subsection, unless the person approving the extension (the Board or Executive Director, as applicable) makes an affirmative finding setting forth that the facts which gave rise to the need for the extension were beyond the reasonable control of the Applicant and could not have been reasonably anticipated. Any such matter to be presented for final determination of penalties by the Board must include notice from the Department to the affected party not less than fourteen (14) days prior to the scheduled Board meeting. The Executive Director may, but is not required, to issue a formal notice after disclosure if it is determined that the matter does not warrant penalties.

(1) If the Applicant or Affiliate failed to meet the original Carryover submission or 10% Test deadline(s) or has requested an extension of the Carryover submission deadline, the 10% Test deadline (relating to either submission or expenditure).

(2) If the Developer or Principal of the Applicant violates the Adherence to Obligations pursuant to §50.12(a) of this chapter (relating to Post Award Activities).

(3) No penalty points will be deducted for extensions that were requested on Developments that involved Rehabilitation when the Department is the primary lender, or for Developments that involve TRDO-USDA as a lender if TRDO-USDA or the Department is the cause for the Applicant not meeting the deadline.

(4) Any penalties assessed by the Board for paragraph (1) or (2) of this subsection based on a Housing Tax Credit Commitment from the preceding Application Round will be attributable to the Applicant or Affiliate of an Application submitted in the current Application Round.

§50.10. Board Decisions.

(a) The Board's decisions shall be based upon the Department's and the Board's evaluation of the proposed Developments' consistency with the criteria and requirements set forth in this QAP and other applicable Department rules.

(1) On awarding tax credits, the Board shall document the reasons for each Application's selection, including any discretionary factors used in making its determination, including good cause and the reasons for any decision that conflicts with the recommendations made by Department Staff. Good cause includes the Board's decision to apply discretionary factors. (§§2306.6725(c); 2306.6731; and 42(m)(1)(A)(iv))

(2) Before the Board approves any Application, the Department shall assess the compliance history of the Applicant with respect to all applicable requirements; and the compliance issues associated with the proposed Development. The Board has established a rule for the materiality of noncompliance in Chapter 60 of this title (relating to Compliance Administration) to address noncompliance associated with the Development, Applicant or Affiliate.

(b) Waiting List. (§2306.6711(c) and (d)) If the entire State Housing Credit Ceiling for the applicable calendar year has been committed or allocated in accordance with this chapter, the Board shall generate, concurrently with the issuance of the Commitment, a waiting list of additional Applications ranked by score in descending order of priority based on Set-Aside categories and regional allocation goals. The Board may also apply discretionary factors in determining the waiting list provided that it takes into account the need to assure adherence to regional allocation requirements. If at any time prior to the end of the Application Round, one or more Commitments expire or a sufficient amount of the State Housing Credit Ceiling becomes available, the Board shall issue a Commitment to Applications on the waiting list subject to the amount of returned credits, the regional allocation goals and the Set-Aside categories, including the 10% Nonprofit Set-Aside allocation, 15% At-Risk Set-Aside allocation and 5% TRDO-USDA Set-Aside required under §42(h)(5) of the Code. At the end of each calendar year, all Applications which have not received a Commitment shall be deemed terminated. The Applicant may re-apply to the Department during the next Application Round.

(c) Appeals Process. (§2306.6715) An Applicant may appeal decisions made by the Department described in paragraphs (1) - (6) of this subsection:

(1) The decisions that may be appealed are identified in subparagraphs (A) - (D) of this paragraph.

(A) A determination regarding the Application's satisfaction of:

(i) Eligibility Requirements;

(ii) Disqualification or debarment criteria;

(iii) Pre-application or Application Threshold Criteria;

(iv) Underwriting Criteria;

(B) The scoring of the Application under the Selection Criteria;

(C) A recommendation as to the amount of Housing Tax Credits to be allocated to the Application; and

(D) Any Department decision that results in termination of an Application can be appealed in accordance with this section. Termination of an Application based on Material Noncompliance will follow the process as described in Chapter 60 of this title;

(2) An Applicant may not appeal a decision made regarding an Application filed by another Applicant;

(3) An Applicant must file its appeal in writing with the Department not later than the seventh calendar day after the date the Department publishes the results of any stage of the Application evaluation process identified in §50.7 of this chapter (relating to Application Process). The appeal must be in writing, signed by the person designated to act on behalf of the Applicant or an attorney that represents the Applicant. The Appeal must be addressed to the Department to the attention of the Director of Housing Tax Credits. In the appeal, the Applicant must specifically identify the Applicant's grounds for appeal, based on the original Application and additional documentation filed with the original Application as supplemented in accordance with the limitations and requirements of this chapter. If the appeal relates to the amount of Housing Tax Credits recommended to be allocated, the Department will provide the Applicant with the underwriting report upon request;

(4) The Executive Director of the Department shall respond in writing to the appeal not later than fourteen (14) calendar days after the date of actual receipt of the appeal by the Department in its offices. If the Applicant is not satisfied with the Executive Director's response to the appeal, the Applicant may appeal directly in writing to the Board, provided that an appeal filed with the Board under this subsection must be received by the Board before:

(A) the seventh calendar day preceding the date of the Board meeting at which the relevant commitment decision is expected to be made; or

(B) the third calendar day preceding the date of the Board meeting described by subparagraph (A) of this paragraph, if the Executive Director does not respond to the appeal before the date described by subparagraph (A) of this paragraph;

(5) Board review of an appeal under paragraph (4) of this subsection is based on the original Application. The Board may not review any information not contained in or filed with the original Application. The decision of the Board regarding the appeal is the final decision of the Department;

(6) the Department will post to its website an appeal filed with the Department or Board and any other document relating to the processing of the appeal. (§2306.6717(a)(5))

(d) Provision of Information or Challenges Regarding Applications from Unrelated Entities to the Application. The Department will address information or challenges received from unrelated entities to a specific active Application, utilizing a preponderance of the evidence standard, as stated in paragraphs (1) - (4) of this subsection, provided the information or challenge includes a contact name, telephone number, fax number and e-mail address of the person providing the information or challenge and must be received by the Department no later than the Application Challenges Deadline as identified in §50.3 of this chapter (relating to Program Calendar):

(1) within fourteen (14) business days of the Application Challenges Deadline as identified in §50.3 of this chapter the Department will post all information and challenges received (including any identifying information) to the Department's website;

(2) within seven (7) business days of the Application Challenges Deadline as identified in §50.3 of this chapter the Department will notify the Applicant related to the information or challenge. The Applicant will then have seven (7) business days to respond to all information and challenges provided to the Department; and

(3) within fourteen (14) business days of the receipt of the response from the Applicant, the Department will evaluate all information submitted and other relevant documentation related to the investigation. This information may include information requested by the Department relating to this evaluation. The Department will post its determination summary to its website. Any determinations made by the Department cannot be appealed by any party unrelated to the Applicant.

(4) Nothing herein shall serve to limit the authority of the Board to apply discretion for good cause to the fullest extent lawfully permitted.

§50.11. Tax-Exempt Bond Developments.

(a) Filing of Applications. Applications for a Tax-Exempt Bond Development may be submitted to the Department as described in paragraphs (1) and (2) of this subsection:

(1) Applicants which receive advance notice of a Certificate of Reservation as a result of the Texas Bond Review Board's (TBRB) lottery for the private activity bond volume cap must file a complete Application not later than the deadline as posted in the Application Procedures for Housing Tax Credits with Tax Exempt Bond Financing document on the Department's website. Such filing must be accompanied by the Application fee described in §50.14 of this chapter (relating to Program Related Fees);

(2) Applicants which receive advance notice of a Certificate of Reservation after being placed on the waiting list for private activity bond volume cap must submit Parts 1 - 4 of the Application and the Application fee described in §50.14 of this chapter prior to the Applicant's Certificate of Reservation date as assigned by the TBRB. Those Applications designated as Priority 3 by the TBRB must submit Parts 1 - 4 within fourteen (14) days of the Certificate of Reservation date if the Applicant intends to apply for tax credits regardless of the Issuer. Any outstanding documentation required under this section regardless of Priority must be submitted to the Department at least sixty (60) days prior to the Board meeting at which the decision to issue a Determination Notice would be made unless a waiver is requested by the Applicant. The Department Staff will have limited discretion to recommend an Application with appropriate justification of the late submission;

(3) Multiple site applications will be considered to be one Application as identified in Chapter 1372 of the Texas Government Code.

(b) Applicability of Rules. Tax-Exempt Bond Development Applications are subject to all rules in this chapter, with the only exceptions being the following sections: §50.4(d)(14) of this chapter (relating to Ineligible Applicants, Applications, and Developments); §50.5(c) of this chapter (relating to Site and Development Restrictions); §50.6(b) - (e) of this chapter (relating to Allocation and Award Process); §50.7(c), (d), (e) and (k) of this chapter (relating to Application Process); §50.9(b) of this chapter (relating to Selection Criteria); §50.10(b) of this chapter (relating to Board Decisions); and §50.12(e) - (f) of this chapter (relating to Post Award Activities).

(c) Tenant Services. Tax-Exempt Bond Development Applications must include the provision of supportive services. No fees may be charged to the tenants for any of the services. Services must be provided on-site or transportation to off-site services as identified on the

list must be provided. The provision of these services will be included in the LURA. Acceptable services include those described in §1.1 of this title (relating to Definitions and Amenities for Housing Program Activities).

(d) Financial Feasibility Evaluation for Tax-Exempt Bond Developments. Section 42(m)(2)(D), Internal Revenue Code, requires the bond issuer (if other than the Department) to ensure that a Tax-Exempt Bond Development does not receive more tax credits than the amount needed for the financial feasibility and viability of a Development throughout the Compliance Period. Treasury Regulations prescribe the occasions upon which this determination must be made. In light of the requirement, issuers may either elect to underwrite the Development for this purpose in accordance with the QAP and §1.32 of this title (relating to Underwriting Rules and Guidelines), or request that the Department perform the function. If the issuer underwrites the Development, the Department may request such underwriting report and may upon review make such changes in the amount of credits which the Development may be allowed as are appropriate under the Department's guidelines. The Determination Notice issued by the Department and any subsequent IRS Form(s) 8609 will reflect the amount of tax credits for which the Development is determined to be eligible in accordance with this subsection, and the amount of tax credits reflected in the IRS Form 8609 may be greater or less than the amount set forth in the Determination Notice, based upon the Department's and the bond issuer's determination as of each building's placement in service. Any increase of tax credits, from the amount specified in the Determination Notice, at the time of each building's placement in service will only be permitted if it is determined by the Department, as required by §42(m)(2)(D) of the Code. Increases to the amount of tax credits that exceed 110% of the amount of credits reflected in the Determination Notice are contingent upon approval by the Board. Increases to the amount of tax credits that do not exceed 110% of the amount of credits reflected in the Determination Notice may be approved administratively by the Executive Director and are subject to the Credit Increase Fee as described in §50.14 of this chapter.

(e) Certification of Tax Exempt Applications with New Docket Numbers. Applications that are processed through the Department review and evaluation process and receive an affirmative Board Determination, but do not close the bonds prior to the Certificate of Reservation expiration date, and subsequently have that docket number withdrawn from the TBRB, may have their Determination Notice reinstated. The Applicant would need to receive a new docket number from the TBRB and paragraph (1) or (2) of this subsection must apply:

(1) the new docket number must be issued in the same program year as the original docket number and must not be more than four (4) months from the date the original application was withdrawn from the TBRB. The Application must remain unchanged. This means that at a minimum, the following cannot have changed: site control, total number of units, unit mix (bedroom sizes and income restrictions), design/site plan documents, financial structure including bond and Housing Tax Credit amounts, development costs, rent schedule, operating expenses, sources and uses, ad valorem tax exemption status, target population, scoring criteria (TDHCA issues) or TBRB priority status including the effect on the inclusive capture rate. Note that the entities involved in the Applicant entity and Developer cannot change; however, the certification can be submitted even if the lender, syndicator or issuer changes, as long as the financing structure and terms remain unchanged. Notifications under §50.8(9) of this chapter (relating to Threshold Criteria) are not required to be reissued. A revised Determination Notice will be issued once notice of the assignment of a new docket number has been provided to the Department and the Department has confirmed that the capture rate and market demand remain acceptable. This certification must be submitted no later than thirty (30) days after the date the TBRB issues the new docket number. In the event that the Department's Board has not yet approved the Application, the Application will continue to be processed and ultimately provided to the Board for consideration. This certification must be submitted no later than thirty (30) days after the date the TBRB issues the new docket number; or

(2) if there are changes to the Application as referenced in paragraph (1) of this subsection or if there is public opposition, the Applicant will be required to submit a new Application in full, along with the applicable fees, to be reviewed and evaluated in its entirety for a new Determination Notice to be issued.

§50.12. Post Award Activities.

(a) Adherence to Obligations. (§2306.6720) Compliance with representations, undertakings and commitments made by an Applicant in the Application process for a Development, whether with respect to Threshold Criteria, Selection Criteria or otherwise, including the timely submittal and completion of cost certification (except for Department approved extensions), shall be deemed to be a condition to any Commitment, Determination Notice, or Carryover Allocation for such Development, the violation of which shall be cause for cancellation of such Commitment, Determination Notice, or Carryover Allocation by the Department, and if concerning the ongoing features or operation of the Development, shall be enforceable even if not reflected in the LURA. All such representations are enforceable by the Department and the tenants of the Development, including enforcement by administrative penalties for failure to perform, as stated in the representations and in accordance with the LURA. If a Development Owner does not produce the Development as represented in the Application; does not receive approval for an amendment to the Application by the Department prior to implementation of such amendment; or does not provide the necessary evidence for any points received by the required deadline:

(1) the Development Owner must provide a plan to the Department, for approval and subsequent implementation, that incorporates additional amenities to compensate for the non-conforming components; and

(2) the Board will opt either to terminate the Application and rescind the Commitment, Determination Notice or Carryover Allocation Agreement as applicable or the Department must:

(A) reduce the score for Applications for Competitive Housing Tax Credits that are submitted by an Applicant or Affiliate related to the Development Owner of the non-conforming Development by up to (10 points) for the two Application Rounds concurrent to, or following, the date that the non-conforming aspect, or lack of financing, was recognized by the Department of the need for the amendment; the placed in service date; or the date the amendment is accepted by the Board;

(B) prohibit eligibility to apply for Housing Tax Credits for a Tax-Exempt Bond Development that are submitted by an Applicant or Affiliate related to the Development Owner of the non-conforming Development for up to twenty-four (24) months from the date that the non-conforming aspect, or lack of financing, was recognized by the Department of the need for the amendment; the placed in service date; or the date the amendment is accepted by the Board, less any time delay caused by the Department;

(C) in addition to, or in lieu of, the penalty in subparagraph (A) or (B) of this paragraph, the Board may assess a penalty fee of up to $1,000 per day for each violation.

(3) For amendments approved administratively by the Executive Director, the penalties in paragraph (2) of this subsection will not be imposed.

(b) Commitments and Determination Notices.

(1) Commitments. If the Application is for a commitment from the State Housing Credit Ceiling, the Department shall issue a Commitment to the Development Owner which shall:

(A) confirm that the Board has approved the Application; and

(B) state the Department's commitment to make a Housing Credit Allocation to the Development Owner in a specified amount, subject to the feasibility determination described in this chapter, and compliance by the Development Owner with the remaining requirements of this chapter and any other terms and conditions set forth therein by the Department. This Commitment shall expire on the date specified therein unless the Development Owner indicates acceptance of the Commitment by executing the Commitment, pays the required fee specified in §50.14(f) of this chapter (relating to Program Related Fees), and satisfies any other conditions set forth therein by the Department. The Commitment expiration date may not be extended.

(2) Determination Notices. If the Application regards a Tax-Exempt Bond Development, issue a Determination Notice to the Development Owner which shall:

(A) confirm the Board's determination that the Development satisfies the requirements of this chapter and other applicable Department rules in accordance with the §42(m)(1)(D) of the Code. Applications that receive a Certificate of Reservation from the TBRB on or before November 15 of the prior program year will be required to satisfy the requirements of the prior year QAP; Applications that receive a Certificate a Reservation from the TBRB on or after January 2 of the current program year will be required to satisfy the requirements of the current program year QAP; and

(B) state the Department's commitment to issue IRS Form(s) 8609 to the Development Owner in a specified amount, subject to the requirements set forth in §50.11 of this chapter (relating to Tax-Exempt Bond Developments) and compliance by the Development Owner with all applicable requirements of this chapter and any other terms and conditions set forth therein by the Department. The Determination Notice shall expire on the date specified therein unless the Development Owner indicates acceptance by executing the Determination Notice, pays the required fee specified in §50.14(f) of this chapter and satisfies any conditions set forth therein by the Department. The Determination Notice expiration date may not be extended. Furthermore, no later than sixty (60) days following closing on the bonds, the Development Owner must submit:

(i) a Management Plan and an Affirmative Marketing Plan (as further described in the carryover procedures as identified in the Tax Credit (Procedures) Manual; and

(ii) evidence that the Development Owner or management company has attended Department-approved Fair Housing training relating to leasing and management issues for at least five (5) hours; and

(iii) the Development architect or engineer responsible for Fair Housing compliance for the Development has attended Department-approved Fair Housing training relating to design issues for at least five (5) hours. Certifications required under clauses (ii) and (iii) of this subparagraph must not be older than two (2) years from the date of the submission deadline.

(3) The Department shall notify, in writing, the mayor or other equivalent chief executive officer of the municipality in which the Property is located informing him/her of the Board's issuance of a Commitment or Determination Notice, as applicable.

(4) A Commitment or Determination Notice shall not be issued with respect to any Development for an unnecessary amount or where the cost for the total development, acquisition, construction or Rehabilitation exceeds the limitations established from time to time by the Department and the Board, unless the Department Staff make a recommendation to the Board based on the need to fulfill the goals of the Housing Tax Credit Program as expressed in this QAP and other applicable Department rules, and the Board accepts the recommendation. The Department's recommendation to the Board shall be clearly documented.

(5) The executed Commitment or Determination Notice must be returned to the Department no later than thirty (30) days after the effective date of the Notice provided that for Commitments under the State Housing Credit Ceiling that date is not later than December 31.

(6) The Department may cancel a Commitment, Determination Notice or Carryover Allocation prior to the issuance of IRS Form 8609 with respect to a Development if:

(A) the Applicant or the Development Owner, or the Development, as applicable, fails after written notice and a reasonable opportunity to cure to meet any of the conditions of such Commitment, Determination Notice or Carryover Allocation or any of the undertakings and commitments made by the Development Owner in the Applications process for the Development;

(B) any material statement or representation made by the Development Owner or made with respect to the Development Owner or the Development is untrue or misleading;

(C) an event occurs with respect to the Applicant or the Development Owner which would have made the Development's Application ineligible for funding pursuant to §50.4 of this chapter (relating to Ineligible Applicants, Applications, and Developments) if such event had occurred prior to issuance of the Commitment, Determination Notice or Carryover Allocation; or

(D) the Applicant or the Development Owner or the Development, as applicable, fails after written notice and a reasonable opportunity to cure to comply with this chapter or other applicable Department rules or the procedures or requirements of the Department.

(c) Agreement and Election Statement. The Development Owner may execute an Agreement and Election Statement, in the form prescribed by the Department, for the purpose of fixing the Applicable Percentage with respect to a building or buildings for the month in which the Carryover Allocation was accepted (or the month the bonds were closed for Tax-Exempt Bond Developments), as provided in the §42(b)(2) of the Code. Current Treasury Regulations, §1.42-8(a)(1)(v), suggest that in order to permit a Development Owner to make an effective election to fix the Applicable Percentage for a Development receiving credits from the State Housing Credit Ceiling, the Carryover Allocation Document must be executed by the Department and the Development Owner within the same month. The Department Staff will cooperate with a Development Owner, as possible or reasonable; to assure that the Carryover Allocation Document can be so executed. For Tax-Exempt Bond Developments where the election is not made for the month the bonds closed, the Applicable Percentage will be determined based on the month each building is placed in service.

(d) Documentation Submission Requirements at Commitment of Funds. No later than the date the Commitment or Determination Notice is executed by the Applicant and returned to the Department with the appropriate Commitment or Determination Fee as further described in §50.14(f) of this chapter, the following documents must also be provided to the Department. Failure to provide these documents may cause the Commitment or Determination Notice to be rescinded. For each Applicant documents described in paragraphs (1) - (5) of this subsection must be provided:

(1) for entities formed outside the state of Texas, evidence that the entity has the authority to do business in Texas in the form of a Certificate of Filing from the Texas Office of the Secretary of State;

(2) a Certificate of Account Status from the Texas Comptroller of Public Accounts or, if such a Certificate is not available because the entity is newly formed, a statement to such effect; and a Certificate of Name Reservation from the Texas Office of the Secretary of State;

(3) evidence that the signer(s) of the Application have the authority to sign on behalf of the Applicant in the form of a corporate resolution which indicates the sub-entity in Control and that those Persons signing the Application constitute all Persons required to sign or submit such documents;

(4) evidence of final zoning that was proposed or needed to be changed pursuant to the Development plan; and

(5) any conditions identified in the Real Estate Analysis report or any other conditions of the award required to be met at Commitment or Determination Notice.

(e) Carryover. All Developments which received a Commitment, and will not be placed in service and receive IRS Form 8609 in the year the Commitment was issued, must submit the Carryover documentation to the Department no later than the Carryover Documentation Delivery Date as identified in §50.3 of this chapter (relating to Program Calendar) of the year in which the Commitment is issued pursuant to §42(h)(1)(C) of the Code.

(1) Commitments for credits will be terminated if the Carryover documentation, or an approved extension, has not been received by this deadline. In the event that a Development Owner intends to submit the Carryover documentation in any month preceding November of the year in which the Commitment is issued, in order to fix the Applicable Percentage for the Development in that month, it must be submitted no later than the first Friday in the preceding month.

(2) If the financing structure, syndication rate, amount of debt or syndication proceeds are revised at the time of Carryover from what was proposed in the original Application, applicable documentation of such changes must be provided and the Development may be reevaluated by the Department.

(3) The Carryover Allocation must be properly completed and delivered to the Department as prescribed by the carryover procedures identified in the Tax Credit (Procedures) Manual.

(4) All Carryover Allocations will be contingent upon the Development Owner providing evidence that they have and will maintain Site Control through 10% Test or through the anticipated closing date, whichever is earlier. For purposes of this paragraph, site control must be identical to the same Development Site that was submitted at the time of Application submission.

(5) Evidence that the Development Owner entity has been formed must be submitted with the Carryover Allocation.

(6) The Department will not execute a Carryover Allocation Agreement with any Development Owner having any member in Material Noncompliance on October 1 of the current program year.

(f) 10% Test. No later than July 1 of the year following the submission of the Carryover Allocation Document more than 10% of the Development Owner's reasonably expected basis must have been incurred pursuant to §42(h)(1)(E)(i) and (ii) of the Internal Revenue Code (as amended by The Housing and Economic Recovery Act of 2008) and Treasury Regulations, §1.42-6. The evidence to support the satisfaction of this requirement must be submitted to the Department no later than the 10% Test Documentation Delivery Date as identified in §50.3 of this chapter. The Development Owner must submit, in the form prescribed by the Department, documentation evidencing paragraphs (1) - (5) of this subsection. The 10% Test Documentation will be contingent upon the following, in addition to all other conditions placed upon the Application in the Commitment:

(1) evidence that the Development Owner has purchased, transferred, leased or otherwise has ownership of, the Development Site;

(2) a certification from a Third Party civil engineer stating that all necessary utilities will be available at the site and that no easements, licenses, royalties or other conditions on or affecting the Development which would materially and adversely impact the ability to acquire, develop and operate as set forth in the Application. Copies of such supporting documents will be provided upon request;

(3) a Management Plan and an Affirmative Marketing Plan as further described in the carryover procedures identified in Tax Credit (Procedures) Manual;

(4) evidence confirming attendance of the Development Owner or management company at Department-approved Fair Housing training relating to leasing and management issues for at least five (5) hours and the Development architect or engineer responsible for Fair Housing compliance for the Development has attended Department-approved Fair Housing training relating to design issues for at least five (5) hours on or before the time the 10% Test Documentation is submitted. Certifications must not be older than two (2) years from the date of submission of the 10% Test Documentation; and

(5) a Certification from the lender or syndicator identifying all Guarantors.

(g) Cost Certification. The Cost Certification Procedures Manual sets forth the documentation required for the Department to perform a feasibility analysis in accordance with §42(m)(2)(C)(i)(II), Internal Revenue Code, and determine the final Credit to be allocated to the Development.

(1) Required cost certification documentation must be received by the Department no later than January 15 following the year the Credit Period begins. Any Developments issued a Commitment or Determination Notice that fails to submit its cost certification documentation by this deadline will be reported to the IRS and the Owner will be required to submit a request for extension consistent with §50.13(c) of this chapter (relating to Application Reevaluation; (§2306.6731(b))

(2) the Department will perform an initial evaluation of the cost certification documentation and notify the Development Owner in a deficiency letter of all additional required documentation. Any communication issued to the Development Owner pertaining to the cost certification documentation may also be copied to the syndicator;

(3) for the Department to release IRS Forms 8609, Developments must have:

(A) placed in Service by December 31 of the year the Commitment Notice was issued if a Carryover Allocation was not requested and received; December 31 of the second year following the year the Carryover Allocation Agreement was executed; or approved Placed in Service deadline;

(B) submitted all Cost Certification documentation as more fully described in the Cost Certification Procedures Manual including:

(i) Carryover Allocation Agreement/Determination Notice and Election Statement;

(ii) Owner's Statement of Certification;

(iii) Owner Summary;

(iv) Evidence of Nonprofit and CHDO Participation;

(v) Evidence of Historically Underutilized Business (HUB) Participation;

(vi) Development Summary (including list of tenant services, unit and common amenities);

(vii) As-Built Survey;

(viii) Closing Statement;

(ix) Title Policy;

(x) Evidence of Placement in Service;

(xi) Independent Auditor's Reports;

(xii) Total Development Cost Schedule;

(xiii) AIA Form G702 and G703, Application and Certificate for Payment;

(xiv) Rent Schedule;

(xv) Utility Allowance;

(xvi) Annual Estimated Operating Expenses and 15-Year Proforma;

(xvii) Current Annual Operating Statement and Rent Roll;

(xviii) Final Sources of Funds;

(xix) Executed Limited Partnership Agreement;

(xx) Loan Agreement or Firm Commitment;

(xxi) Architect's Certification of Fair Housing Requirements;

(xxii) TDHCA Compliance Workshop Certificate;

(C) complied with the requirements set forth in the Cost Certification Procedures Manual;

(D) received written notice from the Department that all deficiencies noted during the final construction inspection have been resolved in accordance with Chapter 60 of this title;

(E) informed the Department of and received written approval for all Development amendments in accordance with §50.13(b) of this chapter (relating to Application Reevaluation); (§2306.6731(b))

(F) informed the Department of and received written approval for all ownership transfers in accordance with §50.13(d) of this chapter;

(G) submitted to the Department the recorded LURA in accordance with Chapter 60 of this title (relating to Compliance Administration);

(H) paid all applicable Department fees; and

(I) corrected all issues of noncompliance, including but not limited to noncompliance status with the LURA (or any other document containing an Extended Low-income Housing Commitment) or the program rules in effect for the subject property, as described in Chapter 60 of this title.

§50.13. Application Reevaluation (§2306.6731(b)).

(a) Regardless of development stage, the Board shall reevaluate a Development that undergoes a substantial change at any time after the initial Board approval of the Development. For the purposes of this subsection, substantial change shall be based on those items identified in subsection (b)(4) of this section. The Board may revoke any Commitment or Determination Notice issued for a Development that has been unfavorably reevaluated by the Board.

(b) Amendment of Application Subsequent to Allocation by Board. (§2306.6712 and §2306.6717(a)(4))

(1) If a proposed modification would materially alter a Development approved for an allocation of Housing Tax Credits, or if the Applicant has altered any Selection Criteria item for which it received points, the Department shall require the Applicant to file a formal, written request for an amendment to the Application. Such request shall include a proposed form of amendment, if requested by the Department, and the applicable fee as identified in §50.14(l) of this chapter (relating to Program Related Fees). The amendment request will not be considered received or processed unless accompanied with the corresponding fee. Changes to the Developer, Guarantor, or Person used for experience constitute a change requiring an amendment and may be approved by the Executive Director.

(2) The Executive Director of the Department shall require appropriate Department Staff to evaluate the amendment and provide a written analysis and recommendation to the Board. The appropriate party monitoring compliance during construction in accordance with Chapter 60 of this title (relating to Compliance Administration) shall also provide to the Board an analysis and written recommendation regarding the amendment. For amendments not requiring Board approval, the amendment will be deemed approved if the Executive Director does not approve or deny within thirty (30) days from the date on which the Department has acknowledged it has received all additional information that it has, in writing, requested of the Applicant to enable the Department to evaluate the amendment request. Amendment requests which require Board approval must be received by the Department at least forty-five (45) calendar days prior to the Board meeting in which the amendment will be considered.

(3) The Board must vote whether to approve an amendment that is material. The Executive Director may administratively approve all non-material amendments. The Board may vote to reject an amendment request and if appropriate, rescind a Commitment or terminate the allocation of Housing Tax Credits and reallocate the credits to other Applicants on the waiting list. Amendment requests may be denied if the Board determines that the modification proposed in the amendment:

(A) would materially alter the Development in a negative manner; or

(B) would have adversely affected the selection of the Application in the Application Round.

(4) Material alteration of a Development includes, but is not limited to:

(A) a significant modification of the site plan;

(B) a modification of the number of units or bedroom mix of units;

(C) a substantive modification of the scope of tenant services;

(D) a reduction of 3% or more in the square footage of the units or common areas;

(E) a significant modification of the architectural design of the Development;

(F) a modification of the residential density of the Development of at least 5%;

(G) an increase or decrease in the site acreage of greater than 10% from the original site under control and proposed in the Application; and

(H) exclusion of any threshold requirements as identified in §50.8 of this chapter (relating to Threshold Criteria).

(I) Any other modification considered significant by the Board.

(5) In evaluating the amendment under this subsection, Department Staff shall consider whether the need for the proposed modification was:

(A) reasonably foreseeable by the Applicant at the time the Application was submitted; or

(B) preventable by the Applicant. Amendment requests will be denied if the circumstances were reasonably foreseeable and preventable unless good cause is found for the approval of the amendment.

(6) This section shall be administered in a manner that is consistent with §42 of the Code.

(7) Before the 15th day preceding the date of Board action on the amendment, notice of an amendment and the recommendation of the Executive Director and monitor regarding the amendment will be posted to the Department's website and the Applicant will be notified of the posting.

(8) In the event that an Applicant or Developer seeks to be released from the commitment to serve the income level of tenants targeted in the Real Estate Analysis Report at the time of the Commitment or Determination Notice issuance, as approved by the Board, the following procedure described in subparagraphs (A) and (B) of this paragraph will apply:

(A) for amendments that involve a reduction in the total number of Low-Income Units being served, or a reduction in the number of Low-Income Units at any level of AMGI, as approved by the Board, evidence must be presented to the Department that includes written confirmation from the lender and syndicator that the Development is infeasible without the adjustment in Units. The Board may or may not approve the amendment request; however, any affirmative recommendation to the Board is contingent upon concurrence from the Real Estate Analysis Division that the Unit adjustment (or an alternative Unit adjustment) is necessary for the continued feasibility of the Development; and

(B) if it is determined by the Department that the allocation of credits would not have been made in the year of allocation because the loss of low-income targeting points would have resulted in the Application not receiving an allocation, and the amendment is approved by the Board, the approved amendment will carry a penalty that prohibits the Applicant and all Persons or entities with any ownership interest in the Application (excluding any tax credit purchaser/syndicator), from participation in the Housing Tax Credit Program (for both the Competitive Housing Tax Credit Developments and Tax-Exempt Bond Developments) for twenty-four (24) months from the time that the amendment is approved.

(c) Extension Requests. Extensions must be requested if the original deadline associated with Carryover, 10% Test (including submission and expenditure deadlines), or Cost Certification requirements will not be met. If the extension is requested at least thirty (30) calendar days in advance of the deadline no fee will be required; however, if the extension is requested at any point after the applicable deadline the applicable fee as further described in §50.14(l) of this chapter must be submitted. Extension requests submitted after the deadline will not be considered received or processed unless accompanied by the applicable fee. Extension requests will be approved by the Executive Director, unless, at Staff's discretion it warrants Board approval due to extenuating circumstances stated in the request. The extension request must specify a requested extension date and the reason why such an extension is required. Carryover extension requests will not be granted an extended deadline later than December 1st of the year the Commitment was issued. If an extension is required at Cost Certification, the fee as identified in §50.14 of this chapter must be received by the Department to qualify for issuance of IRS Forms 8609.

(d) Housing Tax Credit and Ownership Transfers. (§2306.6713) A Development Owner may not transfer an allocation of Housing Tax Credits or ownership of a Development supported with an allocation of Housing Tax Credits to any Person including an Affiliate of the Development Owner unless the Development Owner obtains the Executive Director's prior, written approval of the transfer. The Executive Director may not unreasonably withhold approval of the transfer.

(1) Transfers (other than to an Affiliate included in the ownership structure) will not be approved prior to the issuance of IRS Forms 8609 unless the Development Owner can provide evidence that a hardship is creating the need for the transfer (potential bankruptcy, removal by a partner, etc.). A Development Owner seeking Executive Director approval of a transfer and the proposed transferee must provide to the Department a copy of any applicable agreement between the parties to the transfer, including any Third Party agreement.

(2) A Development Owner seeking Executive Director approval of a transfer must submit documentation requested by the Department, including but not limited to, a list of the names of transferees and Related Parties and detailed information describing the experience and financial capacity of transferees and related parties. All transfer requests must disclose the reason for the request. The Development Owner shall certify to the Executive Director that the tenants in the Development have been notified in writing of the transfer before the 30th day preceding the date of submission of the transfer request to the Department. Not later than the fifth working day after the date the Department receives all necessary information under this section, Staff shall conduct a qualifications review of a transferee to determine the transferee's past compliance with all aspects of the Housing Tax Credit Program, LURAs and eligibility under §§50.4(a), 50.5(c), and 50.8(4) of this chapter. If the viable operation of the Development is deemed to be in jeopardy by the Department, the Department may authorize changes that were not contemplated in the Application.

(3) As it relates to the credit amount further described in §50.5(c) of this chapter (relating to Site and Development Restrictions), the credit amount will not be applied in circumstances described in subparagraphs (A) and (B) of this paragraph:

(A) in cases of transfers in which the syndicator, investor or limited partner is taking over ownership of the Development and not merely replacing the General Partner; or

(B) in cases where the General Partner is being replaced if the award of credits was made at least five (5) years prior to the transfer request date.

(4) The Development Owner, as on record with the Department, will be liable for any penalties imposed by the Department even if such penalty can be attributable to the new Owner unless such ownership transfer is approved by the Department.

(5) The Development Owner must comply with the additional documentation requirements as stated in Chapter 60 of this title (relating to Compliance Administration).

(e) Withdrawals. An Applicant may withdraw an Application prior to receiving a Commitment, Determination Notice, Carryover Allocation Document or Housing Credit Allocation, or may cancel a Commitment or Determination Notice by submitting to the Department written notice of withdrawal or cancellation, and subject to the Unused Credit Fee or Penalty in §50.14(n) of this chapter.

(f) Alternative Dispute Resolution (ADR) Policy. In accordance with §2306.082 of the Texas Government Code, it is the Department's policy to encourage the use of appropriate ADR procedures under the Governmental Dispute Resolution Act, Chapter 2010, Texas Government Code, to assist in resolving disputes under the Department's jurisdiction. As described in Chapter 154, Civil Practices and Remedies Code, ADR procedures include mediation. Except as prohibited by law and the Department's Ex Parte Communications policy, the Department encourages informal communications between Department Staff and Applicants, and other interested persons, to exchange information and informally resolve disputes. The Department also has administrative appeals processes to fairly and expeditiously resolve disputes. If at any time an Applicant or other person would like to engage the Department in an ADR procedure, the person may send a proposal to the Department's Dispute Resolution Coordinator. For additional information on the Department's ADR Policy, see the Department's General Administrative Rule on ADR at §1.17 of this title. Any Applicant may request an informal conference with Staff to attempt to resolve any appealable matter, and the Executive Director may toll the running of periods for appeal to accommodate such meetings. In the event a successful resolution cannot be reached, the statements made in the meeting process may not be used by the Department as admissions.

§50.14. Program Related Fees.

(a) Timely Payment of Fees. All fees must be paid as stated in this section, unless the Executive Director has granted a waiver for specific extenuating and extraordinary circumstances. To be eligible for a waiver, the Applicant must submit a request for a waiver no later than ten (10) business days prior to the deadlines as stated in this section. Any fees, as further described in this section, that are not paid will cause an Applicant to be ineligible to apply for tax credits and additional tax credits and ineligible to submit extension requests, ownership changes and Application amendments until such time the Department receives payment. Payments made by check, for which insufficient funds are available, may cause the Application, Commitment or Allocation to be terminated.

(b) Pre-application Fee. Each Applicant that submits a Pre-application shall submit to the Department, along with such Pre-application, a non refundable Pre-application fee, in the amount of $10 per Unit. Units for the calculation of the Pre-application Fee include all Units within the Development, including tax credit, market rate and owner-occupied Units. Pre-applications without the specified Pre-application Fee in the form of a check will not be accepted. Pre-applications in which a CHDO or Qualified Nonprofit Organization intends to serve as the Managing General Partner of the Development Owner, or Control the Managing General Partner of the Development Owner, will receive a discount of 10% off the calculated Pre-application fee. (§2306.6716(d)) For Tax Exempt Bond Developments with the Department as the issuer, the Applicant shall submit the following fees: $1,000 (payable to TDHCA), $2,000 (payable to Vinson & Elkins, Bond Counsel), and $5,000 (payable to the Texas Bond Review Board).

(c) Application Fee. Each Applicant that submits an Application shall submit to the Department, along with such Application, an Application fee. For Applicants having submitted a pre-application which met Pre-application Threshold and for which a pre-application fee was paid, the Application fee will be $20 per Unit. For Applicants not having submitted a pre-application, the Application fee will be $30 per Unit. Units for the calculation of the Application Fee include all Units within the Development, including tax credit, market rate and owner-occupied Units. Applications without the specified Application Fee in the form of a check will not be accepted. Applications in which a CHDO or Qualified Nonprofit Organization intends to serve as the Managing General Partner of the Development Owner, or Control the Managing General Partner of the Development Owner, will receive a discount of 10% off the calculated Application fee. (§2306.6716(d)) For Tax Exempt Bond Developments with the Department as the Issuer the Applicant shall submit a tax credit application fee of $30 per unit and bond application fee of $10,000. Those Applications utilizing a local issuer only need to submit the tax credit application fee. For Tax-Exempt Bond Development refunding Applications, with the Department as the issuer, the Application Fee will be $10,000 unless the refunding is not required to have a TEFRA public hearing, in which case the fee will be $5,000.

(d) Refunds of Pre-application or Application Fees. (§2306.6716(c)) Upon written request from the Applicant, the Department shall refund the balance of any fees collected for a pre-application or Application that is withdrawn by the Applicant or that is not fully processed by the Department. The amount of refund on pre-applications not fully processed by the Department will be commensurate with the level of review completed. Intake and data entry will constitute 50% of the review, and Threshold review prior to a deficiency issued will constitute 30% of the review. Deficiencies submitted and reviewed constitute 20% of the review. The amount of refund on Applications not fully processed by the Department will be commensurate with the level of review completed. Intake and data entry will constitute 20% of the review, the site visit will constitute 20% of the review, Eligibility and Selection review will constitute 20%, and Threshold review will constitute 20% of the review, and underwriting review will constitute 20%. The Department must provide the refund to the Applicant not later than the 30th day after the date of request.

(e) Third Party Underwriting Fee. Applicants will be notified in writing prior to the evaluation of a Development by an independent external underwriter in accordance with §50.7(h) of this chapter (relating to Application Process) if such a review is required. The fee must be received by the Department prior to the engagement of the underwriter. The fees paid by the Development Owner to the Department for the external underwriting will be credited against the Commitment Fee established in subsection (f) of this section, in the event that a Commitment or Determination Notice is issued by the Department to the Development Owner.

(f) Commitment or Determination Notice Fee. Each Development Owner that receives a Commitment or Determination Notice shall submit to the Department, not later than the expiration date on the Commitment or Determination Notice, a Commitment or Determina-

tion Fee equal to 4% of the annual Housing Credit Allocation amount. The Commitment or Determination Fee shall be paid by check. If a Development Owner of an Application awarded Competitive Housing Tax Credits has paid a Commitment Fee and returns the credits by November 1 of the current Application Round, the Development Owner may receive a refund of 50% of the Commitment Fee. If a Development Owner of an Application awarded Housing Tax Credits associated with Tax-Exempt Bonds has paid a Determination Fee and is not able close on the bond transaction within ninety (90) days of the issuance date of the Determination Notice, the Development Owner may receive a refund of 50% of the Determination Fee. The Determination Fee will not be refundable after ninety (90) days of the issuance date of the Determination Notice.

(g) Compliance Monitoring Fee. Upon receipt of the cost certification, the Department will invoice the Development Owner for compliance monitoring fees. The amount due will equal $40 per tax credit Unit. The fee will be collected, retroactively if applicable, beginning with the first year of the credit period. The invoice must be paid prior to the issuance of IRS Form 8609. Subsequent anniversary dates on which the compliance monitoring fee payments are due shall be determined by the month the first building is placed in service. For Tax-Exempt Bond Developments with the Department as the issuer, the tax credit compliance fee will be paid annually in advance (for the duration of the compliance or affordability period) and is equal to $40/Unit beginning two (2) years from the first payment date of the bonds; the asset management fee, if applicable, is paid in advance and is equal to $25/Unit beginning two (2) years from the first payment date. Compliance fees may be adjusted from time to time by the Department.

(h) Building Inspection Fee. The Building Inspection Fee must be paid at the time the Commitment Fee is paid. The Building Inspection Fee for all Developments is $750. Inspection fees in excess of $750 may be charged to the Development Owner not to exceed an additional $250 per Development.

(i) Tax-Exempt Bond Credit Increase Request Fee. As further described in §50.11 of this chapter (relating to Tax-Exempt Bond Developments), requests for increases to the credit amounts to be issued on IRS Forms 8609 for Tax-Exempt Bond Developments must be submitted with a request fee equal to 5% of the amount of the credit increase for one (1) year.

(j) Public Information Requests. Public information requests are processed by the Department in accordance with the provisions of the Texas Government Code, Chapter 552. The Department uses the guidelines promulgated by the Office of the Attorney General to determine the cost of copying and other costs of production.

(k) Periodic Adjustment of Fees by the Department and Notification of Fees. (§2306.6716(b)) All fees charged by the Department in the administration of the tax credit program will be revised by the Department from time to time as necessary to ensure that such fees compensate the Department for its administrative costs and expenses. The Department shall publish each year an updated schedule of Application fees that specifies the amount to be charged at each stage of the Application process. Unless otherwise determined by the Department, all revised fees shall apply to all Applications in process and all Developments in operation at the time of such revisions.

(l) Extension and Amendment Fees.

(1) All extension requests for deadlines relating to the Carryover, 10% Test (submission and expenditure), or Cost Certification requirements that are submitted after the applicable deadline must be accompanied by an extension fee in the form of a check in the amount of $2,500. Extension requests submitted at least thirty (30) days in advance of the applicable deadline will not be required to submit an extension fee. An extension fee will not be required for extensions requested on Developments that involved Rehabilitation when the Department is the primary lender, or for Developments that involve TRDO-USDA as a lender if TRDO-USDA or the Department is the cause for the Applicant not meeting the deadline.

(2) Amendment requests must be submitted in accordance with §50.13(b) of this chapter (relating to Application Reevaluation). (§2306.6731(b)) An amendment request to be considered non-material that has not been implemented will not be required to pay an amendment fee. Material or non-material amendment requests that have already been implemented will be required to be accompanied by a mandatory amendment fee in the form of a check in the amount of $2,500.

(3) The Board may waive extension or amendment fees for good cause.

(m) Refund of Fees. The Executive Director may approve full or partial refunds of the fees listed in this subsection to ensure equity regarding the work already performed by the Department.

(n) Unused Credit Fee or Penalty. Development Owners who have more tax credits allocated to them than they can substantiate through Cost Certification will return those excess tax credits prior to issuance of 8609's. For Competitive Housing Tax Credit Developments, a penalty fee equal to the one year credit amount of the lost credits (10% of the total unused tax credit amount) will be required to be paid by the Owner prior to the issuance of form 8609's if the tax credits are not returned, and 8609's issued, within one hundred eighty (180) days of the end of the first year of the credit period. This penalty fee may be waived without further Board action if the Department recaptures and re-issues the returned tax credits in accordance with §42, Internal Revenue Code. If an Applicant returns a full credit allocation after the Carryover Allocation deadline required for that allocation, the Executive Director will recommend to the Board the imposition of a penalty on the score for any Competitive Housing Tax Credit Applications submitted by that Applicant or any Affiliate for any Application in an Application Round occurring concurrent to the return of credits or if no Application Round is pending the Application Round immediately following the return of credits. If any such point penalty is recommended to be assessed and presented for final determination by the Board, it must include notice from the Department to the affected party not less than fourteen (14) days prior to the scheduled Board meeting. The Executive Director may, but is not required, to issue a formal notice after disclosure if it is determined that the matter does not warrant point penalties. The penalty will be assessed in an amount that reduces the Applicant's final awarded score by an additional 20%.

§50.16. Waiver and Amendment of Rules.

(a) The Board, in its discretion, may waive any one or more of the rules provided herein if the Board finds that a waiver is necessary to fulfill the purposes or policies of Chapter 2306 of the Texas Government Code, as determined by the Board or if the Board finds that such waiver is in response to a natural, federally declared disaster that occurs after the adoption of this Qualified Allocation Plan. No waiver shall be granted to provide forward commitments. Any such waiver will be subject to all reasonable restrictions and requirements customarily applied by Staff including as applicable, but not limited to, underwriting, satisfactory previous participation reviews, scoring criteria and receipt of required Third Party approvals, including lender or investor approvals.

(b) An Applicant may, at any time, make a specific written request for a waiver. Any waiver must be evidenced in writing consistent with Board approval and must expressly state the purposes or other

good cause that the Board finds to justify the waiver. Waiver requests will be submitted to agency Staff, who will review it and place it on the next eligible Board meeting agenda. Staff shall have at least ten (10) days from the date on which it has received all information reasonably necessary for its consideration and evaluation of the request to make a recommendation to the Executive Director. The Staff recommendation must be reviewed by the Executive Award and Review Advisory Committee. Any recommendation to grant a waiver that would have the effect of changing the Applicant's score must be accompanied by an analysis of competing Applications and their scores. Any such request for waiver must be specific to the unique facts and circumstances of an actual proposed Development. Any waiver, if granted, shall apply solely to the Application and shall not constitute a modification or waiver of the rule involved. Any waiver must be evidenced in writing consistent with Board approval and may specify necessary restrictions, exceptions and other requirements. It is an Applicant's responsibility to initiate any waiver request in sufficient time to allow for it to be assessed and acted upon prior to the time it is actually needed.

§50.17. Department Responsibilities.

(a) The Department shall make all required notifications pursuant to Chapter 2306 of the Texas Government Code.

(b) In accordance with §§2306.6724, 2306.67022, 2306.6711, and §42(m)(1) regarding the deadlines for allocating Housing Tax Credits, paragraphs (1) - (7) of this subsection shall apply:

(1) regardless of whether the Board will adopt the Qualified Allocation Plan (QAP) annually or biennially, the Department, not later than September 30 of the year preceding the year in which the new plan is proposed for use, shall prepare and submit to the Board for adoption any proposed QAP required by federal law for use by the Department in setting criteria and priorities for the allocation of tax credits under the Housing Tax Credit program;

(2) regardless of whether the Board has adopted the plan annually or biennially, the Board shall submit to the Governor any proposed QAP not later than November 15 of the year preceding the year in which the new plan is proposed for use;

(3) the Governor shall approve, reject, or modify and approve the proposed QAP not later than December 1;

(4) the Board shall annually adopt a manual, corresponding to the QAP, to provide information on how to apply for Housing Tax Credits;

(5) applications for Housing Tax Credits to be issued a Commitment during the Application Round in a calendar year must be submitted to the Department not later than March 1;

(6) the Board shall review the recommendations of Department Staff regarding Applications and shall issue a list of approved Applications each year in accordance with the Qualified Allocation Plan not later than June 30 or thirty (30) days preceding the date the board approves final Commitments of Housing Tax Credits for the Application Round; and

(7) the Board shall approve final commitments for allocations of Housing Tax Credits each year in accordance with the QAP not later than July 31, unless unforeseen circumstances prohibit action by that date. In any event, the Board shall approve final Commitments for allocations of Housing Tax Credits each year in accordance with the QAP not later than September 30. Department Staff will subsequently issue Commitments based on the Board's approval. Final Commitments may be conditioned on various factors approved by the Board, including resolution of contested matters in litigation.

(c) With respect to site demographics information, the general rule is for the Department to use current State Demographer information. If the State Demographer information is not available as of the date that is four (4) months prior to the Application Acceptance Period, the Executive Director may approve the use of prior year site demographics.

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 December 9, 2011.

TRD-201105449
Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
Effective date: December 29, 2011
Proposal publication date: October 21, 2011
For further information, please call: (512) 475-3916

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TITLE 13. CULTURAL RESOURCES

PART 8. TEXAS FILM COMMISSION

CHAPTER 121. TEXAS MOVING IMAGE INDUSTRY INCENTIVE PROGRAM

13 TAC §121.3, §121.9

The Texas Film Commission adopts amendments to Title 13, Part 8, Chapter 121, §121.3 and §121.9, concerning Texas Moving Image Industry Incentive Program, without changes to the proposed text as published in the November 11, 2011, issue of the *Texas Register* (36 TexReg 7629).

The adopted amendment to §121.3 makes reference to the new economic impact criteria established in §121.9.

The adopted amendment to §121.9 subjects the review (and potential acceptance or denial) of applications to the Moving Image Industry Incentive Program, given the more constrained program budgetary environment, to an assessment based not only upon existing, minimum program requirements and the appropriateness of content, but also upon a focused set of six (6) criteria assessing the potential magnitude of the economic impact in the State of Texas.

The International Alliance of Theatrical Stage Employees and Moving Picture Technicians, Artists and Allied Crafts, Local 484, representing the studio mechanics of accounting, set construction, costume, craft service, lighting, first aid, greens, grip, locations, make-up, hair, production, property, scenic paint, script supervision, set decorating, sound and special effects, and the Texas Motion Picture Alliance, an advocacy organization representing the film, video, interactive and digital media production industry, each furnished a written comment in support of the adoption of the proposed amendment of §121.9.

The amendments are adopted pursuant to the Texas Government Code, §485.022, which directs the Texas Film Commission to develop a procedure for the submission of grant applications

and the awarding of grants, and Texas Government Code, Chapter 2001, Subchapter B, which prescribes the standards for rulemaking by state agencies.

No other codes, statutes, or articles are affected by this adoption.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 12, 2011.

TRD-201105513
David Zimmerman
Assistant General Counsel, Office of the Governor
Texas Film Commission
Effective date: January 1, 2012
Proposal publication date: November 11, 2011
For further information, please call: (512) 463-9200

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TITLE 16. ECONOMIC REGULATION

PART 4. TEXAS DEPARTMENT OF LICENSING AND REGULATION

CHAPTER 72. STAFF LEASING SERVICES

16 TAC §§72.10, 72.20 - 72.23, 72.40

The Texas Commission of Licensing and Regulation (Commission) adopts amendments to existing rules at 16 Texas Administrative Code (TAC) Chapter 72, §§72.10, 72.20 - 72.23 and 72.40, regarding the Staff Leasing Services program. The amendments to §72.10 and §§72.20 - 72.23 are adopted without changes to the proposed text as published in the September 9, 2011, issue of the *Texas Register* (36 TexReg 5780) and will not be republished. The amendments to §72.40 are adopted with changes to the proposed text as published in the September 9, 2011, issue of the *Texas Register* (36 TexReg 5780), and the section is republished. The adoption takes effect December 31, 2011.

The amendments are necessary to implement House Bill 2249, 81st Legislature, Regular Session (2009), which made certain changes to Chapter 91, Texas Labor Code relating to Staff Leasing Service providers. These changes go into effect December 31, 2011, and primarily address a new requirement that original and renewal applicants for a staff leasing license must establish positive working capital by providing an audited financial statement to the Texas Department of Licensing and Regulation (Department). Currently, an applicant may utilize several options, including a letter of credit or bond, to establish net worth. The new standard of positive working capital is a more stringent financial standard and providing audited statements is estimated to be more costly for applicants, but an increased protection for the public. A summary of each amended rule was included in the notice of proposed rules published in the September 9, 2011, issue of the *Texas Register* (36 TexReg 5780).

The amendment to §72.10 deletes definition of "Net Worth" as a financial qualification to obtain a staff leasing license. The definition of "Working Capital" is found in the statute.

The amendments to §§72.20 - 72.23 replace "net worth" with "positive working capital" as a requirement for initial and renewal licensure.

The amendment to §72.40 is rewritten and reorganized to set forth the information the Department requires to prove "positive working capital" and what kinds of financial security may be provided to satisfy any deficiencies in an applicant's positive working capital requirement.

The Department drafted and distributed the proposed rules to persons internal and external to the agency. The proposed rules were published in the *Texas Register* on September 9, 2011. The 30-day public comment period closed on October 10, 2011.

The Department received public comments from four interested parties: (1) Covenant Strategies, Inc.; (2) Siddons Highway Construction Info, Inc.; (3) Edgar, Kiker & Cross, PC; and (4) a Certified Public Accountant (CPA). The comments are summarized below, together with the Department's responses.

Each of the commenters expressed concern that the requirement of an audited financial statement was very costly, and the CPA expressed concern regarding §72.40(a)(3), which originally required that the date of the audited financial statement be no earlier than 12 months from the date of the application for licensure or renewal. That commenter recommended extending the time frame to 18 months.

The Department responded that although it understands that there are additional costs involved with audited financial statements, it is unable to modify the requirement to provide audited financial statements because that requirement is mandated by statute. A state agency's rules cannot change the requirements set forth in the statute.

Regarding the CPA's request to roll back the date of the financials to 18 months prior to the application date, the Department initially responded in its presentation of the proposed rules to the Commission on November 1, 2011, that 18 months was too far back in time for an accurate and current "snapshot" of the applicant's working capital. During that same meeting, the Department offered as a compromise that it would be willing to allow affected applicants to revise their renewal dates, in order for the dates of the renewals and audited financials to correspond.

During its consideration of the adoption of these proposed amendments on November 1, 2011, the Commission considered the comments, the Department's responses and the significant time required for preparing and submitting audited financial statements, and ultimately determined that financial statements dated no more than 15 months from the date of application would be a reasonable time to allow audited financials to be prepared and submitted. Therefore, the Commission adopted §72.40(a)(3) with one change, which consists of replacing "12" with "15". The Commission adopted the other proposed amendments without any changes.

The amendments are adopted under Texas Labor Code, Chapter 91 and Texas Occupations Code, Chapter 51, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the adoption are those set forth in Texas Labor Code, Chapter 91 and Texas Occupations Code, Chapter 51. No other statutes, articles or codes are affected by the adoption.

§72.40. Proof of Positive Working Capital.

(a) A person applying for an original license or a renewal license must demonstrate the person's positive working capital according to the schedule set out in Texas Labor Code §91.014(a). Positive Working Capital must be demonstrated by the financial statement of the applicant that:

(1) is prepared in accordance with generally accepted accounting principles;

(2) is audited by an independent certified public accountant, and is without qualification as to the going concern status of the applicant;

(3) reflects positive working capital on a date not earlier than 15 months before the date of the application; and

(4) is based on adequate reserves for taxes, insurance, and incurred claims that are not paid.

(b) An applicant that has not had sufficient operating history to have audited financial statements based on at least 12 months of operations must meet the financial capacity requirements required by the schedule in Texas Labor Code §91.014(a) and must provide the department with financial statements that have been reviewed by a certified public accountant.

(c) An applicant may satisfy any deficiencies in the working capital requirement as set forth in subsection (a) or (b), with one or more of the following:

(1) A guaranty with the most recent audited financial statement of the guarantor, demonstrating positive working capital according to the schedule set out in Texas Labor Code §91.014(a);

(2) A surety bond that:

(A) is issued by a surety authorized to do business in the State of Texas;

(B) conforms to the Texas Insurance Code;

(C) is on a department-approved form;

(D) is payable to the executive director on behalf of persons who are injured because of a licensee's violation of Texas Labor Code, Chapter 91 or this chapter; and

(E) states that the surety will provide the department 60 days prior written notice of its intent to cancel the bond;

(3) An original letter of credit that:

(A) is irrevocable;

(B) is issued by a qualified financial institution which is financially responsible in the amount of the letter of credit;

(C) does not require examination of the performance of the underlying transaction between the department and the licensee;

(D) is payable to the department on sight or within a reasonably brief period of time after presentation of all required documents; and

(E) does not include any condition that makes payment to the department contingent upon the consent of or other action by the licensee or other party; or

(4) Another form of security acceptable to the executive director.

(d) Any form of financial security used to satisfy a deficiency in applicant's positive working capital under subsection (a) or (b) that is issued or written for a specified term must be replaced or renewed in accordance with this chapter.

(e) Any form of financial security used to satisfy a deficiency in applicant's positive working capital under subsection (a) or (b) must be maintained by the licensee for the entire time the licensee continues to do business in this state.

(f) Any form of financial security used to satisfy a deficiency in applicant's positive working capital under subsection (a) or (b) must be kept in effect until the later of:

(1) two years after the licensee ceases to do business in this state;

(2) two years after the licensee's license expires; or

(3) the executive director receives satisfactory proof from the licensee and determines that the licensee has discharged or otherwise adequately met all its obligations under Texas Labor Code, Chapter 91 and this chapter.

(g) If any form of financial security under subsection (c) is canceled or lapses during the term of the licensee's license, the licensee may not continue operations after the effective date of the cancellation or lapse, unless and until the licensee files with the executive director a valid form of financial security that meets the requirements provided by Texas Labor Code, Chapter 91, and this chapter and that provides coverage after that date.

(h) Cancellation or lapse of the financial security under subsection (c) does not affect the licensee's liability before or after the effective date of the cancellation or lapse.

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 December 9, 2011.

TRD-201105437
Brian Francis
Deputy Executive Director
Texas Department of Licensing and Regulation
Effective date: December 31, 2011
Proposal publication date: September 9, 2011
For further information, please call: (512) 463-5386

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TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 89. ADAPTATIONS FOR SPECIAL POPULATIONS

SUBCHAPTER EE. COMMISSIONER'S RULES CONCERNING THE COMMUNITIES IN SCHOOLS PROGRAM

The Texas Education Agency (TEA) adopts amendments to §§89.1501, 89.1503, 89.1507, 89.1509, and 89.1511; the repeal of §89.1502; and new §89.1504, concerning the Communities In Schools (CIS) program. The amendments, repeal, and new section are adopted without changes to the proposed text as published in the June 10, 2011, issue of the *Texas Register*

(36 TexReg 3574) and will not be republished. The sections establish policies concerning the CIS program. The adopted rule actions clarify the requirements of the Texas Education Code (TEC), §33.154, which requires the commissioner of education by rule to develop and implement policies concerning the program. In addition, the adopted rule actions clarify requirements under the TEC, §33.155 and §33.156, relating to the effectiveness and funding of the program.

The CIS program is a statewide dropout prevention program that uses a case management model to serve students who are at risk of dropping out of school or engaging in delinquent conduct, including students who are in family conflict or emotional crisis. Through 19 TAC Chapter 89, Subchapter EE, the commissioner exercised rulemaking authority to establish definitions and an equitable funding formula for local CIS programs, in accordance with the TEC, §33.156.

Additionally, in accordance with the TEC, §33.154, the rules in 19 TAC Chapter 89, Subchapter EE, implement policies concerning the responsibility of the TEA in encouraging local businesses to participate in local CIS programs, the responsibility of the TEA in obtaining information from participating school districts, and the use of federal or state funds available to the TEA for programs of this nature. The rules also address provisions such as the establishment of state performance goals, objectives, and measures; withholding of funding from programs that consistently fail to achieve performance goals, objectives, and measures; and requirement that the TEA and CIS, Inc., work together to maximize the effectiveness of the CIS program.

The adopted revisions to 19 TAC Chapter 89, Subchapter EE, incorporate program changes identified during the statutorily required review of rules conducted in 2010, including updates to provisions relating to performance standards and revocation of grant awards. In addition, the adopted revisions reflect updates to the funding formula. Specifically, the adopted revisions to 19 TAC Chapter 89, Subchapter EE, update the CIS rules as follows.

Section 89.1501, Definitions, was amended to clarify the definition for case-managed student in paragraph (1) and add the definition for Total Quality Systems (TQS) as new paragraph (10) to coincide with new policy in §89.1511.

Section 89.1502, Funding Prior to School Year 2009-2010, was repealed since there are no CIS programs funded under the process in place prior to school year 2009-2010.

Section 89.1503, Funding Beginning with School Year 2009-2010, was amended by revising subsection (a) and adding new subsection (c)(1) to clarify that federal and state funds for the CIS program may be retained for administrative purposes as authorized by statute. In addition, up to 10% may be set aside by the TEA in accordance with the TEC, §33.154, for state-level activities, including database development and maintenance, competitive grant opportunities for special initiatives, and state leadership activities benefitting local CIS programs. A performance criterion was added to the local CIS program allocation description as new subsection (c)(2)(C). Language was added as new subsection (c)(5) and (6) to include an option that takes into consideration a potential decrease in CIS funding and outline a funding redistribution plan in the event that a CIS program declines grant funds. A statement was added as new subsection (c)(7) to clarify that the TEA has authority to use unexpended CIS funds from the first year of the biennium during the second year of the biennium. Subsections (e)-(g) were reorganized to address availability of additional funding opportunities. Language was added in proposed subsection (e)(2) to clarify that the TEA may designate no more than 10% for competitive grant opportunities for special initiatives in accordance with language adopted in new subsection (c)(1)(B). Information regarding the funding plan in subsection (f), former subsection (h), was modified for clarification. Minor corresponding technical changes were made throughout the section, including corrections to formatting. In addition, the section name was changed from "Funding Beginning with School Year 2009-2010" to "Funding."

New §89.1504, Demonstration of Community Participation, was added to establish a requirement that each local CIS program must provide cash or in-kind contributions to operate the CIS program in an amount of at least 25% of its total funding allocated by the TEA to demonstrate evidence of community participation. The TEC, §33.156, requires the TEA to develop and implement an equitable formula, authorizes the TEA to reduce state funds annually contributed by the state to a local program, requires the TEA to consider the financial resources of individual communities, provides for the TEA to use savings to extend services to communities not currently served, and requires local programs to develop a funding plan. Adopted new §89.1504 reinforces the intent of the legislature that local communities develop a funding plan and contribute to the cost of operating CIS in local communities. In addition, the adopted rule specifies that the TEA may choose not to award funding to a local CIS program if it determines that the program does not have sufficient funds to adequately serve the required number of case-managed students.

Section 89.1507, Case-Managed Students, was amended to add new subsection (d) addressing the case management student allocation if there is a decrease in CIS funding. This policy is in alignment with Legislative Budget Board performance measures.

Section 89.1509, Other Provisions, was amended to clarify the requirement in subsection (a) that the TEA develop a resource development plan in accordance with the TEC, §33.154, to be in alignment with TQS standards instituted through the CIS national office. Language in subsection (b) regarding the data that school districts provide to CIS programs was clarified to coincide with language on the CIS Parent Consent/Release of Information form (approved annually by TEA legal counsel). In addition, language was added as new subsection (c) to indicate that the TEA may contract with entities to assist in performing state leadership activities in accordance with adopted new §89.1503(c)(1)(C).

Section 89.1511, Performance Standards and Revocation of Grant Award, was amended to clarify the stages of the performance standards in subsection (b) and revocation of grant award process in subsection (e), former subsection (d). Language was added as new subsection (d) to include the TQS accreditation requirements from CIS, Inc., in accordance with the TEC, §33.155.

The adopted rules actions have the following procedural and reporting implications. The adopted amendment to 19 TAC §89.1503 specifies the information that CIS programs must include in the funding plan. The adopted amendment to 19 TAC §89.1509 clarifies the information and data that school districts with CIS programs must provide for students whose parents or legal guardians have authorized education records to be shared with CIS programs and the TEA. The adopted amendment to 19 TAC §89.1511 clarifies specific requirements for a program

that fails to meet performance standards in accordance with the grant application. The adopted amendment to 19 TAC §89.1511 also incorporates the requirement for TQS accreditation. The adopted rule actions have 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 10, 2011, and ended July 10, 2011. Following is a summary of the public comments received and the corresponding responses regarding the proposed rule actions.

Comment: Concerning proposed new 19 TAC §89.1501(10), the CIS of Texas Network; board members and other representatives of CIS of the Bay Area, CIS of Baytown, CIS of the Big Country, CIS of Brazoria County, CIS of Cameron County, CIS of Central Texas, CIS of the Coastal Bend, CIS of the Dallas Region, CIS East Texas, CIS of El Paso, CIS of Galveston County, CIS of the Golden Crescent, CIS of Greater Tarrant County, CIS of the Greater Wichita Falls Area, CIS of the Heart of Texas, CIS of Hidalgo County, CIS of Houston, CIS of Laredo, CIS of North Texas, CIS of Northeast Texas, CIS of the Permian Basin, CIS of San Antonio, CIS of South Central Texas, and CIS of Southeast Harris County; Chapel Hill Independent School District (ISD); Marlin ISD; and numerous individuals commended the agency for including national TQS standards in the proposed rules. The commenters noted that CIS is an evidence-based practice that is supported by consistently meeting high standards for business and program operations.

Agency Response: The agency agrees.

Comment: Concerning proposed new 19 TAC §89.1503(c)(6) and (7), the CIS of Texas Network; board members and other representatives of CIS of the Bay Area, CIS of Baytown, CIS of the Big Country, CIS of Brazoria County, CIS of Cameron County, CIS of Central Texas, CIS of the Coastal Bend, CIS of the Dallas Region, CIS East Texas, CIS of El Paso, CIS of Galveston County, CIS of the Golden Crescent, CIS of Greater Tarrant County, CIS of the Greater Wichita Falls Area, CIS of the Heart of Texas, CIS of Hidalgo County, CIS of Houston, CIS of Laredo, CIS of North Texas, CIS of Northeast Texas, CIS of the Permian Basin, CIS of San Antonio, CIS of South Central Texas, and CIS of Southeast Harris County; Chapel Hill ISD; Marlin ISD; and numerous individuals commended the agency for setting policies "to competitively redistribute grant funding" among CIS programs when funding is declined by a CIS program or when funding is not used in the first year of the biennium.

Agency Response: The agency agrees.

Comment: Concerning proposed new 19 TAC §89.1504, the CIS of Texas Network; board members and other representatives of CIS of the Bay Area, CIS of Baytown, CIS of the Big Country, CIS of Brazoria County, CIS of Cameron County, CIS of Central Texas, CIS of the Coastal Bend, CIS of the Dallas Region, CIS East Texas, CIS of El Paso, CIS of Galveston County, CIS of the Golden Crescent, CIS of Greater Tarrant County, CIS of the Greater Wichita Falls Area, CIS of the Heart of Texas, CIS of Hidalgo County, CIS of Houston, CIS of Laredo, CIS of North Texas, CIS of Northeast Texas, CIS of the Permian Basin, CIS of San Antonio, CIS of South Central Texas, and CIS of Southeast Harris County; Chapel Hill ISD; Marlin ISD; and numerous individuals commended the agency for setting the standard that "every CIS program in Texas should leverage at least 25% of the amount of their state grant in donations," either financial or in-kind. The commenters stated that this policy will ensure that all CIS programs have community buy-in and a higher level of potential for stability.

Agency Response: The agency agrees.

Comment: Concerning proposed new 19 TAC §89.1507(d), the CIS of Texas Network; board members and other representatives of CIS of the Bay Area, CIS of Baytown, CIS of the Big Country, CIS of Brazoria County, CIS of Cameron County, CIS of Central Texas, CIS of the Coastal Bend, CIS of the Dallas Region, CIS East Texas, CIS of El Paso, CIS of Galveston County, CIS of the Golden Crescent, CIS of Greater Tarrant County, CIS of the Greater Wichita Falls Area, CIS of the Heart of Texas, CIS of Hidalgo County, CIS of Houston, CIS of Laredo, CIS of North Texas, CIS of Northeast Texas, CIS of the Permian Basin, CIS of San Antonio, CIS of South Central Texas, and CIS of Southeast Harris County; Chapel Hill ISD; Marlin ISD; and numerous individuals commended the agency for allowing each local CIS program to serve a decreased number of case-managed students if the agency receives a decrease in state appropriations for CIS. As part of the commendation, the commenters recommended that if the state appropriation is decreased, the agency should decrease the number of case-managed students to be served proportionally to the amount of funds distributed to each local CIS program.

Agency Response: The agency disagrees with the recommendation to decrease proportionally the number of case-managed students to be served if the state appropriation is decreased. Other administrative factors may impact the statewide distribution of case-managed students when funding is reduced; therefore, the agency will not implement this recommendation in order to retain administrative flexibility to meet statewide performance measures set by the legislature.

Comment: Concerning proposed changes to 19 TAC §89.1509(b), the CIS of Texas Network; board members and other representatives of CIS of the Bay Area, CIS of Baytown, CIS of the Big Country, CIS of Brazoria County, CIS of Cameron County, CIS of Central Texas, CIS of the Coastal Bend, CIS of the Dallas Region, CIS East Texas, CIS of El Paso, CIS of Galveston County, CIS of the Golden Crescent, CIS of Greater Tarrant County, CIS of the Greater Wichita Falls Area, CIS of the Heart of Texas, CIS of Hidalgo County, CIS of Houston, CIS of Laredo, CIS of North Texas, CIS of Northeast Texas, CIS of the Permian Basin, CIS of San Antonio, CIS of South Central Texas, and CIS of Southeast Harris County; Chapel Hill ISD; Marlin ISD; and numerous individuals commended the agency for updating and aligning language in this section regarding parental consent forms.

Agency Response: The agency agrees.

Comment: Concerning proposed new 19 TAC §89.1511(d), the CIS of Texas Network; board members and other representatives of CIS of the Bay Area, CIS of Baytown, CIS of the Big Country, CIS of Brazoria County, CIS of Cameron County, CIS of Central Texas, CIS of the Coastal Bend, CIS of the Dallas Region, CIS East Texas, CIS of El Paso, CIS of Galveston County, CIS of the Golden Crescent, CIS of Greater Tarrant County, CIS of the Greater Wichita Falls Area, CIS of the Heart of Texas, CIS of Hidalgo County, CIS of Houston, CIS of Laredo, CIS of North Texas, CIS of Northeast Texas, CIS of the Permian Basin, CIS of San Antonio, CIS of South Central Texas, and CIS of Southeast

Harris County; Chapel Hill ISD; Marlin ISD; and numerous individuals commended the agency for requiring CIS programs to earn national TQS accreditation to ensure high quality programming and organizational functioning across the CIS programs in Texas.

Agency Response: The agency agrees.

Comment: Concerning proposed new 19 TAC §89.1503(c)(1), relating to funding allocation, the CIS of Texas Network; board members and other representatives of CIS of the Bay Area, CIS of Baytown, CIS of the Big Country, CIS of Brazoria County, CIS of Cameron County, CIS of Central Texas, CIS of the Coastal Bend, CIS of the Dallas Region, CIS East Texas, CIS of El Paso, CIS of Galveston County, CIS of the Golden Crescent, CIS of Greater Tarrant County, CIS of the Greater Wichita Falls Area, CIS of the Heart of Texas, CIS of Hidalgo County, CIS of Houston, CIS of Laredo, CIS of North Texas, CIS of Northeast Texas, CIS of the Permian Basin, CIS of San Antonio, CIS of South Central Texas, and CIS of Southeast Harris County; Chapel Hill ISD; Marlin ISD; and numerous individuals expressed support for reserving funds needed for the CIS database development and maintenance, but opposed reserving 10% for competitive grant applications, state leadership activities, or special statewide CIS initiatives because of concern that it will destabilize programs in light of a reduction in appropriations from the 82nd Texas Legislature for CIS programs.

The commenters strongly recommended that the agency reserve a minimal portion of state funding for state level functions to maximize the funding that reaches local communities for providing direct services to students. The commenters recommended that no funding be reserved for statewide initiatives or competitive grants, other than funding for the state database and the agency's administrative purposes, until state funding for CIS programs is increased. The commenters suggested that reserving 10% would create a hardship on programs that have already sustained state budget reductions and would negatively affect their CIS programs.

Numerous individuals recommended that due to state budget cuts, the agency should postpone implementing incentive programs, special initiatives, or state leadership activities during this biennium. Another individual added that all plans for replication and expansion should be suspended until the state and local funding resources enjoy better economic conditions. CIS of East Texas added that the agency already holds back 10% of the state funds in escrow until the program's data entry is completed to close out the fiscal year.

Agency Response: The agency disagrees with the recommendation that the provisions in 19 TAC §89.1503(c)(1) should be removed from the rule because of the concern that they will negatively impact CIS services. The rule provides clarification of CIS statewide program initiatives and the flexibility the agency needs to maximize the effectiveness of the CIS program pursuant to the TEC, §§33.154-33.159. The rule clarifies that the CIS database is an authorized program activity necessary to support the CIS service delivery system. The rule also provides transparency and assurance to CIS stakeholders that the agency will not competitively distribute more than 10% of the program funding among CIS providers or reserve more than 10% of the funding for state level program-related activities to benefit CIS students and schools served. The rule does not require the agency to reserve 10% for state leadership activities during this biennium when state funding has been reduced to CIS programs, but rather allows the agency to retain the option to do so when it determines that such activities will maximize the effectiveness of the CIS program. Currently, the agency holds back 10% of each grantee's allocation and releases the hold of each grantee's final 10% of its allocation held in escrow as soon as the CIS grantee submits its final yearly data to the agency.

Comment: Concerning proposed new 19 TAC §89.1503(c)(2)(C), relating to funding allocation, the CIS of Texas Network; board members and other representatives of CIS of the Bay Area, CIS of Baytown, CIS of the Big Country, CIS of Brazoria County, CIS of Cameron County, CIS of Central Texas, CIS of the Coastal Bend, CIS of the Dallas Region, CIS East Texas, CIS of El Paso, CIS of Galveston County, CIS of the Golden Crescent, CIS of Greater Tarrant County, CIS of the Greater Wichita Falls Area, CIS of the Heart of Texas, CIS of Hidalgo County, CIS of Houston, CIS of Laredo, CIS of North Texas, CIS of Northeast Texas, CIS of the Permian Basin, CIS of San Antonio, CIS of South Central Texas, and CIS of Southeast Harris County; Chapel Hill ISD; Marlin ISD; and numerous individuals strongly opposed the provision that up to 25% of the funding formula be based on performance benchmarks. The commenters noted that there are already sanctions for programs not meeting requirements and that CIS consistently earns high marks on quality and quantity of services to youth as required by CIS standards. The commenters asserted that if performance payments are to be included, it would be preferable to change the rule from 25% to 10%, but even that modification would create a hardship on CIS programs this biennium. The commenters recommended that any incentive program should not duplicate penalties that are in place for failure to meet performance standards.

Agency Response: The agency disagrees with the premise that the benchmark payments proposed in rule will duplicate sanctions already in place for CIS providers under 19 TAC §89.1511. Sanctions are in place for achieving performance measures, including graduation and promotion rates, as well as for reaching annual case management targets. The new language in 19 TAC §89.1503(c)(2)(C) provides the agency with the flexibility it needs to incent programs to increase performance on other program goals and measures such as meeting TQS standards and maintaining fidelity to the CIS model to maximize effectiveness, pursuant to the TEC, §33.154. The provision does not require the agency to implement benchmarks in the funding formula during this biennium. Nor does the rule require the agency to reserve a full 25% of the funding formula for performance. The agency may elect to implement this provision from 0.0% to 25% as determined by the agency to be in the best interest of students and communities served by the program. This provides the agency with the flexibility it needs to maximize program effectiveness.

Comment: Concerning proposed changes to 19 TAC §89.1503(e), relating to availability of additional funding opportunities, the CIS of Texas Network; board members and other representatives of CIS of the Bay Area, CIS of Baytown, CIS of the Big Country, CIS of Brazoria County, CIS of Cameron County, CIS of Central Texas, CIS of the Coastal Bend, CIS of the Dallas Region, CIS East Texas, CIS of El Paso, CIS of Galveston County, CIS of the Golden Crescent, CIS of Greater Tarrant County, CIS of the Greater Wichita Falls Area, CIS of the Heart of Texas, CIS of Hidalgo County, CIS of Houston, CIS of Laredo, CIS of North Texas, CIS of Northeast Texas, CIS of the Permian Basin, CIS of San Antonio, CIS of South Central Texas, and CIS of Southeast Harris County; Chapel Hill ISD; Marlin ISD; and numerous individuals commented that this section is not clear. The commenters stated that if the

rule means the agency may designate no more than 10% of "additional" funds to competitive grant opportunities, that plan could be acceptable. However, if the rule means that the agency could designate 10% of existing appropriated funds for CIS, this would not be acceptable. The commenters noted that nearly all CIS affiliates have sustained recent funding reductions from local school districts at the same time they are experiencing a reduction in state appropriations. The commenters stated that if implemented, the proposed rule changes would have an adverse economic impact to their organizations this biennium. The commenters described how reduced funding to local affiliates translates to a reduced ability to prevent students from dropping out of school. The commenters recommended that the agency not implement competitive grant funding during this biennium.

Agency Response: The agency disagrees that reserving 10% of the state funding to implement a competitive grant initiative among CIS providers would reduce the ability of local affiliates to prevent students from dropping out of school. The rule language is not based on the variance of funding levels from biennium to biennium. The rule is based on the actual biennial legislative appropriation for CIS. These CIS funds would go directly to local affiliates for student services to prevent students from dropping out of school. The only difference would be that the 10% of the biennial appropriation would be distributed competitively based on performance among existing CIS providers, which would not reduce the number of students to be served statewide, in order to keep the same number of students from dropping out of schools. A competitive grant program is aligned with the TEC, §§33.154-33.156, which requires the commissioner to set performance standards and provides for a reduction in the formula annually contributed by the state to local CIS programs. The rule does not require the agency to implement a competitive grant program during this biennium, but does provide the agency with needed flexibility to promote continuous program improvement. The rule limits the agency to distribute a maximum of 10% of appropriated funds through competitive grants if the agency elects to reserve a portion of funding for statewide program initiatives, which may include competitive grants to CIS affiliates.

Comment: Concerning proposed changes to 19 TAC §89.1503, relating to funding, CIS of East Texas cited examples of services that are available in metropolitan areas that are not available to students in rural areas and suggested these equate to financial inequalities that do not fairly meet the needs of rural youth. The commenter suggested that funding rural areas should be a priority in the funding formula.

Agency Response: The agency disagrees. The amendment to 19 TAC §89.1503 will allow the agency the flexibility it needs to promote continuous program improvement for both urban and rural CIS programs, which each have unique challenges related to maximizing local and state resources to ensure effective CIS service delivery for youth statewide.

Comment: Concerning proposed changes to 19 TAC §89.1503, relating to funding, CIS of East Texas commented that the weighted average daily attendance (WADA) and corresponding WADA financial value calculations may be a good measure in comparing a community's tax base wealth for school districts since they can tax according to these ratios. The commenter suggested that using WADA as an element in the CIS funding formula, however, is an unrealistic measure for nonprofit organizations that have to solicit funds from area businesses and individuals. The commenter explained that there could be instances when in reality the community may be considered property rich for WADA purposes, but there are few actual cash resources in the community. The commenter provided a suggestion on how to apply WADA to evaluate the outside funding resource potential in an area and also provided a sample of a funding formula. The commenter also suggested that WADA should be removed for the next two years and that larger programs with larger allocations should receive a larger proportion of funding reductions when reductions are made.

Agency Response: The comment addresses an issue outside of the scope of the current rule proposal. No changes were proposed relating to the use of WADA in the funding calculation.

19 TAC §§89.1501, 89.1503, 89.1504, 89.1507, 89.1509, 89.1511

The amendments and new section are adopted under the Texas Education Code (TEC), §33.154, which requires the commissioner of education by rule to develop and implement policies concerning the Communities In Schools program, and TEC, §33.156, which authorizes the agency to develop and implement an equitable formula for the funding of local programs.

The amendments and new section implement the TEC, §§33.151, 33.152, and 33.154-33.159.

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 December 7, 2011.

TRD-201105400
Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
Effective date: December 27, 2011
Proposal publication date: June 10, 2011
For further information, please call: (512) 475-1497

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19 TAC §89.1502

The repeal is adopted under the Texas Education Code (TEC), §33.154, which requires the commissioner of education by rule to develop and implement policies concerning the Communities In Schools program, and TEC, §33.156, which authorizes the agency to develop and implement an equitable formula for the funding of local programs.

The repeal implements the TEC, §§33.151, 33.152, and 33.154-33.159.

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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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) adopts an amendment to §105.11, concerning the Foundation School Program (FSP). The amendment is adopted with changes to the proposed text as published in the October 14, 2011, issue of the *Texas Register* (36 TexReg 6852). The section prescribes the maximum allowable indirect cost for school district use of FSP funds. The adopted amendment updates 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 adopted amendment to 19 TAC §105.11 increases 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 adopted amendment also increases 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 remains set at 45%.

In addition, the adopted amendment includes new subsection (b), which adds 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 adopted new provision also requires the commissioner of education to develop a methodology for a school district to make such a determination.

In response to public comment, language was added in subsection (b) to establish that the commissioner's methodology must limit the percentage increase in allowable indirect cost to no more than the percentage decrease in state and local maintenance and operations revenue from the 2011-2012 school year.

The SBOE took action to approve the amendment for second reading and final adoption during its November 2011 meeting.

The adopted amendment has no procedural and reporting requirements. The adopted amendment has no 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.

In accordance with the TEC, §7.102(f), the SBOE approved the amendment 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 is necessary to implement the TEC, §42.1541, which requires the SBOE to take action that permits the increased indirect cost allotments to apply beginning with the 2011-2012 school year. The effective date for the amendment is 20 days after filing as adopted.

Following is a summary of the public comments received and the corresponding responses regarding the proposed amendment to 19 TAC §105.11.

Comment. Officials with the Texas Industrial Vocational Association and Texas Career and Technology Council, the South Texas Career and Technology Association, the Career and Technology Association of Texas, and the Texas Council of Administrators of Special Education recommended that the SBOE delete subsection (b) of the proposed amendment. The commenters stated that the ability to choose a greater indirect cost allotment would give school districts the flexibility to spend this money in areas other than the special programs.

Response. The SBOE disagreed with deleting subsection (b). The SBOE agreed with limiting the percentage increase in allowable indirect cost to no more than the percentage decrease in state and local maintenance and operations revenue from the 2011-2012 school year. The SBOE took action to add such language to subsection (b) at second reading and final adoption. This action provides school districts with indirect cost rates that help maintain similar spending levels for the special programs, but allows some flexibility for areas other than the special programs.

The amendment is adopted 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% 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, 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% 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. The commissioner's methodology must limit the percentage increase in allowable indirect cost to no more than the percentage decrease in state and local maintenance and operations revenue from the 2011-2012 school year.

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 December 6, 2011.

TRD-201105337
Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
Effective date: December 26, 2011
Proposal publication date: October 14, 2011
For further information, please call: (512) 475-1497

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TITLE 22. EXAMINING BOARDS

PART 39. TEXAS BOARD OF PROFESSIONAL GEOSCIENTISTS

CHAPTER 851. TEXAS BOARD OF PROFESSIONAL GEOSCIENTISTS LICENSING AND ENFORCEMENT RULES

The Texas Board of Professional Geoscientists (Board) adopts amendments to 22 TAC §§851.104, 851.108, and §851.156, concerning the licensure and regulation of Professional Geoscientists. The amendments to §851.104 and §851.156 are adopted with changes to the proposed text as published in the September 30, 2011, issue of the *Texas Register* (36 TexReg 6440). Section 851.108 is adopted without changes to the proposed text and will not be republished.

The adopted amendments to §851.104 clarify the requirements regarding the designation of licensure, registration, and certification on printed items. The adopted amendments to §851.108 clarify the information regarding the application of a license or suspending or revoking an existing license due to conviction of a crime that directly relates to the duties and responsibilities of a Professional Geoscientist. The adopted amendments to §851.156 clarify the requirements regarding usage of a Professional Geoscientist's seal.

Comments regarding §851.104 were received by two entities. One individual agreed with the proposed amendment. The other comment, received from the Railroad Commission of Texas, recommended that the Board replace the term "workpiece" with the term "work product." The Board agrees with the recommendation and used the term "work product" instead of "workpiece" in the adopted language of §851.104(k)(2).

Two comments were received in reference to §851.108. One individual's comment was specific to the rule already in place and not in reference to the proposed amendment. The other individual agreed with the proposed amendment.

Two comments were received specific to §851.156. One individual agreed with the proposed amendment to §851.156. The second comment, from the Railroad Commission of Texas, recommended that the Board insert the following clause after the second sentence in subsection (j) ", unless the work is exempt under §1002.252 of the Texas Occupations Code." The Board agrees with this recommendation and will insert this clause in the adopted language.

SUBCHAPTER C. CODE OF PROFESSIONAL CONDUCT

22 TAC §851.104, §851.108

The adopted amendments are authorized by the Texas Occupations Code, §1002.151 which provides that the Board shall adopt and enforce rules consistent with the Texas Geoscience Practice Act (the Act); §1002.153 which provides that the Board by rule shall adopt a code of professional conduct that is binding on all license holders; §1002.154 which provides that Board shall enforce the Act; and §1002.351 which provides that the Board may adopt rules relating to the public practice of geoscience by a firm or corporation.

The adopted amendments affect Texas Occupations Code, Chapter 1002.

§851.104. Dishonest Practice.

(a) A Professional Geoscientist, a Geoscientist-in-Training, or Geoscience Firm shall not directly or indirectly perform an act, omit an act or allow an omission, make an assertion, or otherwise engage in a practice in such a manner as to:

(1) Defraud;

(2) Deceive; or

(3) Create a misleading impression.

(b) A Professional Geoscientist, a Geoscientist-in-Training, or Geoscience Firm shall not advertise publicly or individually to a client or prospective client in a manner that is false, misleading, or deceptive.

(c) A Professional Geoscientist, a Geoscientist-in-Training, or Geoscience Firm shall not directly or indirectly solicit, offer, give, or receive anything or any service of significant value as an inducement or reward to secure any specific publicly funded geoscience work.

(d) A Professional Geoscientist, a Geoscientist-in-Training, or Geoscience Firm shall not make any false, misleading, deceptive, fraudulent or exaggerated claims or statements about the services of an organization or agency, including, but not limited to, the effectiveness of geoscientific services, qualifications, or products.

(e) If a Professional Geoscientist, a Geoscientist-in-Training, or Geoscience Firm learns that any false, misleading, deceptive, fraudulent or exaggerated claims or statement about the geoscientific services, qualifications or products have been made, the licensee shall take reasonable steps to correct the inappropriate claims. As appropriate, the Professional Geoscientist, a Geoscientist-in-Training, or Geoscience Firm may notify the Board in writing about these claims.

(f) Professional Geoscientists and Geoscience Firms shall issue statements in an objective and truthful manner. Professional Geoscientists, Geoscientist-in-Training, and Geoscience Firms should strive to make affected parties aware of the concerns regarding particular actions or projects, and of the consequences of geoscientific decisions or judgments that are overruled or disregarded.

(g) Information used by a Professional Geoscientist, Geoscientist-in-Training, or Geoscience Firm in any advertisement or announcement shall not contain information which is false, inaccurate, misleading, incomplete, out of context, deceptive or not verifiable.

(h) A Geoscience Firm which retains or hires others to advertise or promote the firm's practice remains responsible for the statements and representations made.

(i) A Professional Geoscientist may use the identification "Professional Geoscientist" or the initials, "P.G.":

(1) In the professional use of the license holder's name, whether P.G. is in an exempt or non-exempt professional geoscience setting; and

(2) In connection with any sign, directory, contract, document, pamphlet, stationery, advertisement, signature, or other means of written professional identification.

(j) A Geoscientist-in-Training may use the identification "Geoscientist-in-Training" or the initials, "GIT":

(1) In the professional use of the license holder's name; and

(2) In connection with any sign, directory, contract, document, pamphlet, stationery, advertisement, signature, or other means of written professional identification.

(k) A Professional Geoscientist shall use the identification "Professional Geoscientist" or the initials, "P.G.":

(1) In advertising communications where a Professional Geoscientist is intentionally offering Professional Geoscientist services; and

(2) In professional communications, including reports and findings and geoscience documents, where a Professional Geoscientist is intentionally indicating that the communication is a professional geoscientific work product.

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 December 8, 2011.

TRD-201105416
Charles Horton
Executive Director
Texas Board of Professional Geoscientists
Effective date: January 1, 2012
Proposal publication date: September 30, 2011
For further information, please call: (512) 936-4405

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SUBCHAPTER D. COMPLIANCE AND ENFORCEMENT

22 TAC §851.156

The adopted amendments are authorized by the Texas Occupations Code, §1002.151 which provides that the Board shall adopt and enforce rules consistent with the Texas Geoscience Practice Act (the Act); §1002.153 which provides that the Board by rule shall adopt a code of professional conduct that is binding on all license holders; and §1002.154 which provides that Board shall enforce the Act.

The adopted amendments affect Texas Occupations Code, Chapter 1002.

§851.156. Professional Geoscientist's Seals.

(a) The purpose of the Professional Geoscientist's seal is to assure the user of the geoscience product that the work has been performed by the Professional Geoscientist named and to identify the Professional Geoscientist's work.

(b) The Professional Geoscientist shall utilize the designation "P.G." or the titles set forth in the Texas Geoscience Practice Act (Act), §1002.251. Physical seals of two different sizes will be acceptable: a pocket seal (the size commercially designated as 1-5/8-inch seal) or desk seal (commercially designated as a two-inch seal) to be of the design shown in this subsection. Computer-applied seals may be of a reduced size provided that the Professional Geoscientist's name and number are clearly legible. All seals obtained and used by license holders must contain any given name or initial combination except for nicknames, provided the surname currently listed with the Board appears on the seal and in the usual written signature.
Figure: 22 TAC §851.156(b) (No change.)

(c) Professional Geoscientists shall only seal work done by them or performed under their direct supervision. Upon sealing, Professional Geoscientists take full professional responsibility for that work.

(d) It shall be misconduct to knowingly sign or seal any geoscience document or product if its use or implementation may endanger the health, safety, property or welfare of the public.

(e) It shall be misconduct or an unlawful act for a license holder whose license has been revoked, suspended, or has expired, to sign or affix a seal on any document or product.

(f) All seals obtained and used by license holders shall be capable of leaving a permanent ink or impression representation on the geoscience work, or shall be capable of placing a computer-generated representation in a computer file containing the geoscience work.

(1) Electronically conveyed geoscience work that would require a seal as per subsection (j) of this section must contain an electronic seal and electronic signature if hard copies with the licensee's

ink or embossed seal and original signature will not be submitted. Such seals should conform to the design requirements set forth in subsection (b) of this section.

(2) Geoscience work transmitted in an electronic format that contains a computer generated seal shall be accompanied by the following text or similar wording: "The seal appearing on this document was authorized by (Example: Leslie H. Doe, P.G. 0112) on (date).", unless accompanied by an electronic signature as described in this section. A license holder may use a computer-generated representation of his or her seal on electronically conveyed work; however, the final hard copy documents of such geoscience work must contain an original signature of the license holder(s) and date or the documents must be accompanied by an electronic signature as described in this section.

(3) A scanned image of an original signature shall not be used in lieu of an original signature or electronic signature. An electronic signature is a digital authentication process attached to or logically associated with an electronic document and shall carry the same weight, authority, and effects as an original signature. The electronic signature, which can be generated by using either public key infrastructure or signature dynamics technology, must be as follows:

(A) Unique to the person using it;

(B) Capable of verification;

(C) Under the sole control of the person using it; and

(D) Linked to a document in such a manner that the electronic signature is invalidated if any data in the document are changed.

(g) Preprinting of blank forms with a Professional Geoscientist's seal, or the use of decal or other seal replicas is prohibited. Signature reproductions, including but not limited to rubber stamps or computer-generated signatures, shall not be used in lieu of the Professional Geoscientist's actual signature.

(h) Professional Geoscientists shall take reasonable steps to insure the security of their physical or computer-generated seals at all times. In the event of loss of a seal, the Professional Geoscientist will immediately give written notification of the facts concerning the loss to the Executive Director.

(i) Professional Geoscientists shall affix an unobscured seal, original signature, and date of signature to the originals of all documents containing the final version of any geoscience work as outlined in subsection (j) of this section before such work is released from their control. Preliminary documents released from their control shall identify the purpose of the document, the Professional Geoscientist(s) of record and the Professional Geoscientist license number(s), and the release date by placing the following text or similar wording instead of a seal: "This document is released for the purpose of (Examples: interim review, mark-up, drafting) under the authority of (Example: Leslie H. Doe, P.G. 0112) on (date). It is not to be used for (Examples: construction, bidding, permit) purposes."

(j) The Professional Geoscientist shall sign, seal and date the original title sheet of bound geoscience reports, specifications, details, calculations or estimates, and each original sheet of plans or drawings regardless of size or binding if the plans or drawings are intended to be or are removed from the report. All other geoscience work, including but not limited to research reports, opinions, recommendations, evaluations, addenda, documents produced for litigation, and geoscience software shall bear the Professional Geoscientist's printed name, date, signature and the designation "P.G." or other terms allowed under §1002.251 of the Act, unless the work is exempt under §1002.252 of the Texas Occupations Code. Electronic correspondence of this type shall include an electronic signature as described in subsection (f) of this section or be followed by a hard copy containing the Professional Geoscientist's printed name, date, signature and the designation "P.G." or other terms allowed under §1002.251 of the Act.

(k) Work performed by more than one Professional Geoscientist shall be sealed in a manner such that all geoscience can be clearly attributed to the responsible Professional Geoscientist or Professional Geoscientists. When sealing plans or documents on which two or more Professional Geoscientists have worked, the seal of each Professional Geoscientist shall be placed on the plan or document with a notation describing the work done under each Professional Geoscientist's responsible charge.

(l) Licensed employees of the state, its political subdivisions, or other public entities are responsible for sealing their original geoscience work; however, such licensed employees engaged in review and evaluation for compliance with applicable law or regulation of geoscience work submitted by others, or in the preparation of general planning documents, a proposal for decision in a contested case or any similar position statement resulting from a compliance review, need not seal the review reports, planning documents, proposals for decision, or position statements.

(m) When a Professional Geoscientist elects to use standards or general guideline specifications, those items shall be clearly labeled as such, shall bear the identity of the publishing entity, and shall be:

(1) Individually sealed by the Professional Geoscientist; or

(2) Specified on an integral design/title/contents sheet that bears the Professional Geoscientist's seal, signature, and date with a statement authorizing its use.

(n) Alteration of a sealed document without proper notification to the responsible Professional Geoscientist is misconduct or an offense under the Act.

(o) A license holder is not required to use a seal for a work product for which the license holder is not required to hold a license under Texas Occupations Code, Chapter 1002.

(p) All geoscience documents released, issued, or submitted by a licensee shall clearly indicate the Geoscience Firm name and registration number by which the Professional Geoscientist is employed. If the Professional Geoscientist is employed by a local, State, or Federal Government agency or a firm that is exempt from the requirement of registration under Texas Occupations Code, Chapter 1002, Subchapter H, then only the name of the agency shall be required.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 8, 2011.

TRD-201105418
Charles Horton
Executive Director
Texas Board of Professional Geoscientists
Effective date: January 1, 2012
Proposal publication date: September 30, 2011
For further information, please call: (512) 936-4405

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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 Health and Human Services Commission (commission), on behalf of the Department of State Health Services (department), adopts amendments to §146.1 and §146.2, concerning promotores and community health workers, without changes to the proposed text as published in the October 14, 2011, issue of the *Texas Register* (36 TexReg 6857), and the sections will not be republished.

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 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.

COMMENTS

The department, on behalf of the commission, did not receive any comments regarding the proposed rules during the comment period.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the rules, as adopted, have been reviewed by legal counsel and found to be a valid exercise of the agencies' legal authority.

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.

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 December 6, 2011.

TRD-201105330
Lisa Hernandez
General Counsel
Department of State Health Services
Effective date: December 31, 2011
Proposal publication date: October 14, 2011
For further information, please call: (512) 776-6972

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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 (commission), on behalf of the Department of State Health Services (department), adopts an amendment to §289.204, concerning radiation fees, with a change to the proposed text as published in the October 14, 2011, issue of the *Texas Register* (36 TexReg 6859).

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 the radiation regulatory programs and the associated "other direct and indirect costs" appropriated in the General Appropriations 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 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 in the development, implementation, and enforcement of the United States Nuclear Regulatory Commission (NRC) mandated increased control (IC) requirements in June 2006, 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 for licensees that possess risk-sensitive quantities of radioactive material. This NRC mandate resulted 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 annual 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 security inspections; Licensing Program to complete verifications in NRC's National Source Tracking System; 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 inspection 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 continue 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 by rounding up to the nearest whole dollar for convenience in invoicing and paying.

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, PSQA, 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, demonstration/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.

Although the fees contained in §289.204(e) for radioactive materials licenses are increased ranging from 15% to 191.75%, these fees are lower than the fees NRC assesses and would charge Texas licensees for equivalent radioactive materials licenses.

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 relettered.

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.

The department, on behalf of the commission, has reviewed and prepared responses to the comments received regarding the proposed rules during the comment period, which the commission has reviewed and accepts. The commenters were individuals, associations, and/or groups, including the following: X-Ray Sales and Service Co., Animal Medical Clinic, dental facilities, and The University of Texas Environmental Health and Safety Advisory Committee. The commenters were against the fee increases.

Comment: Of the approximately 21,000 licensees and registrants notified of the proposed fee increases ranging from 10% - 225%, 10 comments were received. Of the 10 commenters, 5 represent the dental radiation machine fee category and 1 represents the veterinarian radiation machine fee category which will incur a 10% increase respectively equaling a $26 and $40 increase for the 2-year fee. In addition, 2 commenters represent the radiographic machines only fee category and 1 represents the service providers for radiation machines which will incur a 15% increase respectively equaling a $37 and $83 increase for the 2-year fee. One commenter represents research and education for the accelerator, simulator, or other therapeutic radiation machine category which will incur a 225% increase equaling a $1,324 increase for the 2-year fee. All 10 commenters expressed opposition to the fee increase. Three commenters also stated that due to the fee increase along with the poor economy, rising costs of their individual medical licensing fees, and increasing costs of business supplies then they may have to consider closing their businesses. Three commenters expressed that the fee increase would be passed on to their patients creating increased patient healthcare costs. One commenter stated that unlike some of the department's regulated entities, ophthalmologists cannot pass the fee increase costs to their customers and continue to experience reduction in Medicare and Medicaid reimbursements. One commenter suggested that the department cut its budget to cover the proposed increased fees and another commenter inquired how the department's service to the businesses it regulates and facility's patient care would be improved upon if the fees go up.

Response: The commission acknowledges the comments. The Texas legislature reduced the department's budget in the 2011 session and directed the department to assess the need for new fees or increase existing fees in order to equal or exceed the appropriations to the radiation regulatory programs and the associated "other direct and indirect costs" appropriated in the General Appropriations Act. The last radiation fee increase occurred in February 2006. The increased fees recover: regulatory costs associated with additional costs of administration and enforcement of the Licensing, Inspection, Incident and Investigation, PSQA, and Enforcement Programs due to an NRC mandated implementation of increased control requirements and costs for extensive time required for the technical review of additional requirements placed on several categories of radioactive material licenses and the accelerator category of radiation machine. The fee increases will allow the department to continue to ensure the citizens of Texas are not exposed to unnecessary radiation through a regulatory program that licenses and inspects users

of sources of radiation. No change was made to the rule as a result of the comments.

Comment: Concerning the radiation fees in general, a commenter requested additional explanation in the preamble to justify the imposition of these fee increases based on NRC IC requirements at the levels proposed. The commenter also requested an explanation of the term "administrative convenience" used in the proposed preamble under the Section by Section Summary and that the renewal fee be substantially reduced for the accelerator, simulator, or other therapeutic radiation machine category. In addition, the commenter expressed that the fee invoice should provide a breakdown showing how the fee was calculated. In reference to §289.204(m), the commenter questioned whether the department had the authority to impose a subscriber fee for making online payments through Texas.gov (the Texas Online project) even if the licensee did not use the online licensing system for payment. The commenter further asked if the department was authorized to add an online payment subscriber fee to all broad scope licenses even though those licensing fees cannot be paid on line. The commenter additionally requested an explanation as to why their institution appears to have a higher percentage of increase for a specific license.

Response: The commission acknowledges the comments. The department is unable to make any changes to the proposed fee increases as a result of the comments received. It has determined that the proposed radiation fee increases are necessary to comply with HB 1, the General Appropriations Act (82nd Legislature, Regular Session, 2011) Rider 59, to ensure that fees are being collected in order to equal or exceed the appropriations to the radiation regulatory programs and the associated "other direct and indirect costs" appropriated in the General Appropriations Act. The fee increase is also necessary to recover the costs of implementing the radiation control regulatory program, in accordance with Health and Safety Code, §401.301(b). Fees for renewal are not based solely on department costs to renew certificates of registration. Although a renewal application requires a full review of information just like a new application, fees are based on all costs associated with regulating radiation machines such as inspections, amendment requests and any possible enforcement actions. Additional language was added to the background and purpose section of this document to explain the need to impose fee increases based on NRC IC requirements. Although the department does not provide a detailed list of fees on the payment of fees invoice, the Radiation Operations and Records Group can provide one upon customer request. Under the Texas Government Code §2054.252, Texas Online Project, licensing entities including the department, are required to charge a subscription fee determined by the Department of Information Resources (DIR). The subscription fee is assessed on and must be paid by all licensees whether or not the license holder uses the online licensing service. As a result, the department is authorized to add an online payment for a subscription fee for all broad scope licenses even though those licensing fees may not be paid online. Because DIR, not the department, determines the Texas Online fees, the department has modified the language of §289.204(m) to remove the words "or the agency" after the website "texas.gov" in reference to who determines the amounts of the fees. Licensees possessing risk-sensitive quantities of radioactive material will have a higher percentage of increase due to the reasons connected with NRC IC requirements outlined in the background and purpose of this document. Finally, in the first paragraph in the Section by Section Summary in this preamble, the term "administrative convenience" used in the proposed preamble is clarified as the fees are rounded up to the nearest dollar for convenience in invoicing and paying.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the rule, as adopted, has been reviewed by legal counsel and found to be a valid exercise of the agencies' legal authority.

STATUTORY AUTHORITY

The amendment is adopted under the 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.

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

(a) Purpose. The requirements in this section establish fees for licensing, registration, emergency planning and implementation, and other regulatory services, and provide for their payment.

(b) Scope. Except as otherwise specifically provided, the requirements in this section apply to any person who is the following:

(1) an applicant for, or holder of:

(A) a radioactive material license issued in accordance with §289.252 of this title (relating to Licensing of Radioactive Material), or §289.259 of this title (relating to Licensing of Naturally Occurring Radioactive Material (NORM)); or

(B) a general license acknowledgment issued in accordance with §289.251 of this title (relating to Exemptions, General Licenses, and General License Acknowledgments); or

(C) a certificate of registration for radiation machines and/or services, or sources of laser radiation, issued in accordance with §289.226 of this title (relating to Registration of Radiation Machine Use and Services), §289.230 of this title (relating to Certification of Mammography Systems and Mammography Machines Used for Interventional Breast Radiography), a certificate of registration for dental radiation machines in accordance with §289.232 of this title (relating to Radiation Control Regulations for Dental Radiation Machines), a certificate of registration for radiation machines used in veterinary medicine in accordance with §289.233 of this title (relating to Radiation Control Regulations for Radiation Machines Used in Veterinary Medicine), §289.234 of this title (relating to Mammography Accreditation), or §289.301 of this title (relating to Registration and Radiation Safety Requirements for Lasers and Intense-Pulsed Light Devices); or

(2) the holder of a fixed nuclear facility construction permit or operating license issued by the United States Nuclear Regulatory Commission (NRC) in accordance with Title 10, Code of Federal Regulations, Part 50; or

(3) the operator of any other fixed nuclear facility.

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

(1) Contiguous properties--Those locations adjacent to an existing licensed or permitted area.

(2) Decontamination services--Providing deliberate operations to reduce or remove residual radioactivity from equipment, facilities, and land owned, possessed, or controlled by other persons to a level that permits release of equipment, facilities, and land for unrestricted use and/or termination of a license.

(3) Emergency planning and implementation--The development and application of those capabilities necessary for the protection of the public and the environment from the effects of an accidental or uncontrolled release of radioactive materials, including the equipping, training and periodic retraining of response personnel.

(4) Fixed nuclear facility--The following are considered fixed nuclear facilities:

(A) any nuclear reactor(s) at a single site;

(B) any facility designed or used for the assembly or disassembly of nuclear weapons; or

(C) any other facility using special nuclear material for which the agency conducts off-site environmental surveillance and/or emergency planning and implementation to protect the public health and safety or the environment.

(5) Limited manufacturer--A manufacturer/distributor of radioactive material that is not required to submit a decommissioning funding plan or an emergency plan in accordance with §289.252 of this title.

(6) Processor of radioactive material--A manufacturer/distributor who converts normal form radioactive material into special form or a manufacturer/distributor of radioactive sealed sources.

(d) Payment of fees.

(1) Each application for a specific license, general license acknowledgement, or certificate of registration for which a fee is prescribed in subsection (e), (g), or (j) of this section shall be accompanied by a nonrefundable fee equal to the appropriate fee. Each request for evaluation of a sealed source and/or device shall be accompanied by a nonrefundable fee prescribed in subsection (f) of this section. Each application for accreditation of a mammography facility shall be accompanied by a nonrefundable fee prescribed in subsection (h) of this section. Each application for an industrial radiographer certification and an industrial radiographer examination shall be accompanied by a nonrefundable and non-transferable fee prescribed in subsection (i) of this section.

(A) An application for a license covering more than one category of specific license shall be accompanied by the prescribed fee for the highest category and 25% of the applicable prescribed fee for each additional requested category.

(B) An application for a certificate of registration covering more than one category shall be accompanied by the prescribed fee for the highest category.

(C) No application will be accepted for filing or processed prior to payment of the full amount specified.

(2) A nonrefundable fee, in accordance with subsection (e) of this section shall be paid for each radioactive material license and/or for each general license acknowledgement. The fee shall be paid every two years based on the month listed as the expiration month on the license or general license acknowledgement and shall be paid in full on or before the last day of the expiration month. In the case of a single license that authorizes more than one category of use, the fee shall be the prescribed fee for the highest license category plus 25% of the applicable prescribed fee for each additional license category authorized.

(3) A nonrefundable fee, in accordance with subsection (j) of this section, shall be paid for each certificate of registration for radiation machines and/or services, or sources of laser radiation. The fee shall be paid every two years based on the month listed as the expiration month on the certificate of registration and shall be paid in full on or before the last day of the expiration month. For certificates of registration with no specified expiration date, payment shall be paid in full on or before the due date stated on the invoice.

(4) In the case of a single certificate of registration that authorizes more than one category of machine/type of use, the category listed in subsection (j) of this section and assigned the higher fee will be used.

(5) An additional nonrefundable fee equal to five percent of the total fee for each specific license shall be paid with the specified fee by each holder of a specific license, excluding diagnostic nuclear medicine licensees.

(A) The fees collected by the agency in accordance with this paragraph shall be deposited to the credit of the Radiation and Perpetual Care Account, until the fees collectively total $500,000.

(B) If the balance of fees collected in accordance with this paragraph is subsequently reduced to $350,000 or less, the agency shall reinstitute assessment of the fee until the balance reaches $500,000.

(6) Each application for reciprocal recognition of an out-of-state license in accordance with §289.252(s) of this title, an out-of-state registration in accordance with §289.226 of this title, or an out-of-state laser registration in accordance with §289.301 of this title, shall be accompanied by the applicable fee, provided that no such fee has been submitted within 24 months of the date of commencement of the proposed activity.

(7) Each holder of a fixed nuclear facility construction permit or operating license or an operator of any other fixed nuclear facility shall submit an annual fee for services received. This fee shall recover for the State of Texas the actual expenses arising from environmental surveillance and emergency planning and implementation activities. Payment shall be made within 90 days following the date of invoice.

(8) Fee payments shall be in cash or by check or money order made payable to the Department of State Health Services. The payments may be made by personal delivery to the central office, Radiation Control, Department of State Health Services, 1100 West 49th Street, Austin, Texas, or mailed to Radiation Control, Department of State Health Services, P.O. Box 149347, MC 2003, Austin, Texas, 78714-9347.

(9) Any applicant requesting authorization for any of the categories in subsection (e) of this section for veterinary use will be assessed the fee for the corresponding category.

(e) Schedule of fees for radioactive material licenses. The following schedule contains the fees for radioactive material licenses: 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; or

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

(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; or

(B) for an amendment requiring re-evaluation, a fee of $5,330.

(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) 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. 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 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. A fee of $240 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. A nonrefundable fee of $240 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. A fee of $240 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) Each application for accreditation or re-accreditation of a mammography facility shall be accompanied by a nonrefundable fee. No application will be accepted for filing or processed prior to payment of the full amount specified in paragraph (2) of this subsection.

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

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

(B) The accreditation fee for each additional mammography machine is $610.

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

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

(E) The fee for an additional mammography review will be based on the number of clinical image sets reviewed and the type of review.

(F) The fee for reinstatement of a mammography machine is $610.

(G) Each facility for which a targeted clinical image review is required will be charged for actual expenses to the agency arising from the visit.

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

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

(i) Fees for industrial radiographer certification and for radiographer certification examinations.

(1) The nonrefundable and non-transferable application fee for examination shall be $120 and shall be submitted to the agency with the application for examination.

(2) The nonrefundable application fee for radiographer certification shall be $110 and shall be submitted to the agency with the application for radiographer certification.

(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)

(k) Annual fees for environmental surveillance and emergency planning and implementation. Fees shall be set annually by the agency for each facility. Fees for fixed nuclear facilities shall be the actual expenses for environmental surveillance and emergency planning and implementation activities. Costs of activities benefiting more than one facility shall be prorated.

(l) Failure to pay prescribed fees.

(1) In any case where the agency finds that an applicant for a license or certificate of registration has failed to pay the fee prescribed in this section, the agency will not process that application until such fee is paid.

(2) In any case where the agency finds that a licensee or registrant has failed to pay a fee prescribed by this section by the due date, the agency may implement compliance procedures as provided in §289.205 of this title (relating to Hearing and Enforcement Procedures).

(3) In any case where the agency finds that a fixed nuclear facility has failed to pay fees for environmental surveillance or emergency planning and implementation within 90 days following date of invoice, the agency may issue an order to show cause why those services should not be terminated.

(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 to recover costs associated with electronic payment processing.

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 December 7, 2011.

TRD-201105382
Lisa Hernandez
General Counsel
Department of State Health Services
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Proposal publication date: October 14, 2011
For further information, please call: (512) 776-6972

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SUBCHAPTER E. REGISTRATION REGULATIONS

25 TAC §289.229, §289.231

The Executive Commissioner of the Health and Human Services Commission (commission), on behalf of the Department of State Health Services (department), adopts amendments to §289.229 concerning radiation safety requirements for accelerators, therapeutic radiation machines, simulators and electronic brachytherapy devices and §289.231 concerning general provisions and standards for protection against machine-produced radiation. The amendment to §289.229 is adopted with changes to the proposed text as published in the August 5, 2011, issue of the *Texas Register* (36 TexReg 4899). Section 289.231 is adopted without changes, and therefore, the section will not be republished.

BACKGROUND AND PURPOSE

Section 289.229 is amended to correct rule citation references and update terminology to be consistent with current technology. New definitions and requirements for the use of electronic brachytherapy devices are added to include training requirements for physicians and operators; add operating and safety procedures; revisions to medical event notifications; and requirements for surveys, calibrations, and spot checks. The requirements for calibration of dosimetry systems for therapeutic radiation machines are revised.

Section 289.231 is amended to correct rule citation references; update technical terminology; update department name, address and related form names; update licensing board names; revise the requirements for remote inspection procedures; and update record retention requirements.

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). Sections 289.229 and 289.231 have been reviewed and the department has determined that the reasons for adopting these sections continue to exist because rules on these subjects are needed.

SECTION-BY-SECTION SUMMARY

Throughout §289.229, electronic brachytherapy device requirements are added to incorporate a new radiation therapy technology that is now regulated.

Throughout §289.229 and §289.231, minor grammatical and typographical corrections are made and rule reference citations are corrected and/or updated.

Concerning §289.229(b)(1), (c)(2) and (3), (d)(2), (e)(58), (70), and (84), the term "practitioner" is deleted and replaced with "physician" to clarify that therapeutic radiation machines shall be used by or under the direction of a physician.

New §289.229(b)(4) is added to clarify that a "covered entity" as defined in the Health Insurance Portability and Accountability Act (HIPAA) and its rules at 45 Code of Federal Regulations (CFR) §160.103, may be subject to privacy standards governing how information that identifies a patient can be used and disclosed and that failure to follow HIPAA requirements may result in the department making a referral of a potential violation to the United States Department of Health and Human Services.

Concerning §289.229(e), electronic brachytherapy device definitions are added to incorporate terminology related to this new modality. Changes are reflected in §289.229(e)(24), (25), (26), and (60).

Concerning §289.229(e), definitions are revised and/or added to update technical terminology applicable to this section.

The new definition of "certified physician" in §289.229(e)(13) is added to specify the specialty of physicians practicing in radiation oncology or therapeutic radiology.

Concerning §289.229(e)(18), the phrase "For purposes of this section console is an equivalent term" is added to update the term "control panel" to clarify that either term is applicable.

New §289.229(e)(61) adds the definition of "prescribed dose" to ensure that the dose to the patient is administered as described in the "written directive."

New §289.229(e)(92) adds the definition of "virtual source" to specify where the electron and x-ray beam originates.

New §289.229(e)(94) adds the definition of "written directive" to specify written instructions for patient treatment.

Concerning §289.229(f)(1), new language is added to require a person having an accelerator for non-human use to receive a certificate of registration prior to energizing the radiation machine, with the exception of installation and acceptance testing.

In §289.229(f)(2)(C)(iii), (h)(2)(D)(i)(I) and (3)(C)(i), the word "initial" is added before "survey" to clarify that the documentation from the first radiation survey must be maintained.

In reference to §289.229(f)(3)(A)(ix), (h)(2)(A)(viii) and (xi), (h)(2)(D)(ii), (h)(3)(A)(iv), (h)(3)(C)(iii), (h)(4)(A)(v) and (viii), (h)(4)(C)(iv), (i)(1)(B), §289.231(c)(55) and (77), (m)(1)(D)(i), (m)(3)(A), (n)(1)(A), (u)(1), (dd)(2), (ll)(5), and the Figure in (ll)(2), the numbers written as a word are revised to a numerical digit.

Section 289.229(f)(3)(B), (h)(2)(D)(iii)(I), (3)(C)(ii)(I) and (iii)(I) is revised to clarify that written procedures may be documented in an electronic reporting system.

Amendments to §289.229(f)(3)(C), (h)(2)(D)(ii)(IV), (3)(C)(ii)(III)(-b-), and (4)(D)(iii)(II) revise the interval in which radiation measurements shall be performed to be consistent with other sections of this chapter.

New §289.229(f)(3)(G) and (h)(1)(I) add requirements for radiation surveys and contamination smears to incorporate program policy into rule.

Section 289.229(f)(3)(H) adds retention records for receipt, transfer and disposal of radiation machines to be consistent with equivalent requirements throughout the chapter.

Section 289.229(f)(5) and (h)(5) are deleted because record and document requirements are incorporated in other sections of this chapter.

Concerning §289.229(h)(1)(A), language is added to require each person possessing a therapeutic radiation machine capable of operating at or above 1 million electron volts to receive a certificate of registration prior to using the accelerator for human use, with the exception of installation and acceptance testing.

Section §289.229(h)(1) adds qualifications and device-specific training requirements for certified physicians and operators of electronic brachytherapy devices to ensure proper use of the radiation machine.

New §289.229(h)(1)(F) is added to require facilities using therapeutic radiation machines for human use to develop a quality assurance program as a method of minimizing deviations from facility procedures and to document preventative measures.

Concerning §289.229(h)(1)(G) and (2)(D)(iii)(II), the words "with a specialty in therapeutic radiological physics" are added to designate the required specialty necessary for physicists to practice in radiation therapy.

Concerning §289.229(h)(1)(G), the operating and safety procedure requirements are revised to specify applicability to all radiation therapy modalities. Additionally, new operating and safety procedures are added to update current safety practices and to be consistent with requirements specified throughout the chapter.

New §289.229(h)(1)(J) is added to establish criteria to perform acceptance testing on the treatment planning system of therapy-related computer systems in accordance with published protocols.

In Table I of Figure §229(h)(2)(A)(i), the system category for "contact therapy" is deleted because new radiation therapy technology makes this obsolete.

Regarding §289.229(h)(2)(D)(i)(I) and (3)(C)(i)(I), the specialty of "medical health physics" is deleted because it is not applicable for physicists to practice in radiation therapy.

Concerning §289.229(h)(2)(D)(ii)(III)(-c-), §289.231(c)(22) and, (m)(1)(D)(i), the term "air kerma rates" is added to update technical terminology and is an equivalent term to exposure rates.

Concerning §289.229(h)(2)(D)(iii)(VII) and (3)(C)(iii)(VIII), the requirement that an intercomparison be conducted is deleted because the practice is unreliable.

In §289.229(h)(3)(A)(i), "mGy" is added as an equivalent unit of measure to "rad" to be consistent with International Systems of Units.

Concerning §289.229(h)(3)(A)(ii), (iv) - (vii), (xi), (xiv), and (xv), the term "new equipment" has been changed to "equipment manufactured after March 1, 1989" to clarify date specific manufacture of equipment.

Section 289.229(h)(3)(A)(iv)(II) deletes "existing equipment" and replaces it with "equipment manufactured on or before March 1, 1989" to clarify date specific manufacture of equipment.

In §289.229(h)(3)(A)(ii), (iv) - (vii) and (ix) - (xv), (3)(B)(iii) - (v) and (vii), (3)(C)(i), (4)(A)(i) and (4)(D)(ii)(II), the term "control panel" is changed to "console" to be consistent with technical language for radiation machines operating at 1 MeV or above.

Section 289.229(h)(3)(A)(iv)(III)(-e-)(-4-) changes the retention time period for the dose monitoring information from 20 minutes to 15 minutes to accommodate systems with a shorter retention time.

Concerning §289.229(h)(2)(D) and (3)(C), the heading is revised to delete "additional operating and safety procedures" because operating and safety procedure requirements have been moved to another subsection.

Concerning §289.229(h)(3)(C)(v), this clause is deleted to avoid the duplication of information since the requirements for operating and safety procedures applicable to all therapeutic radiation machines for human use are located in §289.229(h)(1)(G).

Concerning §289.229(h)(2)(D)(ii)(III)(-a-) and (3)(C)(ii)(VIII), the word "radiation" is added to "therapy system" to be consistent with language used throughout the section.

New §289.229(h)(3)(C)(ii)(VI) is added to require that therapeutic systems with new components installed be calibrated with an established protocol. In addition, language is added for consistency throughout the section.

Section 289.229(h)(4)(A)(x) adds quality assurance protocols for digital imaging acquisition systems to incorporate the new technology.

Concerning the Figure §289.229(h)(4)(B)(i), the current half value layer (HVL) table for simulators used in radiation therapy treatment planning is deleted and replaced with a new table to include updated HVL values to maintain compatibility with the United States Food and Drug Administration regulation.

New §289.229(h)(4)(C)(vii) adds language to ensure that the planned treatment is properly delivered to the patient.

Section 289.229(h)(4)(D)(iii)(I) adds language to clarify that this section does not apply to a CT system used for simulation purposes only however, if the CT system is also used for diagnostic procedures this section applies.

Section 289.229(h)(4)(D)(iii)(I)(-a-) adds provisions to require dose measurements of the CT unit to be performed within 30 days after installation rather than 12 months to ensure dose measurements are accurate at the time of installation. In addition, for compatibility with rules of this chapter and to be more time and cost effective, the interval for radiation output dose measurements by the physicist is extended from 12 months to 14 months.

In §289.229(h)(4)(D)(iii)(I)(-b-), as a result of deleting the words "except x-ray tube replacement," the rule specifies that a dose measurement be performed when the x-ray tube is replaced to ensure that dose to the patient is accurate.

Regarding §289.229(h)(4)(D)(iii)(III), language is added to specify the clause relating to CT dose measurements be consistent with requirements throughout the chapter.

In §289.229(i), (1), and (2), (j), and (1), the words "therapy event" are deleted and replaced with "medical events" to be consistent with language used throughout the chapter.

New §289.229(i)(2)(D) is added to provide provisions for accountability of cumulative radiation doses received through a combination of external beam radiation therapy and radioactive material therapy.

In reference to Figure §289.229(l), retention intervals are extended for: tests and repairs; calibration surveys; training for operators; credentials of operators; calibration of therapy devices at energies below and above 1 MeV; spot checks and corrective actions of therapy devices at energies below and above 1 MeV; and CT dose measurements so applicable records will be retained until the next inspection interval.

Section 289.231(c)(10), (49), and (50) is revised to reflect licensing board name changes.

Section 289.231(c)(4), (i)(1), (r)(2)(A) and (3), (aa)(2)(A)(ii), and (dd)(3) and (5), and the Figures in §289.231(aa)(2)(A)(ii) and (ll)(2), (6) and (7) are revised to reflect changes in the department name, address, and form name changes.

Relating to §289.231(c)(42)(C), language is added to ensure that a radiation machine categorized as minimal threat has not been known to cause an injury.

Concerning §289.231(c)(66), the verbiage "shallow dose equivalent applies to the external exposure of the skin of the whole body or the skin of an extremity" is added to be consistent with terminology defined throughout the chapter.

New §289.231(m)(4) is added to clarify how to calculate the effective dose equivalent as a part of the individual's annual radiation dose record.

New §289.231(o)(4) is added to provide provisions for accountability of cumulative radiation doses received through a combination of radiation producing machines and radioactive materials.

Concerning §289.231(t)(5), the title of §289.229 is updated to be consistent with the revised rule title.

Concerning §289.231(gg)(2)(C), the subparagraph is deleted because the disposition would be unknown if the radiation machine was reported stolen, lost, or missing.

In reference to §289.231(hh)(1), the language regarding notification of incidents is added to be consistent with requirements specified throughout this chapter.

Section 289.231(kk)(4)(C) adds the words "as determined by the agency" to permit the agency to change the types of radiation machines that are inspected remotely.

Concerning §289.231(kk)(4)(D), the subparagraph is deleted to allow the department to determine which modalities will have remote inspections performed.

COMMENTS

The department, on behalf of the commission, did not receive any public comments concerning the proposals during the comment period.

Concerning §289.229(b)(4), the language was revised to be consistent with HIPAA language used in the chapter, and to add headings of a half-value layer table in Figure §289.229(h)(4)(B)(i) for clarification.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the rules, as adopted, have been reviewed by legal counsel and found to be a valid exercise of the agencies' legal authority.

STATUTORY AUTHORITY

The amendments are authorized by 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 rules implements Government Code, §2001.039.

§289.229. Radiation Safety Requirements for Accelerators, Therapeutic Radiation Machines, Simulators, and Electronic Brachytherapy Devices.

(a) Purpose. This section establishes radiation safety requirements for the use of accelerators, therapeutic radiation machines, radiation therapy simulation systems (simulators), and electronic brachytherapy devices. No person shall possess, use, transfer, or acquire an accelerator, a therapeutic radiation machine, a radiation therapy simulation system (simulator), or electronic brachytherapy device, except as authorized in a certificate of registration issued in accordance with §289.226 of this title (relating to Registration of Radiation Machine Use and Services) or as otherwise provided for in this chapter.

(b) Scope.

(1) This section applies to persons who receive, possess, use or transfer accelerators used in industrial operations and research and development, and therapeutic radiation machines, radiation therapy simulation systems (simulators), and electronic brachytherapy devices used in the healing arts and veterinary medicine. Use of therapeutic radiation machines in the healing arts or veterinary medicine under this section shall be by or under the supervision of a physician of the healing arts or a veterinarian. Use of electronic brachytherapy devices under this section shall be by or under the supervision of a certified physician. The registrant shall be responsible for the administrative control and for directing the use of the accelerators, other therapeutic radiation machines, simulators, or electronic brachytherapy devices.

(2) The requirements of this section are in addition to and not in substitution for other applicable requirements of §289.203 of this title (relating to Notices, Instructions, and Reports to Workers; Inspections), §289.204 of this title (relating to Fees for Certificates of Registration, Radioactive Material Licenses, Emergency Planning and Implementation, and Other Regulatory Services), §289.205 of this title (relating to Hearing and Enforcement Procedures), §289.226 of this title, and §289.231 of this title (relating to General Provisions and Standards for Protection Against Machine-Produced Radiation).

(3) Registrants engaged in industrial radiographic operations are subject to the requirements of §289.255 of this title (relating to Radiation Safety Requirements and Licensing and Registration Procedures for Industrial Radiography).

(4) An entity that is a "covered entity" as that term is defined in HIPAA, (the Health Insurance Portability and Accountability Act of 1996, 45 Code of Federal Regulations, Parts 160 and 164) may be subject to privacy standards governing how information that identifies a patient can be used and disclosed. Failure to follow HIPAA

requirements may result in the department making a referral of a potential violation to the United States Department of Health and Human Services.

(c) Prohibitions.

(1) The agency may prohibit use of accelerators, therapeutic radiation machines, simulators, or electronic brachytherapy devices that pose significant threat or endanger occupational and public health and safety, in accordance with §289.205 of this title and §289.231 of this title.

(2) Individuals shall not be exposed to the useful beam except for healing arts purposes and unless such exposure has been authorized by a physician of the healing arts. For electronic brachytherapy devices, individuals shall not be exposed to the useful beam except for healing arts purposes and unless such exposure has been authorized by a certified physician. This provision specifically prohibits deliberate exposure of an individual for training, demonstration, or other non-healing arts purposes.

(3) No research and/or development using radiation machines on humans shall be conducted unless approved by an Institutional Review Board (IRB) as required by Title 45, CFR Part 46 and Title 21, CFR Part 56. The IRB shall include at least one physician of the healing arts to direct any use of radiation in accordance with §289.231(b) of this title.

(d) Exemptions.

(1) Veterinary facilities are exempt from the aural communication requirements for radiation therapy systems and radiation therapy simulators in subsection (h)(2)(B)(i), (3)(B)(v), or (4)(A)(iv) of this section.

(2) Individuals who are sole physicians, sole operators and the only occupationally exposed individual are exempt from the following requirements:

(A) §289.203(b) and (c) of this title; and

(B) subsection (h)(1)(G) of this section.

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

(1) Absorbed dose (D)--The mean energy imparted by ionizing radiation to matter. Absorbed dose is determined as the quotient of dE by dM, where dE is the mean energy imparted by ionizing radiation to matter of mass dM. The SI unit of absorbed dose is joule per kilogram and the special name of the unit of absorbed dose is the gray (Gy). The previously used special unit of absorbed dose (rad) is being replaced by the gray.

(2) Absorbed dose rate--Absorbed dose per unit time, for machines with timers, or dose monitor unit per unit time for linear accelerators.

(3) Air kerma--The kinetic energy released in air by ionizing radiation. Kerma is the quotient of dE by dM, where dE is the sum of the initial kinetic energies of all the charged ionizing particles liberated by uncharged ionizing particles in air of mass dM. The SI unit of air kerma is joule per kilogram and the special name for the unit of kerma is the gray (Gy).

(4) Barrier--(See definition for protective barrier).

(5) Beam axis--The axis of rotation of the beam limiting device.

(6) Beam-flattening filter--(See field-flattening filter).

(7) Beam-limiting device--A field defining collimator, integral to the therapeutic radiation machine, which provides a means to restrict the dimensions of the useful beam.

(8) Beam monitoring system--A system designed and installed in the radiation head to detect and measure the radiation present in the useful beam.

(9) Beam quality--A term that describes the penetrating power of the x-ray beam. This is identified numerically by half-value layer and is influenced by kilovolt peak (kVp) and filtration.

(10) Beam quality (accelerator)--A term that describes the type and penetrating power of the ionizing radiation produced for certain machine settings.

(11) Beam scattering foil--A thin piece of material (usually metallic) placed in the beam to scatter a beam of electrons in order to provide a more uniform electron distribution in the useful beam.

(12) Central axis of the beam--An imaginary line passing through the center of the useful beam and the center of the plane figure formed by the edge of the first beam-limiting device.

(13) Certified physician--A physician licensed by the Texas Medical Board and certified in radiation oncology or therapeutic radiology.

(14) Coefficient of variation or C--The ratio of the standard deviation to the mean value of a population of observations. It is estimated using the following equation:
Figure: 25 TAC §289.229(e)(14)

(15) Collimator--A device or mechanism by which the x-ray beam is restricted in size.

(16) Computed tomography (CT)--The production of a tomogram by the acquisition and computer processing of x-ray transmission data.

(17) Continuous pressure type switch--A switch so constructed that a circuit closing contact can be maintained only by continuous pressure on the switch by the operator.

(18) Control panel--The part of the radiation machine where the switches, knobs, push buttons, and other hardware necessary for manually setting the technique factors are located. For purposes of this section console is an equivalent term.

(19) CT conditions of operation--All selectable parameters governing the operation of a CT x-ray system including, but not limited to, nominal tomographic section thickness, filtration, and the technique factors as defined in this subsection.

(20) Detector--(See definition for radiation detector).

(21) Diaphragm--A device or mechanism by which the x-ray beam is restricted in size.

(22) Dose monitor unit (DMU)--A unit response from the beam monitoring system from which the absorbed dose can be calculated.

(23) Dosimetry system--A system of devices used for the detection, measurement, and display of qualitative and quantitative radiation exposures.

(24) Electronic brachytherapy--A method of radiation therapy using electrically generated x-rays to deliver a radiation dose at a distance of up to a few centimeters by intracavitary, intraluminal or interstitial application, or by applications with the source in contact with the body surface or very close to the body surface.

(25) Electronic brachytherapy device--The system used to produce and deliver therapeutic radiation including the x-ray tube, the control mechanism, the cooling system, and the power source.

(26) Electronic brachytherapy source--The x-ray tube component used in an electronic brachytherapy device.

(27) External beam radiation therapy--Therapeutic irradiation in which the source of radiation is at a distance from the body.

(28) Field-flattening filter--A filter used to homogenize the absorbed dose rate over the radiation field.

(29) Field size--The dimensions along the major axes of an area in a plane perpendicular to the central axis of the beam at the normal treatment or examination source to image distance and defined by the intersection of the major axes and the 50% isodose line.

(30) Filter--Material placed in the useful beam to change beam quality in therapeutic radiation machines subject to subsection (h) of this section.

(31) Focal spot--The area projected on the anode of the x-ray tube that is bombarded by the electrons accelerated from the cathode and from which the useful beam originates.

(32) Gantry--That part of the radiation therapy system supporting and allowing possible movements of the radiation head about the center of rotation.

(33) Gray (Gy)--For purposes of this section, the SI unit of absorbed dose, kerma, and specific energy imparted equal to 1 joule per kilogram. For purposes of this section the previous unit of absorbed dose (rad) is being replaced by the gray (1 Gy = 100 rad).

(34) Half-value layer (HVL)--The thickness of a specified material which attenuates x-radiation or gamma radiation to an extent such that the exposure rate (air kerma rate), or absorbed dose rate is reduced to one-half of the value measured without the material at the same point.

(35) Healing arts--Any treatment, operation, diagnosis, prescription, or practice for the ascertainment, cure, relief, palliation, adjustment, or correction of any human disease, ailment, deformity, injury, or unhealthy or abnormal physical or mental condition.

(36) Image receptor--Any device, such as a fluorescent screen or radiographic film, that transforms incident x-ray photons either into a visible image or into another form that can be made into a visible image by further transformations.

(37) Institutional Review Board (IRB)--Any board, committee, or other group formally designated by an institution to review, approve the initiation of, and conduct periodic review of biomedical research involving human subjects.

(38) Interlock--A device preventing the start or continued operation of equipment unless certain predetermined conditions prevail.

(39) Interruption of irradiation--The stopping of irradiation with the possibility of continuing irradiation without resetting of operating conditions at the control panel.

(40) Irradiation--The exposure of a living being or matter to ionizing radiation.

(41) Isocenter--The center of the sphere through which the useful beam axis passes while the gantry moves through its full range of motions.

(42) Kilovolt (kV) (kilo electron volt (keV))--The energy equal to that acquired by a particle with one electron charge in passing through a potential difference of one thousand volts in a vacuum. (Note: current convention is to use kV for photons and keV for electrons.)

(43) Kilovolt peak--kVp (See definition for peak tube potential).

(44) Lead equivalent--The thickness of lead affording the same attenuation, under specified conditions, as the material in question.

(45) Leakage radiation--Radiation emanating from the source(s) assembly except for the useful beam and radiation produced when the exposure switch or timer is not activated.

(46) Leakage technique factors--The technique factors associated with the source assembly that is used in measuring leakage radiation.

(47) Licensed medical physicist--An individual holding a current Texas license under the Medical Physics Practice Act, Texas Occupations Code, Chapter 602, with a specialty in therapeutic radiological physics.

(48) Light field--The area illuminated by light, simulating the radiation field.

(49) mA--Milliampere.

(50) Medical event--An event that meets the criteria specified in subsection (i) of this section.

(51) Megavolt (MV) (megaelectron volt (MeV))--The energy equal to that acquired by a particle with one electron charge in passing through a potential difference of one million volts in a vacuum.

(52) Mobile electronic brachytherapy device--An electronic brachytherapy device that is transported from one address to be used at another address.

(53) Moving beam radiation therapy--Radiation therapy with any planned displacement of radiation field or patient relative to each other, or with any planned change of absorbed dose distribution. It includes arc, skip, conformal, intensity modulation and rotational therapy.

(54) Nominal treatment distance--The following nominal treatment distances shall apply.

(A) For electron irradiation, the distance from the scattering foil, virtual source, or exit window of the electron beam to the entrance surface of the irradiated object along the central axis of the useful beam, as specified by the manufacturer.

(B) For x-ray irradiation, the virtual source or target to isocenter distance along the central axis of the useful beam to the isocenter. For non-isocentric equipment, this distance shall be that specified by the manufacturer.

(55) Output--The exposure rate (air kerma rate), dose rate, or a quantity related to these rates from a therapeutic radiation machine.

(56) Peak tube potential--The maximum value of the potential difference in kilovolts across the x-ray tube during an exposure.

(57) Phantom--An object behaving in essentially the same manner as tissue, with respect to absorption or scattering of the ionizing radiation in question.

(58) Physician--An individual licensed by the Texas Medical Board.

(59) Port film--An x-ray exposure made with a radiation therapy system to visualize a patient's treatment area using radiographic film.

(60) Portable shielding--Moveable shielding that can be placed in the primary or secondary beam to reduce the radiation exposure to the patient, occupational worker or a member of the public. The shielding can be easily moved to position with use of mobility devices or by hand.

(61) Prescribed dose--The total dose and dose per fraction as documented in the written directive. The prescribed dose is an estimation from measured data from a specified therapeutic machine using assumptions that are clinically acceptable for the treatment technique and historically consistent with the clinical calculations previously used for patients treated with the same clinical technique.

(62) Primary dose monitoring system--A system that will monitor the useful beam during irradiation and that will terminate irradiation when a preselected number of dose monitor units have been delivered.

(63) Primary protective barrier--(See definition for protective barrier).

(64) Protective apron--An apron made of radiation absorbing materials used to reduce radiation exposure.

(65) Protective barrier--A barrier of radiation absorbing materials used to reduce radiation exposure. The types of protective barriers are as follows:

(A) primary protective barrier--A barrier sufficient to attenuate the useful beam to the required degree.

(B) secondary protective barrier--A barrier sufficient to attenuate the stray radiation to the required degree.

(66) Protective glove--A glove made of radiation absorbing materials used to reduce radiation exposure.

(67) Radiation detector--A device which, in the presence of radiation provides, by either direct or indirect means, a signal or other indication suitable for use in measuring 1 or more quantities of incident radiation.

(68) Radiation field--(See definition for useful beam).

(69) Radiation head--The structure from which the useful beam emerges.

(70) Radiation oncologist--A physician with a specialty in radiation therapy.

(71) Radiation therapy simulation system (simulator)--An x-ray system intended for localizing and confirming the volume to be irradiated during radiation treatment and confirming the position and size of the therapeutic irradiation field.

(72) Radiation therapy system--An x-ray system that utilizes prescribed doses of ionizing radiation for treatment.

(73) Scan--The complete process of collecting x-ray transmission data for the production of a tomogram. Data can be collected simultaneously during a single scan for the production of one or more tomograms.

(74) Scan increment--The amount of relative displacement of the patient with respect to the CT x-ray system between successive scans measured along the direction of such displacement.

(75) Scan sequence--A preselected set of 2 or more scans performed consecutively under preselected CT conditions of operation.

(76) Scan time--The period of time between the beginning and end of x-ray transmission data accumulation for a single scan.

(77) Scattered radiation--Radiation that has been deviated in direction during passage through matter.

(78) Secondary dose monitoring system--A system which will terminate irradiation in the event of failure of the primary dose monitoring system.

(79) Secondary protective barrier (See definition for protective barrier).

(80) Shutter--A device attached to the tube housing assembly which can totally intercept the useful beam and which has a lead equivalency not less than that of the tube housing assembly.

(81) Source-to-skin distance (SSD)--The distance from the source to the skin of the patient.

(82) Spot check--Those tests and analyses performed at specified intervals for the purpose of verifying the consistent output of radiation equipment.

(83) Stationary beam therapy--Radiation therapy without displacement of one or more mechanical axes relative to the patient during irradiation.

(84) Supervision--The delegating of the task of applying radiation in accordance with this section to persons not licensed in the healing arts or veterinary medicine, who provide services under the physician's control. The physician or veterinarian assumes full responsibility for these tasks and shall assure that the tasks will be administered correctly.

(85) Target--That part of an x-ray tube or accelerator onto which a beam of accelerated particles is directed to produce ionizing radiation or other particles.

(86) Termination of irradiation--The stopping of irradiation in a fashion which will not permit continuance of irradiation without the resetting of operating conditions at the control panel.

(87) Therapeutic radiation machine--X ray or electron producing equipment designed and used for external beam radiation therapy.

(88) Traceable to a national standard--This indicates that a quantity or a measurement has been compared to a national standard, for example, National Institute of Standards and Technology, directly or indirectly through one or more intermediate steps and that all comparisons have been documented.

(89) Tube housing assembly--The tube housing with tube installed. It includes high-voltage and/or filament transformers and other appropriate elements when such are contained within the tube housing.

(90) Useful beam--Radiation that passes through the window, aperture, cone, or other collimating device of the source housing. Also referred to as the primary beam.

(91) Veterinarian--An individual licensed by the Texas Board of Veterinary Medical Examiners.

(92) Virtual source--A point from which radiation appears to originate.

(93) Wedge filter--An added filter effecting continuous progressive attenuation on all or part of the useful beam.

(94) Written directive--An order in writing for the administration of radiation to a specific patient as specified in subsection (h)(1)(F)(ii) of this section.

(f) Accelerators used for research and development and industrial operations.

(1) Registration. Each person possessing an accelerator for non-human use, shall apply for and receive a certificate of registration from the agency before beginning use of the accelerator. A person may energize the accelerator for purposes of installation and acceptance testing before receiving a certificate of registration from the agency in accordance with §289.226(i)(1) of this title.

(2) Facility requirements.

(A) Each accelerator facility shall be provided with primary and/or secondary barriers as are necessary to assure compliance with §289.231(m) and (o) of this title.

(B) A radiation survey shall be conducted when the accelerator is registered and is capable of producing radiation to determine compliance with §289.231(m) and (o) of this title.

(C) Initial surveys shall be performed as follows.

(i) All new and existing facilities not previously surveyed shall have a survey made by, or under the direction of, the registrant.

(ii) A survey report shall be made and shall include, but not be limited to, the following:

(I) a diagram of the facility that details building structures and the position of the accelerator, control panel, and associated equipment;

(II) a description of the accelerator including the manufacturer, model and serial number, beam type, and beam energy;

(III) a description of the instrumentation used to determine radiation measurements, including the date and source of the most recent calibration for each instrument used;

(IV) conditions under which radiation measurements were taken; and

(V) survey data including:

(-a-) projected annual total effective dose equivalent (TEDE) in areas adjacent to the accelerator; and

(-b-) a description of workload, use, and occupancy factors employed in determining the projected annual TEDE.

(iii) The registrant shall maintain a copy of the initial survey report for inspection by the agency in accordance with subsection (l) of this section.

(iv) The survey report shall include documentation of all instances where the facility is in violation of applicable requirements of this chapter. Any deficiencies detected during the survey shall be corrected prior to using the accelerator.

(3) Safety requirements.

(A) Interlock systems shall comply with the following requirements.

(i) Instrumentation, readouts, and controls in the accelerator console shall be clearly identified.

(ii) Each entrance into a target room or other high radiation area shall be provided with a safety interlock that shuts down the machine under conditions of barrier penetration.

(iii) When the production of radiation has been interrupted, it shall only be possible to resume operation of the accelerator by manually resetting the console.

(iv) Each safety interlock shall be on an electrical circuit that allows the interlock to operate independently of all other safety interlocks.

(v) All safety interlocks shall be designed so that any defect or component failure in the interlock system prevents operation of the accelerator.

(vi) A scram button or other emergency power cut-off switches shall be labeled. The scram button or cut-off switches shall include a manual reset so that the accelerator cannot be restarted from the accelerator console without resetting the cut-off switch.

(vii) The safety interlock system shall have a visible or audible alarm that will indicate when any interlock has been activated.

(viii) All interlocks and visible or audible alarms shall be tested for proper operation at intervals not to exceed three months.

(ix) If an interlock or alarm is operating improperly, it shall be immediately labeled as defective and repaired within 7 calendar days.

(x) Records of tests and repairs required by this paragraph shall be made and maintained in accordance with subsection (l) of this section for inspection by the agency.

(B) Each registrant shall develop and implement written operating and safety procedures. The procedures may be documented in an electronic reporting system and shall include, but not be limited to, the following:

(i) methods used to secure the accelerator from unauthorized use;

(ii) methods of testing and training operators in accordance with paragraph (4) of this subsection;

(iii) procedures for notifying the proper personnel in the event of an accident;

(iv) posting requirements;

(v) procedures for testing interlocks, entrance controls, and alarm systems;

(vi) personnel monitoring;

(vii) maintenance of records; and

(viii) procedures for necessary area surveys and time intervals.

(C) The registrant shall ensure that radiation measurements are performed with a calibrated dosimetry system. The dosimetry system calibration shall be traceable to a national standard. The calibration interval shall not exceed 24 months. There shall be available at each accelerator facility, appropriate portable monitoring equipment that is operable and has been calibrated for the appropriate radiations being produced at the facility.

(D) A radiation protection survey shall be performed and the results recorded when changes have been made in shielding, operation, equipment, or occupancy of adjacent areas.

(E) For portable or mobile accelerators, such as neutron generators that are used at temporary job sites where permanent shielding is not available, radiation protection shall be provided by temporary

shielding or by providing an adequate exclusion area around the accelerator while it is in use.

(F) Records of calibration and survey results made in accordance with subparagraphs (C) and (D) of this paragraph shall be maintained in accordance with subsection (l) of this section.

(G) The registrant shall perform radiation surveys and contamination smears prior to the transfer or disposal of an accelerator operating at or above 10 MeV. Such survey(s) shall be documented and maintained by the registrant for inspection by the agency in accordance with subsection (l) of this section.

(H) The registrant shall retain records of receipt, transfer, and disposal of all radiation machines specific to each authorized use location. The records shall include the date, manufacturer name, model and serial number from the control panel or console of the radiation machine and identification of the person making the record.

(4) Training requirements for operators.

(A) No person shall be permitted to operate an accelerator unless such person has received instruction in and demonstrated competence with the following:

(i) operating and safety procedures in accordance with paragraph (3)(B) of this subsection;

(ii) radiation warning and safety devices incorporated into the equipment and in the room;

(iii) identification of radiation hazards associated with the use of the equipment; and

(iv) procedures for reporting an actual or suspected exposure.

(B) Records of the training specified in subparagraph (A) of this paragraph shall be made and maintained for agency inspection in accordance with subsection (l) of this section.

(g) Requirements for accelerator(s) used in industrial radiography. In addition to the requirements in subsections (f)(1), (2), and (3)(C) - (H) of this section, accelerators used for industrial radiography shall meet the applicable requirements of §289.255 of this title.

(h) Therapeutic radiation machines, simulators used in the healing arts, veterinary medicine, and electronic brachytherapy devices.

(1) General requirements.

(A) Each person possessing a therapeutic radiation machine capable of operating at or above 1 million electron volts (MeV) shall apply for and receive a certificate of registration from the agency before using the accelerator for human use. A person may energize the accelerator for purposes of installation and acceptance testing before receiving a certificate of registration from the agency.

(B) Each person possessing a simulator, a therapeutic radiation machine capable of operating below 1 MeV, and/or an electronic brachytherapy device, shall apply for a certificate of registration within 30 days after energizing the equipment.

(C) Individuals who operate radiation machines for human use shall meet the appropriate credentialing requirements issued in accordance with the Medical Radiologic Technologist Certification Act, Texas Occupations Code, Chapter 601. Copies of the credentialing document shall be maintained at the locations(s) where the individual is working.

(D) The electronic brachytherapy registrant shall require the physician to be:

(i) licensed by the Texas Medical Board; and

(ii) certified in:

(I) radiation oncology or therapeutic radiology by the American Board of Radiology; or

(II) radiation oncology by the American Osteopathic Board of Radiology;

(E) Operators of the electronic brachytherapy device shall complete device-specific training as follows:

(i) completion of a training program provided by the manufacturer; or

(ii) training received that is substantially equivalent to the manufacturer's training program from a certified physician or a licensed medical physicist who is trained to use the device.

(iii) The registrant shall retain a record of each individual's device-specific training in accordance with subsection (l) of this section for inspection by the agency.

(F) Each facility, including facilities using electronic brachytherapy devices, shall develop a quality assurance program in writing or in an electronic reporting system. The quality assurance program shall be implemented as a method of minimizing deviations from facility procedures and to document preventative measures taken prior to serious patient injury or therapeutic misadministration.

(i) The quality assurance program shall include but not be limited to the following topics:

(I) treatment planning and patient simulation;

(II) charting and documenting treatment field parameters;

(III) dose calculation and review procedures;

(IV) review of daily treatment records; and

(V) for electronic brachytherapy, verification of catheter placement and device exchange procedures;

(ii) A written directive shall be prepared prior to administration of a therapeutic radiation dose except where a delay to provide a written directive would jeopardize the patient's health. The information contained in the oral directive shall be documented immediately in the patient's record and a written directive prepared within 24 hours of the oral directive.

(iii) A written directive that changes an existing written directive for any therapeutic radiation procedure is only acceptable if the revision is dated and signed by a certified physician prior to the administration of the therapeutic dose, or the next fractional dose.

(iv) Deviations from the prescribed treatment, from the facilities quality assurance program, and from the operating and safety procedures shall be investigated and brought to the attention of the certified physician or licensed medical physicist, and the radiation safety officer (RSO).

(v) The patient's identity shall be verified by more than one method as the individual named in the written directive prior to administration.

(vi) The discovery of each medical event or misadministration shall be reported in accordance with subsection (i) or (j) of this section.

(vii) The review of the quality assurance program shall include all the deviations from the prescribed treatment and shall

be conducted at intervals not to exceed 14 months. A signed record of each dated review shall be maintained for inspection by the agency in accordance with subsection (l) of this section and shall include evaluations and findings of the review.

(G) Written operating and safety procedures shall be developed by a licensed medical physicist with a specialty in therapeutic radiological physics and shall include any restrictions required for the safe operation of the particular therapeutic radiation machine. These procedures shall be available in the control area of the therapeutic radiation machine and an electronic brachytherapy device. The operator(s) shall be able to demonstrate familiarity with these procedures. These procedures shall include, but are not limited to the following:

(i) therapeutic radiation machines shall not be used for irradiation of patients unless full calibration measurements and quality assurance checks have been completed;

(ii) therapeutic radiation machines shall not be used in the administration of radiation therapy if a spot check indicates a significant change in the operating characteristics of a system as specified in the written procedures;

(iii) therapeutic radiation machines shall not be left unattended unless secured by a locking device which will prevent unauthorized use (A computerized pass-word system would also constitute a locking device);

(iv) when there is a need to immobilize a patient or port film for radiation therapy, mechanical supporting or restraining devices shall be used;

(v) no individual, other than the patient, shall be in the treatment room during exposures from therapeutic radiation machines operating above 150 kV;

(vi) at energies less than or equal to 150 kV, any individual, other than the patient, in the treatment room shall be protected by a barrier sufficient to meet the requirements of §289.231(m) and (o) of this title;

(vii) use of a technique chart for simulators in accordance with paragraph (4)(A)(i) of this subsection;

(viii) radiation dose requirements in accordance with §289.231(m) and (o) of this title;

(ix) personnel monitoring requirements in accordance with §289.231(n) of this title;

(x) use of protective devices for simulators in accordance with paragraph (4)(A)(iii) of this subsection;

(xi) credentialing requirements for individuals operating radiation machines in accordance with subparagraph (C) of this paragraph;

(xii) film processing program for simulators in accordance with paragraph (4)(A)(viii) of this subsection; and

(xiii) procedures for restriction and alignment of beam for simulators in accordance with paragraph (4)(B)(iii) of this subsection.

(H) Registrants with equipment that has been issued variances by the United States Food and Drug Administration (FDA) to Title 21, CFR Part 1020 shall maintain copies of those variances at authorized use locations in accordance with subsection (l) of this section.

(I) The registrant shall perform radiation surveys and contamination smears prior to the transfer or disposal of an accelerator operating at or above 10 MeV. Such survey(s) shall be documented and maintained by the registrant for inspection by the agency in accordance with subsection (l) of this section.

(J) Where applicable, the licensed medical physicist shall perform acceptance testing on the treatment planning system of therapy-related computer systems in accordance with published protocols accepted by nationally recognized bodies. In the absence of such a published protocol, the manufacturer's current protocol shall be followed.

(2) Therapeutic radiation machines capable of operating at energies below 1 MeV.

(A) Equipment requirements.

(i) When the tube is operated at its leakage technique factors, the leakage radiation shall not exceed the values specified at the distance stated for the classification of that radiation machine system shown in the following Table I. The leakage technique factors are the maximum-rated peak tube potential and the maximum-rated continuous tube current for the maximum-rated peak tube potential.
Figure: 25 TAC §289.229(h)(2)(A)(i)

(ii) Permanent fixed diaphragms or cones used for limiting the useful beam shall provide the same or a higher degree of protection as required for the tube housing assembly.

(iii) Removable and adjustable beam-limiting devices shall meet the following requirements.

(I) Removable beam-limiting devices shall, for the portion of the useful beam to be blocked by these devices, transmit not more than 1.0% of the useful beam at the maximum kVp and maximum treatment filter. This requirement does not apply to auxiliary blocks or materials placed in the x-ray field to shape the useful beam to the individual patient.

(II) Adjustable beam-limiting devices installed before March 1, 1989, shall, for the portion of the x-ray beam to be blocked by these devices, transmit not more than 5.0% of the useful beam at the maximum kVp and maximum treatment filter.

(III) Adjustable beam-limiting devices installed after March 1, 1989, shall meet the requirements of subclause (I) of this clause.

(iv) The filter system shall be so designed that:

(I) the filters cannot be accidentally displaced at any possible tube orientation;

(II) for equipment installed after March 1, 1989, an interlock system prevents irradiation if the proper filter is not in place;

(III) the radiation at 5 centimeters (cm) from the filter insertion slot opening does not exceed 30 roentgens per hour (R/hr) (300 mGy/hr) under any operating conditions; and

(IV) each filter is marked as to its material of construction and its thickness. For wedge filters, the wedge angle shall appear on the wedge or wedge tray.

(v) The tube housing assembly shall be capable of being immobilized for stationary treatments.

(vi) The tube housing assembly shall be so marked that it is possible to determine the location of the focal spot to within 5 millimeters (mm), and such marking shall be readily accessible for use during calibration procedures.

(vii) Contact therapy tube housing assemblies shall have a removable shield of at least 0.5 mm lead equivalency at 100 kVp that can be positioned over the entire useful beam exit port during periods when the beam is not in use.

(viii) The timer shall:

(I) have a display provided at the treatment control panel and a pre-set time selector;

(II) activate with the production of radiation and retain its reading after irradiation is interrupted. After irradiation is terminated and before irradiation can be reinitiated, it shall be necessary to reset the elapsed time indicator to zero;

(III) terminate irradiation when a pre-selected time has elapsed, if any dose monitoring system present has not previously terminated irradiation;

(IV) permit selection of exposure times as short as one second;

(V) not permit an exposure if set at zero;

(VI) not activate until the shutter is opened when irradiation is controlled by a shutter mechanism unless calibration includes a timer factor to compensate for mechanical lag; and

(VII) be accurate to within 1.0% of the selected value or 1 second, whichever is greater.

(ix) The control panel, in addition to the displays required in clause (viii)(I) of this subparagraph, shall have the following:

(I) an indication of whether electrical power is available at the control panel and if activation of the x-ray tube is possible;

(II) an indication of whether x rays are being produced;

(III) means for indicating x-ray tube potential and current;

(IV) means for terminating an exposure at any time;

(V) a locking device that will prevent unauthorized use of the therapeutic radiation system (a computerized pass-word system would also constitute a locking device);

(VI) for therapeutic radiation systems manufactured after March 1, 1989, a positive display of specific filters in the beam; and

(VII) emergency buttons/switches that shall be clearly labeled as to their functions.

(x) There shall be means of determining initially the SSD to within 1 cm and of reproducing this measurement to within 2 mm thereafter.

(xi) Unless it is possible to bring the radiation output to the prescribed exposure parameters within 5 seconds, the beam shall be attenuated by a shutter having a lead equivalency not less than that of the tube housing assembly. After the unit is at operating parameters, the shutter shall be controlled electrically by the operator from the control panel. An indication of shutter position shall appear at the control panel.

(xii) Each therapeutic radiation system equipped with a beryllium or other low-filtration window shall be clearly labeled as such upon the tube housing assembly and at the control panel.

(B) Facility requirements for therapeutic radiation systems capable of operating above 50 kVp.

(i) Provision shall be made for two-way aural communication between the patient and the operator at the control panel.

(ii) Windows, mirrors, closed-circuit television, or an equivalent system shall be provided to permit continuous observation of the patient during irradiation and shall be so located that the operator can observe the patient from the control panel.

(I) Should the viewing system described in clause (ii) of this subparagraph fail or be inoperative, treatment shall not be performed with the unit until the system is restored.

(II) In a facility that has a primary viewing system by electronic means and an alternate viewing system, should both viewing systems described in clause (ii) of this subparagraph fail or be inoperative, treatment shall not be performed with the unit until one of the systems is restored.

(C) Additional facility requirements for therapeutic radiation systems capable of operation above 150 kVp.

(i) Each installation shall be provided with primary and/or secondary barriers as are necessary to assure compliance with §289.231(m) and (o) of this title. All protective barriers shall be fixed except for entrance doors or beam interceptors.

(ii) The control panel shall be located outside the treatment room or in an enclosed booth inside the room.

(iii) Interlocks shall be provided such that all entrance doors shall be closed, including doors to any interior booths, before treatment can be initiated or continued. If the radiation beam is interrupted by any door opening, it shall not be possible to restore the machine to operation without closing the door and reinitiating irradiation by manual action at the control panel. When any door is opened while the x-ray tube is activated, the exposure at a distance of 1 m from the source shall be reduced to less than 100 mR/hr (1 mGy/hr).

(D) Surveys, calibrations, and spot checks.

(i) Surveys shall be performed as follows.

(I) All new and existing facilities not previously surveyed shall have an initial survey made by a licensed medical physicist with a specialty in therapeutic radiological physics, who shall provide a written report of the survey to the registrant. Additional surveys shall be done after any change in the facility, facility design, or equipment that might cause a significant increase in radiation hazard.

(II) The registrant shall maintain a copy of the initial survey report and all subsequent survey reports required by subclause (I) of this clause in accordance with subsection (l) of this section for inspection by the agency.

(III) The survey report shall indicate all instances where the installation is in violation of applicable requirements of this chapter.

(ii) Calibrations shall be performed as follows.

(I) The calibration of a therapeutic radiation system shall be performed at intervals not to exceed 1 year and after any change or replacement of components that could cause a change in the radiation output. The calibrations shall be such that the dose at a reference point in a water or plastic phantom can be calculated to within an uncertainty of 5.0%.

(II) The calibration of the radiation output of the therapeutic radiation system shall be performed by a licensed medical

physicist with a specialty in therapeutic radiological physics who is physically present at the facility during such calibration.

(III) The calibration of the therapeutic radiation system shall include, but not be limited to, the following determinations:

(-a-) verification that the radiation therapy system is operating in compliance with the design specifications;

(-b-) HVL for each kV setting and filter combination used;

(-c-) the exposure rates (air kerma rates) as a function of field size, technique factors, filter, and treatment distance used; and

(-d-) the degree of congruence between the radiation field and the field indicated by the localizing device, if such device is present, which shall be within 5 mm for any field edge.

(IV) Calibration of the radiation output of a therapeutic radiation system shall be performed with a calibrated dosimetry system. The dosimetry system calibration shall be traceable to a national standard. The calibration interval shall not exceed 24 months.

(V) Records of calibration measurements specified in clause (ii) of this subparagraph shall be maintained by the registrant in accordance with subsection (l) of this section for inspection by the agency.

(VI) A copy of the latest calibrated absorbed dose rate measured on a particular therapeutic radiation system shall be available at a designated area within the therapy facility housing that therapeutic radiation system.

(iii) Spot checks shall be performed on therapeutic radiation systems capable of operation at greater than 150 kVp. Such measurements shall meet the following requirements.

(I) The spot check procedures shall be in writing, or documented in an electronic reporting system, and shall have been developed by a licensed medical physicist with a specialty in therapeutic radiological physics.

(II) If a licensed medical physicist does not perform the spot check measurements, the results of the spot check measurements shall be reviewed by a licensed medical physicist with a specialty in therapeutic radiological physics within 5 treatment days and a record made of the review. If the output varies by more than 5.0% from the expected value, a licensed medical physicist with a specialty in therapeutic radiological physics shall be notified immediately.

(III) The written spot check procedures shall specify the frequency that tests or measurements are to be performed and that the spot check shall be performed during the calibration specified in clause (ii) of this subparagraph. The acceptable tolerance for each parameter measured when compared to the value for that parameter determined in the calibration specified in clause (ii) of this subparagraph shall be stated.

(IV) The written spot check procedures shall include special operating instructions that shall be carried out whenever a parameter in subclause (III) of this clause exceeds an acceptable tolerance.

(V) Whenever a spot check indicates a significant change in the operating characteristics of a system, as specified in the procedures, the system shall be recalibrated, as required in clause (ii) of this subparagraph.

(VI) Records of written spot checks and any necessary corrective actions shall be maintained by the registrant in accordance with subsection (l) of this section for inspection by the agency. A copy of the most recent spot check shall be available at a designated area within the therapy facility housing that therapeutic radiation system.

(VII) Spot checks shall be obtained using a system satisfying the requirements of clause (ii)(IV) of this subparagraph.

(3) Therapeutic radiation machines capable of operating at energies of 1 MeV and above.

(A) Equipment requirements.

(i) For operating conditions producing maximum leakage radiation, the absorbed dose in rads (mGy) due to leakage radiation, including x rays, electrons, and neutrons, at any point in a circular plane of 2 m radius centered on and perpendicular to the central axis of the beam at the isocenter or normal treatment distance and outside the maximum useful beam size shall not exceed 0.1% of the maximum absorbed dose in rads (mGy) of the unattenuated useful beam measured at the point of intersection of the central axis of the beam and the plane surface. Measurements excluding those for neutrons shall be averaged over an area up to, but not exceeding, 100 square centimeters (cm^2) at the positions specified. Measurements of the portion of the leakage radiation dose contributed by neutrons shall be averaged over an area up to, but not exceeding, 200 cm^2. For each system, the registrant shall determine or obtain from the manufacturer the leakage radiation existing at the positions specified for the specified operating conditions. Records on leakage radiation measurements shall be maintained in accordance with subsection (l) of this section for inspection by the agency.

(ii) Each wedge filter that is removable from the system shall be clearly marked with an identification number. Documentation available at the control panel shall contain a description of the filter. The wedge angle shall appear on the wedge or wedge tray (if permanently mounted to the tray). If the wedge tray is damaged, the wedge transmission factor shall be redetermined. Equipment manufactured after March 1, 1989, shall meet the following requirements.

(I) Irradiation shall not be possible until a selection of a filter or a positive selection to use "no filter" has been made at the treatment console, either manually or automatically.

(II) An interlock system shall be provided to prevent irradiation if the filter selected is not in the correct position.

(III) A display shall be provided at the treatment console showing the beam quality in use.

(IV) An interlock shall be provided to prevent irradiation if any filter selection operation carried out in the treatment room does not agree with the filter selection operation carried out at the treatment console.

(iii) The registrant shall determine data sufficient to assure that the following beam quality requirements in tissue equivalent material are met.

(I) The absorbed dose resulting from x rays in a useful electron beam at a point on the central axis of the beam 10 cm greater than the practical range of the electrons shall not exceed the values stated in the following Table II. Linear interpolation shall be used for values not stated.

Figure: 25 TAC §289.229(h)(3)(A)(iii)(I) (No change.)

(II) Compliance with subclause (I) of this clause shall be determined using:

(-a-) a measurement within a tissue equivalent phantom with the incident surface of the phantom at the normal treatment distance and normal to the central axis of the beam;

(-b-) a field size of 10 cm by 10 cm; and

(-c-) a phantom whose cross-sectional dimensions exceed the measurement radiation field by at least 5 cm and whose depth is sufficient to perform the required measurement.

(III) The absorbed dose at a surface located at the normal treatment distance, at the point of intersection of that surface with the central axis of the useful beam during x-ray irradiation, shall not exceed the limits stated in the following Table III. Linear interpolation shall be used for values not stated.

Figure: 25 TAC §289.229(h)(3)(A)(iii)(III) (No change.)

(IV) Compliance with subclause (III) of this clause shall be determined by measurements made as follows:

(-a-) within a tissue equivalent phantom using an instrument that will allow extrapolation to the surface absorbed dose;

(-b-) using a phantom whose size and placement meet the requirements of subclause (II) of this clause;

(-c-) after removal of all beam modifying devices that can be removed without the use of tools, except for beam scattering or beam-flattening filters; and

(-d-) using the largest field size available that does not exceed 15 cm by 15 cm.

(iv) All therapeutic radiation systems shall be provided with radiation detectors in the radiation head. These shall include the following, as appropriate.

(I) Equipment manufactured after March 1, 1989, shall be provided with at least 2 independent radiation detectors. The detectors shall be incorporated into 2 independent dose monitoring systems.

(II) Equipment manufactured on or before March 1, 1989, shall be provided with at least 1 radiation detector. This detector shall be incorporated into a primary dose monitoring system.

(III) The detector and the system into which that detector is incorporated shall meet the following requirements.

(-a-) Each detector shall be removable only with tools and shall be interlocked to prevent incorrect positioning.

(-b-) Each detector shall form part of a dose monitoring system from whose readings in dose monitor units the absorbed dose at a reference point in the treatment volume can be calculated.

(-c-) Each dose monitoring system shall be capable of independently monitoring, interrupting, and terminating irradiation.

(-d-) For equipment manufactured after March 1, 1989, the design of the dose monitoring systems shall assure that the malfunctioning of 1 system shall not affect the correct functioning of the secondary system; and failure of any element common to both systems that could affect the correct function of both systems shall terminate irradiation.

(-e-) Each dose monitoring system shall have a legible display at the treatment console. For equipment manufactured after March 1, 1989, each display shall:

(-1-) maintain a reading until intentionally reset to zero;

(-2-) have only one scale and no scale multiplying factors;

(-3-) utilize a design such that increasing dose is displayed by increasing numbers and shall be so designed that, in the event of an overdosage of radiation, the absorbed dose may be accurately determined; and

(-4-) retain the dose monitoring information in at least one system for a 15-minute period of time in the event of a power failure.

(v) In equipment manufactured after March 1, 1989, inherently capable of producing useful beams with unintentional asymmetry exceeding 5.0%, the asymmetry of the radiation beam in two orthogonal directions shall be monitored before the beam passes through the beam-limiting device. If the difference in dose rate between one region and another region symmetrically displaced from the central axis of the beam exceeds 5.0% of the central axis dose rate, indication of this condition shall be at the console; and if this difference exceeds 10% of the central axis dose rate, the irradiation shall be terminated.

(vi) Selection and display of dose monitor units shall meet the following requirements.

(I) Irradiation shall not be possible until a selection of a number of dose monitor units has been made at the treatment console.

(II) The preselected number of dose monitor units shall be displayed at the treatment console until reset manually for the next irradiation.

(III) After termination of irradiation, it shall be necessary to reset the dosimeter display to zero before subsequent treatment can be initiated.

(IV) For equipment manufactured after March 1, 1989, after termination of irradiation, it shall be necessary to manually reset the preselected dose monitor units before irradiation can be initiated.

(vii) Termination of irradiation by the dose monitoring system or systems during stationary beam therapy shall meet the following requirements.

(I) Each primary system shall terminate irradiation when the preselected number of dose monitor units has been detected by the system.

(II) If original design of the equipment includes a secondary dose monitoring system, that system shall be capable of terminating irradiation when not more than 15% or 40 dose monitor units, whichever is smaller, above the preselected number of dose monitor units set at the console has been detected by the secondary dose monitoring system.

(III) For equipment manufactured after March 1, 1989, a secondary dose monitoring system shall be present. That system shall be capable of terminating irradiation when not more than 10% or 25 dose monitoring units, whichever is smaller, above the preselected number of dose monitor units set at the console has been detected by the secondary dose monitoring system.

(IV) For equipment manufactured after March 1, 1989, an indicator on the console shall show which dose monitoring system has terminated irradiation.

(viii) A locking device shall be provided in the system to prevent unauthorized use of the x-ray system. A computerized password system would also constitute a locking device.

(ix) It shall be possible to interrupt irradiation and equipment movements at any time from the operator's position at the treatment console. Following an interruption, it shall be possible to restart irradiation by operator action without any reselection of operat-

ing conditions. If any change is made of a preselected value during an interruption, irradiation and equipment movements shall be automatically terminated.

(x) It shall be possible to terminate irradiation and equipment movements or go from an interruption condition to termination conditions at any time from the operator's position at the treatment console.

(xi) Timers shall meet the following requirements.

(I) A timer that has a display shall be provided at the treatment console. The timer shall have a preset time selector and an elapsed time indicator.

(II) The timer shall be a cumulative timer that activates with the production of radiation and retains its reading after irradiation is interrupted or terminated. After irradiation is terminated and before irradiation can be reinitiated, it shall be necessary to reset the elapsed time indicator to zero.

(III) For equipment manufactured after March 1, 1989, after termination of irradiation and before irradiation can be reinitiated, it shall be necessary to manually reset the preset time selector.

(IV) The timer shall terminate irradiation when a preselected time has elapsed if the dose monitoring systems have not previously terminated irradiation.

(xii) Equipment capable of producing more than 1 radiation type shall meet the following additional requirements.

(I) Irradiation shall not be possible until a selection of radiation type has been made at the treatment console.

(II) An interlock system shall be provided to:

(-a-) ensure that the equipment can emit only the radiation type that has been selected;

(-b-) prevent irradiation if any selected operations carried out in the treatment room do not agree with the selected operations carried out at the treatment console;

(-c-) prevent irradiation with x-rays except to obtain a port film when electron applicators are fitted; and

(-d-) prevent irradiation with electrons when accessories specific for x-ray therapy are fitted.

(III) The radiation type selected shall be displayed at the treatment console before and during irradiation.

(xiii) Equipment capable of generating radiation beams of different energies shall meet the following requirements.

(I) Irradiation shall not be possible until a selection of energy has been made at the treatment console.

(II) An interlock system shall be provided to prevent irradiation if any selected operations carried out in the treatment room do not agree with the selected operations carried out at the treatment console.

(III) The nominal energy value selected shall be displayed at the treatment console before and during irradiation.

(xiv) Equipment capable of both stationary beam therapy and moving beam therapy shall meet the following requirements.

(I) Irradiation shall not be possible until a selection of stationary beam therapy or moving beam therapy has been made at the treatment console.

(II) An interlock system shall be provided to prevent irradiation if any selected operations carried out in the treatment room do not agree with the selected operations carried out at the treatment console.

(III) The selection of stationary or moving beam shall be displayed at the treatment console. An interlock system shall be provided to ensure that the equipment can only operate in the mode that has been selected.

(IV) For equipment manufactured after March 1, 1989, an interlock system shall be provided to terminate irradiation if movement of the gantry occurs during stationary beam therapy or stops during moving beam therapy unless such stoppage is a preplanned function.

(V) Moving beam therapy shall be controlled to obtain the selected relationships between incremental dose monitor units and incremental angle of movement.

(-a-) For equipment manufactured after March 1, 1989, an interlock system shall be provided to terminate irradiation if the number of dose monitor units delivered in any 10 degrees of arc differs by more than 20% from the selected value.

(-b-) For equipment manufactured after March 1, 1989, where gantry angle terminates the irradiation in arc therapy, the dose monitor units shall differ by less than 5.0% from the value calculated from the absorbed dose per unit angle relationship.

(VI) Where the dose monitor system terminates the irradiation in moving beam therapy, the termination of irradiation shall be as required by clause (vii) of this subparagraph.

(xv) For equipment manufactured after March 1, 1989, a system shall be provided from whose readings the absorbed dose rate at a reference point in the treatment volume can be calculated. The radiation detectors specified in subparagraph (iv) of this paragraph may form part of this system. In addition, the dose monitor unit rate shall be displayed at the treatment console. If the equipment can deliver under any conditions an absorbed dose rate at the normal treatment distance more than twice the maximum value specified by the manufacturer for any machine parameters utilized, a device shall be provided that terminates irradiation when the absorbed dose rate exceeds a value twice the specified maximum. The dose rate at which the irradiation will be terminated shall be in a record maintained by the registrant in accordance with subsection (l) of this section for agency inspection.

(xvi) The registrant shall determine, or obtain from the manufacturer, the location with reference to an accessible point on the radiation head of the x-ray target or the virtual source of x-rays and the electron window or the virtual source of electrons if the system has electron beam capabilities.

(xvii) Capabilities shall be provided so that all radiation safety interlocks can be checked for correct operation.

(B) Facility and shielding requirements.

(i) Each installation shall be provided with primary and/or secondary barriers as are necessary to assure compliance with §289.231(m) and (o) of this title.

(ii) All protective barriers shall be fixed except for entrance doors or beam interceptors.

(iii) The console shall be located outside the treatment room and all emergency buttons/switches shall be clearly labeled as to their functions.

(iv) Windows, mirrors, closed-circuit television, or an equivalent system shall be provided to permit continuous observation of the patient following positioning and during irradiation and shall be so located that the operator may observe the patient from the console.

(I) Should the viewing system described in clause (iv) of this subparagraph fail or be inoperative, treatment shall not be performed with the unit until the system is restored.

(II) In a facility that has a primary viewing system by electronic means and an alternate viewing system, should both viewing systems described in clause (iv) of this subparagraph fail or be inoperative, treatment shall not be performed with the unit until one of the systems is restored.

(v) Provision shall be made for continuous two-way aural communication between the patient and the operator at the console independent of the accelerator. However, where excessive noise levels or treatment requirements make aural communication impractical, other methods of communication shall be used. When this is the case, a description of the alternate method shall be submitted to and approved by the agency.

(vi) Treatment room entrances shall be provided with a warning light in a readily observable position near the outside of all access doors to indicate when the useful beam is "on."

(vii) Interlocks shall be provided such that all entrance doors shall be closed before treatment can be initiated or continued. If the radiation beam is interrupted by any door opening, it shall not be possible to restore the machine to operation without closing the door and reinitiating irradiation by manual action at the console.

(C) Surveys, calibrations, spot checks, and operational requirements.

(i) Surveys shall be performed as follows.

(I) All new and existing facilities not previously surveyed shall have an initial survey made by a licensed medical physicist with a specialty in therapeutic radiological physics, who shall provide a written report of the survey to the registrant. The physicist who performs the survey shall be a person who did not consult in the design of the therapeutic radiation machine installation and is not employed by or within any corporation or partnership with the person who consulted in the design of the installation. In addition, such surveys shall be done after any change in the facility or equipment that might cause a significant increase in radiation hazard.

(II) The survey report shall include, but not be limited to the following:

(-a-) a diagram of the facility that details building structures and the position of the console, therapeutic radiation machine, and associated equipment;

(-b-) a description of the therapeutic radiation system, including the manufacturer, model and serial number, beam type, and beam energy;

(-c-) a description of the instrumentation used to determine radiation measurements, including the date and source of the most recent calibration for each instrument used;

(-d-) conditions under which radiation measurements were taken; and

(-e-) survey data including:

(-1-) projected annual TEDE in areas adjacent to the therapy room; and

(-2-) a description of workload, use, and occupancy factors employed in determining the projected annual TEDE.

(III) The registrant shall maintain a copy of the survey report and a copy of the survey report shall be provided to the agency within 30 days of completion of the survey. Records of the survey report shall be maintained in accordance with subsection (l) of this section for inspection by the agency.

(IV) The survey report shall include documentation of all instances where the installation is in violation of applicable regulations. Any deficiencies detected during the survey shall be corrected prior to using the machine.

(ii) Calibrations of therapeutic systems shall be performed as follows.

(I) The calibration of systems subject to this subsection shall be performed in accordance with an established calibration protocol before the system is first used for irradiation of a patient and thereafter at time intervals that do not exceed 12 months and after any change that might significantly alter the calibration, spatial distribution, or other characteristics of the therapy beam. The calibration procedures shall be in writing, or documented in an electronic reporting system, and shall have been developed by a licensed medical physicist with a specialty in therapeutic radiological physics. The calibration protocol entitled, "Protocol for Clinical Reference Dosimetry of High-Energy Photon and Electron Beams," Task Group 51, Radiation Therapy Committee, American Association of Physicists in Medicine, Medical Physics 26(9): 1847 - 1870, September 1999, would be accepted as an established protocol. At a minimum, the calibration protocol shall include items in subclauses (III) - (V) of this clause below.

(II) The calibration shall be performed by a licensed medical physicist with a specialty in therapeutic radiological physics who is physically present at the facility during the calibration.

(III) Calibration radiation measurements required by subclause (I) of this clause shall be performed using a dosimetry system:

(-a-) having a calibration factor for cobalt-60 gamma rays traceable to a national standard;

(-b-) that is traceable to a national standard and at an interval not to exceed 24 months;

(-c-) that has been calibrated in such a fashion that an uncertainty can be stated for the radiation quantities monitored by the system; and

(-d-) that has had constancy checks performed on the system as specified by the licensed medical physicist with a specialty in therapeutic radiological physics.

(IV) Calibrations shall be in sufficient detail that the dose at a reference point in a tissue equivalent phantom can be calculated to within an uncertainty of 5.0%.

(V) The calibration of the therapy unit shall include, but not be limited to, the following determinations.

(-a-) Verification that the equipment is operating in compliance with the design specifications concerning the light field, patient positioning lasers, and back-pointer lights with the isocenter when applicable, variation in the axis of rotation for the table, gantry, and collimator system, and beam flatness and symmetry at the specified depth.

(-b-) The absorbed dose rate at various depths in a tissue equivalent phantom for the range of field sizes used, for each effective energy, that will verify the accuracy of the dosimetry of all therapy procedures utilized with that therapy beam.

(-c-) The uniformity of the radiation field to include symmetry, flatness, and dependence on gantry angle.

(-d-) Verification that existing isodose charts applicable to the specific machine continue to be valid or are updated to existing machine conditions.

(-e-) Verification of transmission factors for all accessories such as wedges, block trays, and/or universal and custom made beam modifying devices.

(VI) Calibration of therapeutic systems containing asymmetric jaws, multileaf collimation, or dynamic/virtual wedges shall be performed with an established protocol. The procedures shall be developed by a licensed medical physicist with a specialty in therapeutic radiological physics and shall be in writing or documented in an electronic reporting system. Current recommendations by a national professional association as the American Association of Physicists in Medicine, Task Group 142 report: "Quality Assurance of Medical Accelerators" published August 17, 2009, would be considered an established protocol.

(VII) Records of calibration measurements specified in subclause (I) of this clause and dosimetry system calibrations specified in subclause (III) of this clause shall be maintained by the registrant in accordance with subsection (l) of this section for inspection by the agency.

(VIII) A copy of the latest calibrated absorbed dose rate measured in accordance with subclause (I) of this clause shall be available at a designated area within the facility housing that radiation therapy system.

(iii) Spot checks shall be performed on systems subject to this paragraph during calibrations and thereafter at weekly intervals with the period between spot checks not to exceed 5 treatment days. Such radiation output measurements shall meet the following requirements.

(I) The spot check procedures shall be performed in accordance with established protocol, shall be in writing, or documented in an electronic reporting system, and shall have been developed by a licensed medical physicist with a specialty in therapeutic radiological physics. Either the spot check protocol entitled, "Comprehensive QA for Radiation Oncology," Task Group 40, Radiation Therapy Committee, American Association of Physicists in Medicine, Medical Physics 21(4): 581-618, April, 1994, or Task Group 142 report: Quality Assurance of Medical Accelerators, published by American Association of Physicists in Medicine on August 17, 2009, are accepted as an established protocol. At a minimum, the spot check protocol shall include items in subclauses (III) - (VI) of this clause.

(II) If a licensed medical physicist does not perform the spot check measurements, the results of the spot check measurements shall be reviewed by a licensed medical physicist at a frequency not to exceed 5 treatment days and a record kept of the review. If the output varies by more than 3.0% from the expected value, a licensed medical physicist shall be notified immediately.

(III) The written spot check procedures shall specify the frequency at which tests or measurements are to be performed and the acceptable tolerance for each parameter measured in the spot check when compared to the value for that parameter determined in the calibration.

(IV) Where a system has built-in devices that provide a measurement of any parameter during irradiation, such measurement shall not be utilized as a spot check measurement.

(V) A parameter exceeding a tolerance set by a licensed medical physicist shall be corrected before the system is used for patient irradiation.

(VI) Whenever a spot check indicates a significant change in the operating characteristics of a system, as specified in a licensed medical physicist's written procedures, the system shall be recalibrated, as required in this clause of this subparagraph.

(VII) Records of spot check measurements and any necessary corrective actions shall be maintained by the registrant in accordance with subsection (l) of this section for inspection by the agency.

(VIII) Spot checks shall be obtained using a system satisfying the requirements of clause (ii)(III) of this subparagraph.

(iv) Facilities with therapeutic radiation machines with energies of 1 MeV and above shall procure the services of a licensed medical physicist with a specialty in therapeutic radiological physics.

(I) The physicist shall be responsible for:

(-a-) calibration of radiation machines;

(-b-) supervision and review of beam and clinical dosimetry;

(-c-) measurement, analysis, and tabulation of beam data;

(-d-) establishment of quality assurance procedures and performance of spot check review; and

(-e-) review of absorbed doses delivered to patients.

(II) The licensed medical physicist described in subclause (I) of this clause shall also be available and responsive to immediate problems or emergencies.

(4) Radiation therapy simulators.

(A) General requirements. In addition to the general requirements in paragraph (1)(B), (C), (F), and (H) of this subsection, radiation therapy simulators shall comply with the following:

(i) Technique chart. A technique chart relevant to the particular radiation machine shall be provided or electronically displayed in the vicinity of the console and used by all operators.

(ii) Operating and safety procedures. Each registrant shall have and implement written operating and safety procedures in accordance with paragraph (1)(G) of this subsection.

(iii) Protective devices. When utilized, protective devices shall meet the following requirements.

(I) Protective devices shall be made of no less than 0.25 mm lead equivalent material.

(II) Protective devices, including aprons, gloves, and shields shall be checked annually for defects, such as holes, cracks, and tears. These checks may be performed by the registrant by visual, tactile, or x-ray imaging. If a defect is found, equipment shall be replaced or removed from service until repaired. A record of this test shall be made and maintained by the registrant in accordance with subsection (l) of this section for inspection by the agency.

(iv) Viewing system. Windows, mirrors, closed circuit television, or an equivalent system shall be provided to permit the operator to continuously observe the patient during irradiation. The operator shall be able to maintain verbal, visual, and aural contact with the patient.

(v) Operator position. The operator's position during the exposure shall be such that the operator's exposure is as low as reasonably achievable (ALARA) and the operator is a minimum of 6 feet from the source of radiation or protected by an apron, gloves, or other shielding having a minimum of 0.25 mm lead equivalent material.

(vi) Holding of tube. In no case shall an individual hold the tube or tube housing assembly supports during any radiographic exposure.

(vii) No individuals other than the patient and the operator(s) shall be in the treatment room during operation of the simulator.

(viii) Film processing.

(I) Films shall be developed in accordance with the time-temperature relationships recommended by the film manufacturer. The specified developer temperature for automatic processing and the time-temperature chart for manual processing shall be posted in the darkroom. If the registrant determines an alternate time-temperature relationship is more appropriate for a specific facility, that time-temperature relationship shall be documented and posted.

(II) Chemicals shall be replaced according to the chemical manufacturer's or supplier's recommendations or at an interval not to exceed 3 months.

(III) Darkroom light leak tests shall be performed and any light leaks corrected at intervals not to exceed 6 months.

(IV) Lighting in the film processing/loading area shall be maintained with the filter, bulb wattage, and distances recommended by the film manufacturer for that film emulsion or with products that provide an equivalent level of protection against fogging.

(V) Corrections or repairs of the light leaks or other deficiencies in subclauses (II), (III), and (IV) of this clause shall be initiated within 72 hours of discovery and completed no longer than 15 days from detection of the deficiency unless a longer time is authorized by the agency. Records of the correction or repairs shall include the date and initials of the individual performing these functions and shall be maintained in accordance with subsection (l) of this section for inspection by the agency.

(VI) Documentation of the items in subclauses (II), (III), and (V) of this clause shall be maintained at the site where performed and shall include the date and initials of the individual completing these items. These records shall be kept in accordance with subsection (l) of this section for inspection by the agency.

(ix) Alternative processing systems. Users of daylight processing systems, laser processors, self-processing film units, or other alternative processing systems shall follow manufacturer's recommendations for image processing. Documentation that the registrant is following manufacturer's recommendations shall include the date and initials of the individual completing the document and shall be maintained at the site where performed in accordance with subsection (l) of this section for inspection by the agency.

(x) Digital imaging acquisition systems. Users of digital imaging acquisition systems shall follow quality assurance/quality control protocol for image processing established by the manufacturer or, if no manufacturer's protocol is available, by the registrant. The registrant shall include the protocol, whether established by the registrant or the manufacturer in its operating and safety procedures. The registrant shall document the frequency at which the quality assurance/quality control protocol is performed. Documentation shall include the date and initials of the individual completing the document and shall be maintained at the site where performed in accordance with subsection (l) of this section for inspection by the agency.

(B) Additional requirements for radiation therapy simulators used in the general radiographic mode of operation.

(i) Beam quality (HVL). The half-value layer of the useful beam for a given x-ray tube potential shall not be less than the values shown in the following Table IV. If it is necessary to determine such half-value layer at an x-ray tube potential that is not listed in Table IV, linear interpolation may be made.
Figure: 25 TAC §289.229(h)(4)(B)(i)

(ii) Technique and exposure indicators.

(I) The technique factors to be used during an exposure shall be indicated before the exposure begins except when automatic exposure controls are used, in which case the technique factors that are set prior to the exposure shall be indicated.

(II) The indicated technique factors shall be accurate to within manufacturer's specifications. If these specifications are not available from the manufacturer, the factors shall be accurate to within ±10% of the indicated setting.

(iii) Beam limitation.

(I) The beam limiting device (collimator) shall restrict the useful beam to the area of clinical interest.

(II) A method shall be provided to visually define the center (cross-hair centering) of the x-ray field to within a 2 mm diameter.

(III) A method shall be provided to accurately indicate the distance to within 2 mm.

(IV) The delineator wires shall be accurate with the indicated setting within 2 mm.

(V) The x-ray field shall be congruent with the light field within 2 mm.

(iv) Timers. Means shall be provided to terminate the exposure at a preset time interval, a preset product of current and time, a preset number of pulses, or a preset radiation exposure to the image receptor. In addition, it shall not be possible to make an exposure when the timer is set to a "zero" or "off" position if either position is provided and a visual and/or audible signal shall indicate when an exposure has been terminated.

(v) AEC. When an AEC is provided, an indication shall be made on the control panel when this mode of operation is selected.

(vi) Timer reproducibility. When all technique factors are held constant, including control panel selections associated with AEC systems, the coefficient of variation of exposure interval for both manual and AEC systems shall not exceed 0.05. This requirement applies to clinically used techniques.

(vii) Exposure reproducibility. When all technique factors are held constant, including control panel selections associated with AEC systems, the coefficient of variation of exposure for both manual and AEC systems shall not exceed 0.05. This requirement applies to clinically used techniques.

(viii) Linearity.
Figure: 25 TAC §289.229(h)(4)(B)(viii) (No change.)

(C) Additional requirements for radiation therapy simulators utilizing fluoroscopic capabilities.

(i) X-ray production in the fluoroscopic mode shall be controlled by a device that requires continuous pressure by the fluoroscopist for the entire time of the exposure (continuous pressure type switch).

(ii) During fluoroscopy and cinefluorography, the kV and the mA shall be continuously indicated at the control panel and/or the fluoroscopist's position.

(iii) The SSD shall not be less than the 20 cm for image-intensified fluoroscopes used for examinations as specified in the registrant's operating and safety procedures. The written operating and safety procedures shall provide precautionary measures to be adhered to during the use of this device. The procedures shall provide information on the means to restore the unit to a 30 cm SSD when the unit is returned to general service.

(iv) Fluoroscopic timers shall meet the following requirements.

(I) Means shall be provided to preset the cumulative on-time of the fluoroscopic x-ray tube. The maximum cumulative time of the timing device shall not exceed 5 minutes without resetting.

(II) A signal audible to the fluoroscopist shall indicate the completion of any preset cumulative on-time. Such signal shall continue to sound while x-rays are produced until the timing device is reset. In lieu of such signal, the timer shall terminate the beam after the preset cumulative on-time is completed.

(v) The exposure foot switch shall be permanently mounted in the control booth to ensure that the operator cannot enter the simulator room while the fluoroscope is activated.

(vi) Simulators shall duplicate the geometric conditions of the radiation therapy equipment plan and therefore measurements regarding geometric conditions shall be performed in accordance with subsection (h)(3)(C)(iii)(I) of this section.

(vii) If the treatment-planning system is different from the treatment-delivery system, the accuracy of electronic transfer of the treatment-delivery parameters to the treatment-delivery unit shall be verified at the treatment location.

(D) Additional requirements for radiation therapy simulators utilizing CT capabilities. CT simulators producing digital images only are exempt from the requirements of this subparagraph and paragraph (h)(4)(A)(i), (viii), and (ix) of this subsection.

(i) Equipment requirements.

(I) Tomographic systems shall meet the following requirements.

(-a-) For any single tomogram system, means shall be provided to permit visual determination of the tomographic plane or a reference plane offset from the tomographic plane.

(-b-) For any multiple tomogram system, means shall be provided to permit visual determination of the tomographic plane or a reference plane offset from the tomographic plane.

(-c-) If a device using a light source is used to satisfy the requirements of item (-a-) or (-b-) of this subclause, the light source shall provide illumination levels sufficient to permit visual determination of the location of the tomographic plane or reference plane under ambient light conditions of up to 500 lux.

(II) The CT x-ray system shall be designed such that the CT conditions of operation to be used during a scan or a scan sequence are indicated prior to the initiation of a scan or a scan sequence. On equipment having all or some of these conditions of operation at fixed values, this requirement may be met by permanent markings. Indication of CT conditions shall be visible from any position from which scan initiation is possible.

(III) The x-ray control and gantry shall provide visual indication whenever x rays are produced and, if applicable, whether the shutter is open or closed.

(IV) Means shall be provided to require operator initiation of each individual scan or series of scans.

(V) All emergency buttons/switches shall be clearly labeled as to their functions.

(VI) Termination of exposure shall be as follows.

(-a-) Means shall be provided to terminate the x-ray exposure automatically by either de-energizing the x-ray source or shuttering the x-ray beam in the event of equipment failure affecting data collection. Such termination shall occur within an interval that limits the total scan time to no more than 110% of its preset value through the use of either a backup timer or devices that monitor equipment function.

(-b-) A signal visible to the operator shall indicate when the x-ray exposure has been terminated through the means required by item (-a-) of this subclause.

(-c-) The operator shall be able to terminate the x-ray exposure at any time during a scan or series of scans under CT x-ray system control, of greater than 0.5 second duration. Termination of the x-ray exposure shall necessitate resetting of the CT conditions of operation prior to initiation of another scan.

(VII) CT x-ray systems containing a gantry manufactured after September 3, 1985, shall meet the following requirements.

(-a-) The total error in the indicated location of the tomographic plane or reference plane shall not exceed 5 mm.

(-b-) If the x-ray production period is less than 0.5 second, the indication of x-ray production shall be actuated for at least 0.5 second. Indicators at or near the gantry shall be discernible from any point external to the patient opening where insertion of any part of the human body into the primary beam is possible.

(-c-) The deviation of indicated scan increment versus actual increment shall not exceed ±1 mm with any mass from 0 to 100 kilograms (kg) resting on the support device. The patient support device shall be incremented from a typical starting position to the maximum incremented distance or 30 cm, whichever is less, and then returned to the starting position. Measurement of actual versus indicated scan increment can be taken anywhere along this travel.

(ii) Facility design requirements.

(I) Provision shall be made for two-way aural communication between the patient and the operator at the control panel.

(II) Windows, mirrors, closed-circuit television, or an equivalent shall be provided to permit continuous observation of the patient during irradiation and shall be so located that the operator can observe the patient from the console.

(-a-) Should the viewing system described in subclause (II) of this clause fail or be inoperative, treatment shall not be performed with the unit until the system is restored.

(-b-) In a facility that has a primary viewing system by electronic means and an alternate viewing system, should both viewing systems described in subclause (II) of this clause fail or be inoperative, treatment shall not be performed with the unit until 1 of the systems is restored.

(iii) Dose measurements of the radiation output of the CT x-ray system.

(I) Dose measurements of the radiation output of the CT x-ray system shall be performed by a licensed medical physicist with a specialty in diagnostic radiological physics. If the CT system is used for simulation purposes only, the following requirements do not apply. If the unit is also used for diagnostic procedures, the measurements shall be performed as follows:

(-a-) within 30 days after installation and thereafter, at intervals not to exceed 14 months;

(-b-) when major maintenance that could affect radiation output is performed; or

(-c-) when a major change in equipment operation (e.g. introduction of a new software package) is accomplished.

(II) Measurements of the radiation output of a CT x-ray system shall be performed with a calibrated dosimetry system. The dosimetry system calibration shall be traceable to a national standard. The calibration interval shall not exceed 24 months.

(III) Records of dose measurements specified in clause (iii) of this subparagraph shall be maintained by the registrant in accordance with subsection (l) of this section for inspection by the agency.

(iv) A maintenance schedule shall be developed in accordance with the manufacturer's United States Department of Health and Human Services maintenance schedule. The schedule shall include, but need not be limited to the following:

(I) dose measurements required by clause (iii)(I) of this subparagraph; and

(II) acquisition of images obtained with phantoms using the same processing mode and CT conditions of operation as are used to perform dose measurements required by clause (iii)(I) of this subparagraph. The registrant shall retain either of the following in accordance with subsection (l) of this section for inspection by the agency:

(-a-) photographic copies of the images obtained from the image display device; or

(-b-) images stored in digital form.

(i) Medical events (misadministrations).

(1) Medical events involving equipment operating at energies below 1 MeV and electronic brachytherapy devices, shall be reported when:

(A) the event involves the wrong individual, or wrong treatment site;

(B) the treatment consists of 3 or fewer fractions and the calculated total administered dose differs from the total prescribed dose by more than 10% of the total prescribed dose; or

(C) the calculated total administered dose differs from the total prescribed dose by more than 20% of the total prescribed dose.

(2) Medical events involving equipment operating with energies of 1 MeV and above shall be reported when:

(A) the event involves the wrong individual, wrong type of radiation, wrong energy, or wrong treatment site;

(B) the treatment consists of 3 or fewer fractions and the calculated total administered dose differs from the total prescribed dose by more than 10% of the total prescribed dose;

(C) the calculated total administered dose differs from the total prescribed dose by more than 20% of the total prescribed dose; or

(D) the combination of external beam radiation therapy and radioactive material therapy causes over-radiation of a patient resulting in physical injury or death.

(j) Reports of medical events (misadministrations).

(1) For a medical event, a registrant shall do the following:

(A) notify the agency by telephone no later than 24 hours after discovery of the event;

(B) notify the referring physician and also notify the patient of the event no later than 24 hours after its discovery, unless the referring physician personally informs the registrant either that he or she will inform the patient or that, based on medical judgement, telling the patient would be harmful. The registrant is not required to notify the patient without first consulting the referring physician. If the referring physician or patient cannot be reached within 24 hours, the registrant shall notify the patient as soon as possible thereafter. The registrant may not delay any appropriate medical care for the patient, including any necessary remedial care as a result of the event, because of any delay in notification;

(C) submit a written report to the agency within 15 days after the discovery of the event. The report shall not include the patient's name or other information that could lead to identification of the patient. The written report shall include the following:

(i) registrant's name and certificate of registration number;

(ii) prescribing physician's name;

(iii) a brief description of the event;

(iv) why the event occurred;

(v) the effect on the patient;

(vi) what improvements are needed to prevent recurrence;

(vii) actions taken to prevent recurrence;

(viii) whether the registrant notified the patient, or the patient's responsible relative or guardian (this person will be subsequently referred to as "the patient"); and if not, why not; and

(ix) if the patient was notified, what information was provided to the patient; and

(D) furnish the following to the patient within 15 days after discovery of the event if the patient was notified:

(i) a copy of the report that was submitted to the agency; or

(ii) a brief description of both the event and the consequences, as they may affect the patient, provided a statement is included that the report submitted to the agency can be obtained from the registrant.

(2) Each registrant shall retain a record of each event in accordance with subsection (l) of this section for inspection by the agency. The record shall contain the following:

(A) the names of all individuals involved (including the prescribing physician, allied health personnel, the patient, and the patient's referring physician);

(B) the patient's identification number;

(C) a brief description of the event;

(D) why it occurred;

(E) the effect on the patient;

(F) what improvements are needed to prevent recurrence; and

(G) the actions taken to prevent recurrence.

(3) Aside from the notification requirement, nothing in subsection (i) of this section and paragraphs (1) and (2) of this subsection shall affect any rights or duties of registrants, and physicians in relation to each other, patients, or the patient's responsible relatives or guardians.

(k) Additional requirements for electronic brachytherapy devices.

(1) Technical requirements for electronic brachytherapy devices.

(A) The timer shall:

(i) have a display provided at the treatment control panel and a pre-set time selector;

(ii) activate with the production of radiation and retain its reading after irradiation is interrupted. After irradiation is terminated and before irradiation can be reinitiated, it shall be necessary to reset the elapsed time indicator to zero;

(iii) terminate irradiation when a pre-selected time has elapsed, if any dose monitoring system present has not previously terminated irradiation;

(iv) permit selection of exposure times as short as 1 second;

(v) not permit an exposure if set at zero; and

(vi) be accurate to within 1.0% of the selected value or 1 second, whichever is greater.

(B) The control panel, in addition to the displays required in subparagraph (A) of this paragraph, shall have the following:

(i) an indication of whether electrical power is available at the control panel and if activation of the x-ray tube is possible;

(ii) means for indicating x-rays are being produced;

(iii) means for indicating x-ray tube potential and current; and

(iv) means for terminating an exposure at any time.

(C) All emergency buttons/switches shall be clearly labeled as to their functions.

(2) Surveys, calibrations, and spot checks.

(A) Surveys shall be performed as follows.

(i) All facilities having electronic brachytherapy device(s) shall have an initial survey made by a licensed medical physicist, with a specialty in therapeutic radiological physics, who shall provide a written report of the survey to the registrant. Additional surveys shall be done as follows:

(I) when making any change in the portable shielding;

(II) when making any change in the location where the electronic brachytherapy device is used within the treatment room; and

(III) when relocating the electronic therapy device.

(ii) The registrant shall maintain a copy of the initial survey report and all subsequent survey reports in accordance with subsection (l) of this section for inspection by the agency.

(iii) The survey report shall indicate all instances where the installation is in violation of applicable requirements of this chapter.

(B) Calibrations shall be performed as follows.

(i) Calibration procedures shall be in writing, or documented in an electronic reporting system, and shall have been developed by a licensed medical physicist with a specialty in therapeutic radiological physics.

(ii) The registrant shall make calibration measurements required by this section in accordance with any current recommendations from a recognized, national professional association (such as the American Association of Physicists in Medicine Report Number 152) for electronic brachytherapy, when available. Equivalent alternative methods are acceptable. In the absence of a protocol by a national professional association, published protocol included in the device manufacturer operator's manual should be followed.

(iii) The calibration of the electronic brachytherapy device shall be performed after change of the x-ray tube or replacement of components that could cause a change in the radiation output. The calibrations shall be such that the dose at a reference point in water or plastic phantom can be calculated to within an uncertainty of 5.0%.

(iv) The calibration of the radiation output of the electronic brachytherapy device shall be performed by a licensed medical physicist with a specialty in therapeutic radiological physics who is physically present at the facility during such calibration.

(v) The calibration of the therapeutic electronic brachytherapy device shall include verification that the electronic brachytherapy device is operating in compliance with the design specifications.

(vi) Calibration of the radiation output of the electronic brachytherapy device shall be performed with a calibrated dosimetry system. The dosimetry calibration shall be traceable to a national standard. The calibration interval shall not exceed 24 months.

(vii) Records of calibration measurements shall be maintained by the registrant in accordance with subsection (l) of this section for inspection by the agency.

(viii) A copy of the latest calibrated absorbed dose rate measured on the electronic brachytherapy device shall be available at a designated area within the therapy facility housing the electronic brachytherapy device.

(C) Spot check procedures.

(i) Spot check procedures shall be in writing, or documented in an electronic reporting system, and shall have been developed by a licensed medical physicist with a specialty in therapeutic radiological physics.

(ii) If a licensed medical physicist does not perform the spot check measurements, the results of the spot check measurements shall be reviewed by a licensed medical physicist with a specialty in therapeutic radiological physics within 2 treatment days and a record made of the review.

(iii) The written spot check procedures shall specify the operating instructions that shall be carried out whenever a parame-

ter exceeds an acceptable tolerance as established by the licensed medical physicist.

(iv) The certified physician or licensed medical physicist shall prevent the clinical use of a malfunctioning device until the malfunction identified in the spot check has been evaluated and corrected or, if necessary, the equipment repaired.

(v) Records of the written spot checks and any necessary corrective actions shall be maintained by the registrant in accordance with subsection (l) of this section for inspection by the agency. A copy of the most recent spot check shall be available at a designated area within the therapy facility housing that therapeutic radiation system.

(vi) Spot checks shall be obtained using a dosimetry system satisfying the requirements of subparagraph (B)(vi) of this paragraph.

(l) Records for agency inspection. The registrant shall maintain the following records at the time intervals specified, for inspection by the agency. The records may be maintained in electronic format.
Figure: 25 TAC §289.229(l)

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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Lisa Hernandez
General Counsel
Department of State Health Services
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TITLE 28. INSURANCE

PART 2. TEXAS DEPARTMENT OF INSURANCE, DIVISION OF WORKERS' COMPENSATION

CHAPTER 126. GENERAL PROVISIONS APPLICABLE TO ALL BENEFITS

28 TAC §126.15, §126.16

The Commissioner of Workers' Compensation (Commissioner), Texas Department of Insurance, Division of Workers' Compensation (Division) adopts new §126.15 and §126.16 of this title (relating to Procedures for Resolution of Underpayments of Income Benefits, and Procedures for Recouping Overpayments of Income Benefits).

These rules are necessary to implement statutory provisions of House Bill 2089, enacted by the 82nd Legislature, Regular Session, effective September 1, 2011 (HB 2089).

The Division adopts §126.15 and §126.16 with changes to the proposed text published in the October 28, 2011, issue of the *Texas Register* (36 TexReg 7264). The changes, which are more fully discussed below, are in response to written comment provided on the rules as proposed. The changes, however, do not materially alter issues raised in the proposal, introduce new subject matter, or affect persons other than those previously on notice.

In accordance with Government Code §2001.033, the Division's reasoned justification for the rules is set out in this order, which includes the preamble. The preamble contains a summary of the factual basis for the rules, a summary of the comments received from interested parties, the names of 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 Division held two informal work group meetings on September 1, 2011 and September 12, 2011 for the purpose of formulating rule language for these rules required by HB 2089. These meetings were open to the public, and workers' compensation system participants at these meetings assisted the Division in developing the rule language in the proposal. Subsequently, the Division published an informal draft of the rules on the Division's website from September 21, 2011 until October 5, 2011. The Division received eight informal comments. The Division made several changes to the proposal as a result of the informal comments.

The Division also prepared and posted on the Division's website an informally proposed sample notice, *Notice of Underpayment of Income Benefits,* injured employees may use under §126.15(c) when providing written notice to an insurance carrier of an underpayment in income benefits. The Division accepted informal comments until November 28, 2011.

The sample notice is not mandatory and injured employees are free to use their own notices that meet the requirements of §126.15(c).

After the publication of the proposal in the *Texas Register,* the Commissioner conducted a public hearing on the proposed new rules on November 14, 2011. Two individuals provided public testimony at this hearing. The public comment period for the proposed new rules ended on November 28, 2011. The Division received seven written public comments. Several changes were made to the rule language as proposed as a result of the comments. One nonsubstantive clarifying change was made in §125.15(g) to change "denies" to "disagrees" for consistency in terminology.

The Division is adopting elsewhere in this issue of the *Texas Register* amendments to §128.1 of this title (relating to Average Weekly Wage: General Provisions). Those amendments are also necessary to implement provisions of HB 2089. Section 128.1 of this title as a whole relates to the calculation of average weekly wage. Recoupment of overpayments of income benefits and correction of underpayments of income benefits for any reason, including a miscalculation of the average weekly wage, are best addressed in independent rules in order to avoid confusion by system participants.

Adopted §126.15 and §126.16 are necessary to implement certain amendments in House Bill 2089, enacted by the 82nd Legislature, Regular Session, effective September 1, 2011, that affect underpayment and overpayment of income benefits.

HB 2089 enacted Labor Code §408.0815, which relates to the resolution of overpayment or underpayment of income benefits under the Texas workers' compensation program. Labor Code §408.0815(a) requires the Commissioner by rule to establish a

procedure by which an insurance carrier (1) may recoup an overpayment of income benefits from future income benefit payments that are not reimbursable under Labor Code §410.209; and (2) shall pay an underpayment of income benefits, including interest on accrued but unpaid benefits.

Labor Code §408.0815(b) requires the procedures adopted pursuant to subsection (a) to include: (1) a process by which an injured employee may notify the insurance carrier of an underpayment; (2) the time frame and methodology by which an insurance carrier shall pay to an injured employee an underpayment; (3) a process by which an insurance carrier shall notify an injured employee of an overpayment of income benefits; (4) the time frame and methodology by which an insurance carrier may recoup an overpayment through the reduction of a future income benefit payment; and (5) a method for coordinating overpayments that may be recouped from future income benefits and reimbursements described by Labor Code §410.209.

Labor Code §408.0815(c) provides that the procedure for recouping overpayments under subsection (a)(1) must take into consideration the cause of the overpayment and minimize the financial hardship to the injured employee. However, this does not require continuation of an overpayment of income benefits due to a miscalculation of an injured employee's average weekly wage. Under §128.1 of this title, an insurance carrier shall make adjustments in the injured employee's average weekly wage and begin payment based on the adjusted average weekly wage not later than the first payment due at least seven days following the date the carrier received new average weekly wage information for the injured employee.

Previous Division rule §128.1 of this title established procedures for recouping overpayments of income benefits in certain cases. Previous §128.1(e) and (f) of this title permitted insurance carriers to recoup an overpayment of income benefits when the overpayment resulted from a miscalculation of the injured employee's average weekly wage. The procedures in §128.1(e) and (f) of this title did not provide for recoupment of an overpayment made for reasons other than average weekly wage miscalculations. These adopted rules are based on, expand on, and supersede the procedures previously established.

§126.15. Procedures for Resolution of Underpayments of Income Benefits

Adopted §126.15 establishes the procedure by which an insurance carrier shall pay an underpayment of income benefits, including interest on accrued but unpaid benefits.

Adopted §126.15(a) clarifies that this procedure will apply only to insurance carrier underpayment of income benefits. It does not apply to insurance carrier underpayment of death, burial, or medical benefits. This subsection is consistent with the definition of "income benefit" as that term is defined in Labor Code §401.011. This subsection also states that this section does not apply to redesignation of income benefits. This provision was added in response to comment on §126.16.

Adopted §126.15(b) provides that an insurance carrier shall pay an underpayment plus interest to the injured employee within seven days of its determination if the insurance carrier determines on its own that an underpayment of income benefits has occurred. This provision is necessary in order to establish the timeframe and methodology by which an insurance carrier will pay an underpayment in cases where an insurance carrier discovers that it has underpaid income benefits.

Adopted §126.15(c) provides that, if an injured employee determines that the injured employee has received less than the correct amount owed in income benefits, and the injured employee wishes to resolve the underpayment under this section, the injured employee must notify the insurance carrier in writing to request the additional amount. The notice must include an explanation and information that supports the injured employee's determination of the underpayment. This subsection is necessary in order to establish a procedure by which an injured employee may notify the insurance carrier of an underpayment in income benefits as required by Labor Code §408.0815(b)(1). In response to a comment, language was added to clarify that the written notice requirement only applies to this section.

As previously stated, the Division has prepared a sample notice that injured employees may use to notify insurance carriers of an underpayment.

Adopted §126.15(d) provides that, if the insurance carrier agrees with the injured employee that there has been an underpayment of income benefits, the insurance carrier shall pay the full amount of the underpayment with interest on accrued but unpaid benefits within seven days of receipt of the notice from the injured employee. This provision is necessary in order to establish the time frame and methodology the insurance carrier must follow when an injured employee notifies the insurance carrier of the underpayment and the insurance carrier agrees there has been an underpayment.

Adopted §126.15(e) provides for dispute resolution by specifying that, if the insurance carrier disagrees that there has been an underpayment of income benefits, the insurance carrier must, within seven days of receipt of the notice from the injured employee, provide the injured employee with written notice of its determination. The insurance carrier notice must include the reasons for the insurance carrier's determination, and a statement that the injured employee may request dispute resolution through the dispute resolution processes outlined in Chapters 140 - 144 and 147 of this title (relating to Dispute Resolution), including expedited dispute resolution. This subsection is necessary in order to ensure that the injured employee is promptly notified by the insurance carrier when the insurance carrier disagrees that there has been an underpayment of income benefits. It is also necessary to ensure that the injured employee is informed of his or her right to seek dispute resolution.

Adopted §126.15(f) sets forth that the insurance carrier must provide notice to the injured employee and the Division of any change in the payment of an injured employee's income benefits in accordance with the requirements of §124.2 of this title (relating to Carrier Reporting and Notification Requirements). This subsection is necessary in order to ensure that both the injured employee and the Division have up-to-date and accurate information regarding the amount of income benefits received by the injured employee.

Adopted §126.15(g) provides for dispute resolution by specifying that, if an insurance carrier denies that there has been an underpayment of income benefits, the injured employee may request dispute resolution. This subsection is necessary in order to clarify that a dispute over whether there has been an underpayment of income benefits may be resolved in the Division's dispute resolution process.

Adopted §126.15(h) provides that this rule does not affect the Division's authority to identify and take action on underpayments on its own motion. This provision is necessary in order to clarify

that this rule will not prevent the Division from exercising any authority provided by the Act or Division rules when it identifies or otherwise becomes aware of any underpayment of income benefits.

§126.16. Procedures for Recouping Overpayments of Income Benefits

Adopted §126.16 establishes the procedure by which an insurance carrier may recoup an overpayment of income benefits from future income benefits payments. Recoupment under this section is separate and distinct from reimbursement from the Subsequent Injury Fund (SIF). Nothing in this section creates an entitlement to seek reimbursement from the SIF. Reimbursement from the SIF is governed by Labor Code §§403.006, 408.0041, 410.209 and applicable Division rules.

Adopted §126.16(a) clarifies that this section applies only to insurance carrier overpayment of income benefits. It does not apply to insurance carrier overpayment of death, burial, or medical benefits. This provision is consistent with the definition of "income benefit" in Labor Code §401.011(25). Subsection (a) also provides that this section will not apply to redesignation of income benefits. Provisions regarding redesignation of income benefits were originally proposed in a subsection (i). However, in response to comment, subsection (i) was removed and the provisions regarding redesignation proposed in that subsection were moved to subsection (a). Those provisions were also changed in response to comment. Finally, subsection (a) also provides that this section will not apply to recovery of fraudulently denied or obtained benefits under Labor Code §415.008. This provision was also added in response to comment.

Adopted §126.16(b) establishes the procedure by which an insurance carrier may recoup overpayments from future income benefit payments. Adopted subsection (b)(1) requires an insurance carrier to provide the injured employee with written notice when it will begin recouping overpayment of income benefits. Adopted subsection (b)(1) also specifies that the notice must be in plain language and in English or Spanish, as appropriate. Subsection (b)(1) also specifies what information must be included in this notice to the injured employee, and provides that the insurance carrier may not begin recoupment of the overpayment earlier than the second income benefit payment made after the written notice has been sent to the injured employee. Adopted subsection (b)(1) is necessary in order to establish a procedure by which the insurance carrier will notify the injured employee of an overpayment in income benefits and the time frame and methodology by which an insurance carrier may recoup an overpayment of income benefits.

Adopted §126.16(b)(2) and (3) sets out what percentage of future income benefits payable to the injured employee the insurance carrier may withhold in order to recoup an overpayment of income benefits. If the injured employee's income benefits are not concurrently being reduced to pay approved attorney's fees or to recoup a Division approved advance, the insurance carrier may recoup the overpayment in an amount not to exceed 25% of the income benefit payment due to the injured employee. If the injured employee's income benefits are concurrently being reduced to pay approved attorney's fees or to recoup a Division approved advance, the insurance carrier may recoup the overpayment in an amount not to exceed 10% of the income benefit payment due to the injured employee. These provisions are necessary in order to establish the methodology by which an insurance carrier may recoup an overpayment of income benefits from future income benefits.

Adopted §126.16(c) provides that if the insurance carrier wishes to recoup an overpayment in an amount greater than the 10% or 25% of income benefits permitted by subsection (b)(2) and (3), the insurance carrier must attempt to enter into a written agreement with the injured employee and, if unable to do so, may request dispute resolution. Adopted subsection (c) also provides that if the injured employee wishes to provide for recoupment of an overpayment in an amount less than the percentage chosen by the insurance carrier, the injured employee must attempt to enter into a written agreement with the insurance carrier and, if unable to do so, request dispute resolution. These provisions are necessary because they establish a methodology that allows insurance carriers and injured employees to agree upon the recoupment rate the insurance carrier may use for recoupment.

Adopted §126.16(d) provides for dispute resolution when the insurance carrier and injured employee cannot agree on a recoupment rate. This adopted subsection provides that in determining whether to approve an increase or decrease in the recoupment rate, the Division must consider the cause of the overpayment and minimize the financial hardship that may reasonably be created for the injured employee. This provision is necessary to provide an opportunity to consider the cause of the overpayment and the financial hardship to the injured employee when determining the recoupment rate the insurance carrier may use to recoup overpayments.

Adopted §126.16(e) provides that the insurance carrier must provide notice to the injured employee and the Division of any change in the payment of an injured employee's income benefits. The insurance carrier's notice to the injured employee also must identify the amount that was overpaid. This subsection is necessary in order to ensure that both the injured employee and the Division has up-to-date and accurate information regarding the amount of income benefits received by the injured employee.

Adopted §126.16(f) provides that this section does not create an entitlement for an insurance carrier to seek reimbursement from the SIF except as provided by Labor Code §§403.006, 408.0041, 410.209, and applicable Division rules. This subsection is necessary in order to clarify that this rule does not govern reimbursements from the SIF. Reimbursement by the SIF is governed by Labor Code §§403.006, 408.0041, 410.209, and applicable Division rules.

Adopted §126.16(g) states that, if an injured employee does not agree that the injured employee has received an overpayment of income benefits, the injured employee may request dispute resolution. This subsection is necessary in order to clarify that a dispute over whether there has been an overpayment of income benefits may be resolved in the Division's dispute resolution process.

Adopted §126.16(h) provides that this section does not affect the Division's authority to identify and take action on overpayments on its own motion. This provision is necessary in order to clarify that this rule will not prevent the Division from exercising any authority provided by the Act or Division rules when it identifies or otherwise becomes aware of any overpayment of income benefits.

SUMMARY OF COMMENTS AND AGENCY RESPONSES

COMMENT: Several commenters state their support for these rules. A commenter states that the proposed rules track the legislative intent of HB 2089 and reflect the work of Division staff and system participants who met twice to negotiate the rules. The commenter voiced appreciation for the work of system partici-

pants and Division staff in the modified rulemaking negotiations. A commenter states the formal proposal is within the Division's rulemaking authority and appears to provide for reasonable implementation of HB 2089. A commenter states it supports the Division's proposed approach to both the underpayment and overpayment process as generally consistent with the intent of HB 2089. A commenter states it generally supports the proposed rules. A commenter states that the proposed rules will implement the intent of HB 2089 and opines that they are fair and a testament and a tribute to how the system works.

AGENCY RESPONSE: The Division appreciates the supportive comments.

COMMENT: A commenter states that the issue of the procedure outlining how to take into consideration the cause and financial hardship was discussed "quite a bit" by the work group and was "thoroughly hashed out in both work group meetings." The commenter explains that the procedure has been in place for about a decade and the 10 and the 25 percent already take into account the financial hardship and "no one has had any complaints." Furthermore, the commenter clarifies that if a carrier seeks to recoup anything above either one of those levels depending on what's involved in the claim, then there is Division involvement through dispute resolution level.

AGENCY RESPONSE: The Division agrees with commenter. The percentages have been in place under §128.1 of this title (relating to Average Weekly Wage: General Provisions) since 2002. Section 126.16(b) outlines the process and amounts for standard recoupment if the carrier determines there has been an overpayment and seeks recoupment. Section 126.16(c) provides that if the insurance carrier wishes to recoup an overpayment in an amount greater than the 10 or 25 percent of income benefits permitted by §126.16(b), the insurance carrier must attempt to enter into a written agreement with the injured employee and, if unable to do so, may request dispute resolution outlined in Chapters 140 - 144 and 147 of this title (relating to Dispute Resolution).

§126.15

COMMENT: A commenter provides a hypothetical situation in which the insurance carrier denies disability. The injured employee pursues dispute resolution. The Division issues a Contested Case Hearing Decision and Order in favor of the injured employee. The Decision and Order is not appealed and becomes final. The insurance carrier refuses to pay income benefits as required. The injured employee seeks judicial action under Labor Code §410.208 to enforce the order of the Division. The insurance carrier then moves to abate the proceeding citing §126.15 because the injured employee has not exhausted his administrative remedies. The commenter questions whether the employee must go back through the administrative process under §126.15 before proceeding forward with the §410.208 claim. The commenter suggests adding the following to §126.15(h): "This section does not affect the claimant's ability to pursue judicial remedies for an underpayment pursuant to Texas Labor Code §410.208."

AGENCY RESPONSE: The Division agrees to provide additional clarification. It was not the intent of the Division in proposed new §126.15 to require an injured employee to utilize the procedures in that rule prior to pursuing a remedy authorized by Labor Code §410.208 as described by commenter, or any other remedy available under the Texas Workers' Compensation Act or other Division rules. The Division therefore has modified the language in this rule to clarify the Division's intent. Specifically, the Division modified the first sentence in §126.15(c) to state "if an injured employee determines that the injured employee has received less than the correct amount owed in income benefits *and the injured employee wishes to resolve the underpayment under this section,* the injured employee must notify the insurance carrier in writing to request the additional amount." (italics added). However, if a party does not comply with a Division order, the opposing party should notify the Division immediately so that it may investigate possible enforcement action for noncompliance.

COMMENT: A commenter agrees with the insurance carrier having seven days from receipt of information or determination of an underpayment to make the additional benefits payment. The commenter stated that they appreciate the Division clarifying a previously undefined payment deadline in these situations.

AGENCY RESPONSE: The Division appreciates the supportive comment.

§126.15(a) and §126.16(a)

COMMENT: A commenter states that these rules should apply to death benefits as well as income benefits and that a procedure for correcting errors in payments of death benefits should be added to these rules.

AGENCY RESPONSE: The Division disagrees and declines to make the change. First, House Bill 2089 and the supporting bill analysis speaks only about income benefits. Death benefits are excluded in the definition of income benefits in Labor Code §401.011(25). Second, the Division held two informal work group meetings with system participants representing injured employees and insurance carriers to address House Bill 2089 and develop rule language and procedures. During the work group meeting of September 1, 2011, the moderator raised the issue of applicability and whether the procedures for resolution of underpayment and procedures for recouping overpayments would only apply to income benefits and not apply to death, burial, or medical benefits. There was consensus that the procedures would only apply to income benefits.

§126.16(b)

COMMENT: A commenter states that this section should not apply to Labor Code §415.008(c), relating to Fraudulently Obtaining or Denying Benefits; Administrative Violation. The commenter suggested the following language be added to the rule: "This section does not apply to repayments pursuant to §415.008(c) of the Texas Labor Code."

AGENCY RESPONSE: The Division agrees and has added language to §126.16(a) providing that this section "does not apply to repayments pursuant to Labor Code §415.008."

§126.16(b)

COMMENT: A commenter states that this section should begin with the clause: "Except as provided in subsection (i)...".

AGENCY RESPONSE: The Division agrees it is necessary to clarify that the text in proposed subsection (i) applies to this section. The Division has moved the text proposed in subsection (i) to subsection (a) which governs the applicability of this rule. Placement of this provision in subsection (a) will provide better clarity as to the applicability of this rule.

§126.16(b)(1)

COMMENT: A commenter states that some benefits are paid monthly. Waiting until the 2nd benefit check to begin recoupment requires the carrier to wait two months to start recoupment. The commenter suggests that §126.16(b)(1) be changed to allow recoupment to begin 10 days after the written notice of recoupment has been sent to the injured employee, rather than the second income benefit payment made after the notice has been sent.

AGENCY RESPONSE: The Division disagrees and declines to make the change. The work group that participated in the development of these rules agreed to begin recoupment on the second income benefit payment made after the notice was sent. The suggested recommendation might benefit an insurance carrier when they are making payments monthly, by possibly allowing the insurance carrier to begin recoupment on the first benefit payment after the notice was sent to the injured employee. But it may negatively impact an insurance carrier's ability to begin recoupment of weekly income benefits. In these situations, the suggested recommendation could possibly postpone the beginning of the recoupment process until the third weekly income benefit payment. Additionally, the Division also declines to make the change for income benefits paid monthly because doing so would create different timeframes for different benefit types which would be administratively burdensome.

§126.16(b)(2) and (3)

COMMENT: A commenter suggests that the 10% recoupment rate in §126.16(b)(3) and the 25% recoupment rate in §126.16(b)(2) should only apply if the injured employee caused the overpayment. If the overpayment was caused by the insurance carrier, the commenter suggests a recoupment rate of 5% if benefits are concurrently being reduced to pay attorney fees or an advance and a recoupment rate of 10% if benefits are not being concurrently reduced.

AGENCY RESPONSE: The Division disagrees and declines to make the change. The 10% and 25% recoupment rates already take into account minimization of financial hardship. The rates have been in place by rule since 2002 and have not been problematic. Cause must be addressed in a case specific review and has been taken into consideration in two ways. First, the rule allows flexibility for agreements between the parties and second, the rule allows for variation in the percentage of recoupment through the dispute resolution process.

§126.16(d)

COMMENT: A commenter states that language should be added to §126.16(d) as follows: "Regardless of the cause for the overpayment, the division may not eliminate the carrier's right to recoup the overpayments against future indemnity benefits. The Division may provide that recoupment against income replacement benefits are at a different rate than against impairment income benefits (IIBs). The injured employees' knowledge of the overpayment and any actions to minimize the overpayment shall be considered."

AGENCY RESPONSE: The Division disagrees and declines to make the change. The suggested language would serve to restrict the hearing officer's ability to fully consider the cause of the overpayment. Cause is best addressed in case specific reviews. There may be instances where the hearing officer may determine there should be no recoupment from future income benefits allowed, just as there may be instances where the hearing officer may allow a 100% reduction of income benefits.

§126.16(d)

COMMENT: A commenter suggests specifying appropriate factors that can be considered when considering a request to increase or decrease the recoupment rate, such as income benefit type, duration of expected future benefits, etc.

AGENCY RESPONSE: The Division disagrees. While the suggested factors may be appropriate in certain cases, it is not possible to enumerate all the possible factors that could be appropriate in a given case. The determination of which factors are appropriate is best made by a hearing officer on a case-by-case basis.

§126.16(i)

COMMENT: Commenter states that this rule properly recognizes that temporary income benefits (TIBs) previously paid after the date of maximum medical improvement (MMI) can be re-characterized as impairment income benefits (IIBs) consistent with APD 110692 and should preclude frivolous objections to that as has been seen in the past. However, the commenter states that by limiting this to the attainment of MMI, the rule does not contemplate the situation where the date of MMI is rescinded. The commenter states that under such circumstances instead of re-designating the IIBs as TIBs, the carrier may simply pay TIBs back to the original date of MMI with the intention of taking credit for the IIBs paid once another IR is issued. This frequently occurs when a claimant is not disabled and therefore not entitled to TIBs during the period where he was paid IIBs. As such, and given that IIBs are not income replacement benefits, the carrier should be allowed to take a week for week credit of IIBs against IIBs. The commenter requests that the following text be added to §126.16: "Nothing in this section applies to the redesignation of accrued and paid income benefits upon receipt of certification that the injured employee has reached maximum medical improvement. Upon notification that an injured employee is not at maximum medical improvement after a previous certification, an insurance carrier may either elect to redesignate any payment of impairment income benefits (IIBs) as accrued temporary income benefits (TIBs) or it may elect to issue payment for accrued TIBs and credit any previously paid IIBs against future IIBs due to the injured employee."

AGENCY RESPONSE: The Division agrees with commenter in part and disagrees in part. First, the Division agrees that the language as proposed in §126.16(i) is too limited. There may be other situations such as a rescinded date of MMI as cited by the commenter where there could be a redesignation of income benefits from one income benefit type to another. Thus, the Division has modified the language as proposed in §126.16(i) to state that this section "does not apply to redesignation of income benefits." The Division has clarified this provision in §126.16(a)(2) and has also added this provision to §126.15(a).

Second, the Division disagrees with the commenter's suggested text that states, "upon notification that an injured employee is not at maximum medical improvement after a previous certification, an insurance carrier may either elect to redesignate any payment of impairment income benefits (IIBs) as accrued temporary income benefits (TIBs) or it may elect to issue payment for accrued TIBs and credit any previously paid IIBs against future IIBs due to the injured employee." Adopted §126.16 is intended to create procedures to recoup overpayments of income benefits from future income benefits. If, in the scenario presented by the commenter, there is an overpayment of income benefits, then this adopted rule would govern the recoupment of the overpayment. However, if there is a redesignation of income benefits,

then that redesignation is not affected by these adopted rules and is outside the scope of these adopted rules.

COMMENT: A commenter states that situations arise where there is both an overpayment and an underpayment on the same claim. For example, a carrier may have been paying the wrong TIBs rate until discontinuance due to an assertion of a lack of disability or attainment of maximum medical improvement. Subsequently, however, it is determined that the claimant remained disabled or was not at maximum medical improvement. Thus, a lump sum is due. Under such circumstances any lump sum of past benefits should be offset by any overpayment of past benefits. The commenter suggests additional text to §126.15 to provide that upon a determination that there has been an underpayment of income benefits in accordance with §126.15 of this title, the insurance carrier may offset any accrued but unpaid benefits by any overpayment of benefits. The commenter suggests additional text to §126.16 to provide that upon a determination that there has been an overpayment of income benefits in accordance with §126.16 of this title, the insurance carrier may offset any accrued but unpaid benefits by any overpayment of benefits.

RESPONSE: The Division disagrees that the suggested language is necessary and declines to make the change. When applying the plain text as adopted, the existence of an overpayment or underpayment will be determined based on the amount owed and the amount paid, in the aggregate. If there is an underpayment of income benefits, §126.15 will provide direction. If there is ultimately an overpayment of income benefits, §126.16 will provide direction.

THOSE COMMENTING FOR AND AGAINST THE PROPOSAL

For: American Insurance Association, Burns Anderson Jury & Brenner, LLP, Insurance Council of Texas and Property Casualty Insurers Association of America.

For, with changes: One individual, Office of Injured Employee Counsel, State Office of Risk Management, Texas Mutual Insurance Company and Flahive, Ogden & Latson.

Against: None.

Neither for or Against: None.

The new rules are adopted under the Labor Code §§408.081, 408.0815, 402.00116, 402.00111, 402.061, and 402.00128. Section 408.081 states that an employee is entitled to timely and accurate income benefits as provided by Labor Code Chapter 408. Section 408.0815 directs the Commissioner to establish procedures by rule by which an insurance carrier may recoup an overpayment of income benefits from future income benefit payments and shall pay an underpayment of income benefits, including interest on accrued but unpaid benefits. Section 402.00116 grants the powers and duties of chief executive and administrative officer to the Commissioner and the authority to enforce the Labor Code, Title 5, and other laws applicable to the Division or Commissioner. Section 402.00111 provides that the Commissioner shall exercise all executive authority, including rulemaking authority, under the Labor Code, Title 5. Section 402.061 provides the Commissioner the authority to adopt rules as necessary to implement and enforce the Texas Workers' Compensation Act. Section 402.00128 vests general operational powers to the Commissioner including the authority to delegate, and assess and enforce penalties as authorized by the Labor Code, Title 5.

§126.15. Procedures for Resolution of Underpayments of Income Benefits.

(a) This section applies to insurance carrier underpayment of income benefits. It does not apply to:

(1) insurance carrier underpayment of death, burial, or medical benefits; or

(2) redesignation of income benefits.

(b) If the insurance carrier determines on its own that an underpayment of income benefits has occurred, the insurance carrier shall pay the full amount of the underpayment with interest on accrued but unpaid benefits in accordance with Chapter 408, Labor Code, applicable division rules related to payment of benefits, §102.10 of this title (relating to Interest, General), and §126.12 of this title (relating to Payment of Interest on Accrued but Unpaid Income Benefits) within seven days of the determination.

(c) If an injured employee determines that the injured employee has received less than the correct amount owed in income benefits and the injured employee wishes to resolve the underpayment under this section, the injured employee must notify the insurance carrier in writing to request the additional amount. The notice must include an explanation and information that supports the injured employee's determination of the underpayment.

(d) If the insurance carrier agrees with the injured employee that there has been an underpayment of income benefits, the insurance carrier shall pay the full amount of the underpayment with interest on accrued but unpaid benefits in accordance with Chapter 408, Labor Code, applicable division rules related to payment of benefits, §102.10 of this title, and §126.12 of this title within seven days of receipt of the notice from the injured employee.

(e) If the insurance carrier disagrees that there has been an underpayment of income benefits, the insurance carrier must, within seven days of receipt of the notice from the injured employee, provide the injured employee with written notice of its determination. The insurance carrier notice must be in plain language, in English or Spanish, as appropriate, and include the reasons for the insurance carrier's determination, and a statement that the injured employee may request dispute resolution through the dispute resolution processes outlined in Chapters 140 - 144 and 147 of this title (relating to Dispute Resolution), including expedited dispute resolution.

(f) The insurance carrier must provide notice to the injured employee and the division of any change in the payment of an injured employee's income benefits in accordance with the requirements of §124.2 of this title (relating to Carrier Reporting and Notification Requirements).

(g) If an insurance carrier disagrees that there has been an underpayment of income benefits, the injured employee may request dispute resolution through the dispute resolution processes outlined in Chapters 140 - 144 and 147 of this title, including expedited dispute resolution.

(h) This section does not affect the division's authority to identify and take action on underpayments on its own motion.

§126.16. Procedures for Recouping Overpayments of Income Benefits.

(a) This section applies to insurance carrier overpayment of income benefits. It does not apply to:

(1) insurance carrier overpayment of death, burial, or medical benefits;

(2) redesignation of income benefits; or

(3) repayments pursuant to Labor Code §415.008.

(b) If an insurance carrier determines that it has overpaid income benefits to an injured employee, the insurance carrier may recoup the overpayment from future income benefit payments as follows:

(1) The insurance carrier must notify the injured employee in writing that it will begin withholding benefits to recoup an overpayment. The notice must be in plain language and in English or Spanish, as appropriate. The notice must also include the reason for the overpayment; the amount of the overpayment to be recouped from future income benefit payments; the date recoupment will begin; and relevant documentation that supports the insurance carrier's determination of an overpayment, such as a wage statement or a supplemental report of injury. The notice must also advise the injured employee that if the injured employee disagrees that there has been an overpayment, the injured employee may request dispute resolution through the dispute resolution processes outlined in Chapters 140 - 144 and 147 of this title (relating to Dispute Resolution), including expedited dispute resolution. The insurance carrier may not begin recoupment of the overpayment earlier than the second income benefit payment made after the written notice has been sent to the injured employee.

(2) If the injured employee's income benefits are not concurrently being reduced to pay approved attorney's fees or to recoup a division approved advance, the insurance carrier may recoup the overpayment under this subsection in an amount not to exceed 25% of the income benefit payment to which the injured employee is entitled, except as provided by subsection (c) of this section.

(3) If the injured employee's income benefits are concurrently being reduced to pay approved attorney's fees or to recoup a division approved advance, the insurance carrier may recoup the overpayment under this subsection in an amount not to exceed 10% of the income benefit payment to which the injured employee is entitled, except as provided by subsection (c) of this section.

(c) If the insurance carrier wishes to recoup the overpayment in an amount greater than that permitted by subsection (b) of this section, the insurance carrier must attempt to enter into a written agreement with the injured employee and, if unable to do so, request dispute resolution through the dispute resolution processes outlined in Chapters 140 - 144 and 147 of this title. If the injured employee wishes to provide for recoupment of the overpayment in an amount less than the percentage chosen by the insurance carrier, the injured employee must attempt to enter into a written agreement with the insurance carrier and, if unable to do so, request dispute resolution through the dispute resolution processes outlined in Chapters 140 - 144 and 147 of this title.

(d) In determining whether to approve an increase or decrease in the recoupment rate, the division must consider the cause of the overpayment and minimize the financial hardship that may reasonably be created for the injured employee.

(e) The insurance carrier must provide notice to the injured employee and the division of any change in the payment of an injured employee's income benefits in accordance with the requirements of §124.2 of this title (relating to Carrier Reporting and Notification Requirements). The insurance carrier's notice to the injured employee must identify the amount that was overpaid.

(f) This section does not create an entitlement for an insurance carrier to seek reimbursement from the Subsequent Injury Fund except as provided by Labor Code §§403.006, 408.0041, 410.209, and applicable division rules.

(g) If an injured employee does not agree that the injured employee has received an overpayment of income benefits, the injured employee may request dispute resolution through the dispute resolution processes outlined in Chapters 140 - 144 and 147 of this title, including expedited dispute resolution.

(h) This section does not affect the division's authority to identify and take action on overpayments on its own motion.

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 December 12, 2011.

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Dirk Johnson
General Counsel
Texas Department of Insurance, Division of Workers' Compensation
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Proposal publication date: October 28, 2011
For further information, please call: (512) 804-4703

CHAPTER 128. BENEFITS--CALCULATION OF AVERAGE WEEKLY WAGE

28 TAC §128.1

The Commissioner of Workers' Compensation (Commissioner), Texas Department of Insurance, Division of Workers' Compensation (Division) adopts amendments to §128.1 of this title (relating to Average Weekly Wage: General Provisions) deleting §128.1(e)(1) and (2) and part of (f) of this title. Those provisions applied to cases where there was a miscalculation of the average weekly wage and contained procedures to govern the recoupment of an overpayment of income benefits and the payment of an underpayment of income benefits attributable to the average weekly wage miscalculation.

Deleting §128.1(e)(1) and (2) and part of (f) of this title is necessary to implement statutory provisions of House Bill 2089, enacted by the 82nd Legislature, Regular Session, effective September 1, 2011 (HB 2089). The amendments to §128.1 are adopted without changes to the proposed text published in the October 28, 2011, issue of the *Texas Register* (36 TexReg 7269), and the section will not be republished.

The Division held two informal work group meetings on September 1, 2011 and September 12, 2011 for the purpose of formulating rule language for the rules required by HB 2089. Subsequently, the Division published an informal draft of the amendments on the Division's website from September 21, 2011 until October 5, 2011. The Division received no informal comments.

After the publication of the proposal in the *Texas Register,* the Commissioner conducted a public hearing on the proposed amendments on November 14, 2011. Two individuals provided public testimony at this hearing. The public comment period for the amendments ended on November 28, 2011. The Division received one written public comment. No changes were made to the adopted text as a result of the comments.

HB 2089 created new Labor Code §408.0815, which relates to the resolution of overpayment or underpayment of income benefits under the Texas workers' compensation program. Newly enacted §408.0815 requires the Division to establish procedures for an injured employee to recover an underpayment of income benefits, and for an insurance carrier to recoup an overpayment

of income benefits from future income benefit payments that are not reimbursable under Labor Code §410.209.

Previous §128.1(e)(1) and (2) and part of (f) of this title were not sufficient to implement Labor Code §408.0815 because they do not address overpayment and underpayment of income benefits caused by anything other than a miscalculation of the average weekly wage. Furthermore, §128.1 as a whole relates to the calculation of average weekly wage. Recoupment of overpayments of income benefits and correction of underpayments of income benefits for any reason, including a miscalculation of the average weekly wage, are best addressed in independent rules in order to avoid confusion by system participants. Deleting §128(e)(1) and (2) and (f) is necessary to prevent overlap and conflict between provisions, to provide clarity in the procedures for resolution of underpayments and overpayments of income benefits, and to implement changes in new Labor Code §408.0815.

The Division is contemporaneously adopting new §126.15 and §126.16 of this title (relating to Procedures for Resolution of Underpayments of Income Benefits and Procedures for Recouping Overpayments of Income Benefits) which contain procedures designed to implement the requirements of HB 2089. Those adopted new rules are published elsewhere in this issue of the *Texas Register* and apply to recoupment of overpayments of income benefits and correction of underpayments of income benefits for any reason. The adopted amendments also include nonsubstantive changes to text by deleting references to "commission" and inserting "division."

HB 2089 enacted Labor Code §408.0815, which relates to the resolution of overpayment or underpayment of income benefits under the Texas workers' compensation program. Labor Code §408.0815(a) requires the Commissioner by rule to establish a procedure by which an insurance carrier (1) may recoup an overpayment of income benefits from future income benefit payments that are not reimbursable under Labor Code §410.209; and (2) shall pay an underpayment of income benefits, including interest on accrued but unpaid benefits.

Labor Code §408.0815(b) requires the procedures under subsection (a) to include: (1) a process by which an injured employee may notify the insurance carrier of an underpayment; (2) the time frame and methodology by which an insurance carrier shall pay to an injured employee an underpayment; (3) a process by which an insurance carrier shall notify an injured employee of an overpayment of income benefits; (4) the time frame and methodology by which an insurance carrier may recoup an overpayment through the reduction of a future income benefit payment; and (5) a method for coordinating overpayments that may be recouped from future income benefits and reimbursements described by Labor Code §410.209.

Labor Code §408.0815(c) provides that the procedure for recouping overpayments under subsection (a)(1) must take into consideration the cause of the overpayment and minimize the financial hardship to the injured employee. However, this does not require continuation of an overpayment of income benefits due to a miscalculation of an injured employee's average weekly wage until the insurance carrier can initiate a recoupment of overpayments. Under §128.1 of this title, an insurance carrier shall make adjustments in the injured employee's average weekly wage and begin payment based on the adjusted average weekly wage not later than the first payment due at least seven days following the date the carrier received new average weekly wage information for the injured employee.

Previous §128.1(e) and (f) of this title permitted insurance carriers to recoup an overpayment of income benefits when the overpayment resulted from a miscalculation of the injured employee's average weekly wage. The procedures in previous §128.1(e) and (f) of this title did not provide for recoupment of an overpayment made for reasons other than average weekly wage miscalculations.

The adopted amendments deleting §128.1(e)(1) and (2) remove procedures for an insurance carrier to recoup an overpayment of income benefits caused by a miscalculation of income benefits. Those provisions are superseded by the adopted provisions in §126.15 of this title.

The adopted amendment to §128.1(f) deletes a sentence providing for a notice to an employee of an overpayment. That deleted provision has been superseded by the adopted provisions in §126.15. A nomenclature correction was also made replacing "commission" with "division".

COMMENTS AND AGENCY RESPONSES

General

COMMENT: Commenters support the rule amendments as proposed.

AGENCY RESPONSE: The Division appreciates the support.

THOSE COMMENTING FOR AND AGAINST THE PROPOSAL.

For: American Insurance Association, Burns Anderson Jury & Brenner, LLP and Insurance Council of Texas.

For, with changes: None.

Against: None.

Neither for or Against: None.

The amendments are adopted under the Labor Code §§408.081, 408.0815, 402.00116, 402.00111, 402.061 and 402.00128. Section 408.081 states that an employee is entitled to timely and accurate income benefits as provided by Labor Code Chapter 408. Section 408.0815 directs the Commissioner to establish procedures by which an insurance carrier may recoup an overpayment of income benefits from future income benefit payments that are not reimbursable under Section 410.209, and shall pay an underpayment of income benefits, including interest on accrued but unpaid benefits. Section 402.00116 grants the powers and duties of chief executive and administrative officer to the Commissioner and the authority to enforce Title 5, Labor Code, and other laws applicable to the Division or Commissioner. Section 402.00111 provides that the Commissioner shall exercise all executive authority, including rulemaking authority, under Title 5, Labor Code. Section 402.061 provides the Commissioner the authority to adopt rules as necessary to implement and enforce the Texas Workers' Compensation Act. Section 402.00128 vests general operational powers to the Commissioner including the authority to delegate, and assess and enforce penalties as authorized by Title 5, Labor Code.

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 December 12, 2011.

TRD-201105482

Dirk Johnson
General Counsel
Texas Department of Insurance, Division of Workers' Compensation
Effective date: January 1, 2012
Proposal publication date: October 28, 2011
For further information, please call: (512) 804-4703

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 115. CONTROL OF AIR POLLUTION FROM VOLATILE ORGANIC COMPOUNDS

SUBCHAPTER B. GENERAL VOLATILE ORGANIC COMPOUND SOURCES

DIVISION 1. STORAGE OF VOLATILE ORGANIC COMPOUNDS

The Texas Commission on Environmental Quality (TCEQ or commission) adopts the amendments to §§115.110, 115.112 - 115.114, and 115.119; repeal of §§115.115 - 115.117; and new §§115.111 and 115.115 - 115.118.

Amended §§115.112, 115.114, and 115.119 and new §§115.111 and 115.115 - 115.118 are adopted *with changes* to the proposed text as published in the June 24, 2011, issue of the *Texas Register* (36 TexReg 3801). Sections 115.110 and 115.113 and the repeal of §§115.115 - 115.117 are adopted *without changes* to the proposed text and will not be republished.

The amended, repealed, and new sections will be submitted to the United States Environmental Protection Agency (EPA) as revisions to the state implementation plan (SIP).

Background and Summary of the Factual Basis for the Adopted Rules

During the second Texas Air Quality Study (May 2005), remote sensing work indicated that there were significant unreported and underreported emissions of volatile organic compounds (VOC) from storage tanks in the Houston-Galveston-Brazoria 1997 eight-hour ozone nonattainment area (HGB area), including emissions from tanks storing crude oil and condensate prior to custody transfer and floating roof landing loss emissions. The commission estimated the unreported and underreported VOC emissions from floating roof or cover landing loss emissions in the HGB area were approximately 7,250 tons in 2003. On May 23, 2007, the commission revised the VOC storage rules in Chapter 115, Subchapter B, Division 1 to reduce these unreported and underreported VOC emissions from storage tanks in the HGB area (June 8, 2007, issue of the *Texas Register* (32 TexReg 3178)).

On April 30, 2004, the Dallas-Fort Worth 1997 eight-hour ozone nonattainment area (DFW area), consisting of Collin, Dallas, Denton, Ellis, Johnson, Kaufman, Parker, Rockwall, and Tarrant Counties, was designated a moderate nonattainment area for the 1997 eight-hour ozone National Ambient Air Quality Standards (NAAQS), with a June 15, 2010, attainment deadline. Effective January 19, 2011, the EPA finalized a determination that the DFW area did not attain the 1997 eight-hour ozone standard by the June 15, 2010, deadline, and reclassified the DFW area to serious with a June 15, 2013, attainment deadline (75 FR 79302, December 20, 2010). Because of the reclassification, the state is required to submit an attainment demonstration SIP revision that addresses the 1997 eight-hour ozone standard serious nonattainment area requirements by January 19, 2012. Federal Clean Air Act (FCAA), §172(c)(1) and §182(b)(2) require the attainment demonstration SIP revision to provide for the implementation of reasonably available control technology (RACT) requirements for all major stationary sources of emissions and all emission source categories addressed in an EPA-issued control techniques guidelines (CTG) document. The EPA defines RACT as the lowest emission limit that a particular source is capable of meeting by the application of control technology that is reasonably available considering technological and economic feasibility (44 FR 53761, September 17, 1979).

The primary purpose of this rulemaking is to implement RACT requirements for VOC storage tanks in the DFW area. The commission is adopting additional requirements in Chapter 115, Subchapter B, Division 1 for low-leaking storage tank fittings and to limit situations when a floating roof storage tank is allowed to emit VOC because the roof is not floating on the liquid. Although this rulemaking implements FCAA RACT requirements for the petroleum liquid storage CTG emission source category, these rules are more stringent than the EPA's RACT recommendations for these sources (EPA Document Numbers EPA-450/2-77-036, EPA-450/2-78-047, and EPA-453/R-94-001). The commission's Point Source Emissions Inventory and recent emissions inventory improvement projects, including Phase II of the Barnett Shale Special Emissions Inventory, indicate there are storage tanks in the DFW area with VOC emissions that exceed the 50 tons per year (tpy) major source threshold for serious nonattainment areas. The adopted rules also require 95% control of VOC flash emissions from tanks storing crude oil and condensate prior to custody transfer with uncontrolled VOC emissions that equal or exceed 50 tpy. The commission is adopting this requirement to fulfill FCAA RACT requirements for major stationary sources in serious nonattainment areas. The adopted control requirements are technologically and economically feasible and therefore represent RACT for the storage of VOC.

The commission is requiring 95% control of VOC emissions from storage tanks in the DFW area. Although this requirement is more stringent than the 90% control level currently required in the HGB area, the commission has determined that it is technologically and economically feasible to achieve 95% control of VOC emissions from these sources. The 95% control requirement is consistent with limits on floating roof storage tanks in the Refinery Maintenance, Startup, and Shutdown Model Permit and with requirements in 40 Code of Federal Regulations (CFR) Part 60, Subpart Kb, the applicable federal New Source Performance Standard (NSPS) for storage tanks constructed after 1984. Additionally, a 2010 survey study (TCEQ Project 2010-43) found that all responding upstream oil and gas sources in the HGB area chose to install vapor recovery units or flares to comply with the Chapter 115, Subchapter B, Division 1 requirements. The installation of these technologies when controls are required in the HGB area demonstrates their technological and economic feasibility. To ensure that flares and vapor recovery units installed to comply with these Chapter 115 requirements maintain at least 95% control efficiency, the commission requires flares to be designed and operated in compliance with 40 CFR §60.18

and specifies design and operational parameters for vapor recovery units consistent with the requirements in paragraphs (a) - (k) of the TCEQ Air Quality Standard Permit for Oil and Gas Handling and Production Facilities applicable in counties of the Barnett Shale formation.

The commission proposed to control flash emissions from crude oil and condensate storage tanks, prior to custody transfer, in the DFW area with uncontrolled VOC emissions that equal or exceed 25 tpy. At proposal, the commission determined that it was both technologically and economically feasible to control flash emissions from crude oil and condensate storage tanks, prior to custody transfer, in the DFW area. The 25 tpy threshold was proposed because preliminary analysis indicated that additional VOC reductions, beyond those reductions achieved from controlling flash emissions from major sources with uncontrolled VOC emissions that equal or exceed 50 tpy, were necessary to help meet FCAA Reasonable Further Progress (RFP) requirements. The commission has since determined that these additional VOC emission reductions are not necessary to meet RFP requirements. However, the requirements of FCAA, §182 regarding RACT must be fulfilled. Therefore, the adopted requirements to control flash emissions from crude oil and condensate storage tanks, prior to custody transfer, in the DFW area apply to major sources with uncontrolled VOC emissions that equal or exceed 50 tpy.

While the adopted rule only applies the emission control requirements to crude oil and condensate tanks prior to custody transfer in the DFW area with uncontrolled VOC emissions that equal or exceed 50 tpy, the commission is also adopting a provision in §115.119(b)(1)(C) that specifies if the commission publishes notice in the *Texas Register* that the DFW area has been reclassified as severe for the 1997 eight-hour ozone standard, the control requirements for flash emissions will apply to major sources with uncontrolled VOC emissions that equal or exceed 25 tpy. Once the commission publishes notice in the *Texas Register,* affected sources will have 15 months to comply with these control requirements. The commission is adopting this provision in §115.119(b)(1)(C) to avoid a duplicative demonstration of the technological and economic feasibility of controlling flash emissions from crude oil and condensate storage tanks, prior to custody transfer, in the DFW area with uncontrolled VOC emissions that equal or exceed 25 tpy. The commission has determined these requirements represent RACT for major sources. The photochemical modeling and corroborative analyses show the DFW area will attain the 1997 eight-hour ozone standard in 2012. However, if in the future the DFW area were reclassified to severe for the 1997 eight-hour ozone standard, the commission would be required to implement RACT for major stationary sources with the potential to emit at least 25 tpy. Because the commission has already determined the controls are feasible at the 25 tpy VOC threshold and provided adequate notice with the proposal of this rulemaking, the provision in §115.119(b)(1)(C) will enable the commission to implement RACT for this category of sources at the 25 tpy threshold expeditiously without the need for duplicative rulemaking should the area be reclassified to severe nonattainment in the future.

The rulemaking also addresses concerns raised by stakeholders by revising Chapter 115, Subchapter B, Division 1 to clarify and add specificity to the rule requirements for sources in all affected areas, including the DFW and HGB areas, the Beaumont-Port Arthur 1997 eight-hour ozone maintenance area (BPA), and Aransas, Bexar, Calhoun, El Paso, Gregg, Matagorda, Nueces, San Patricio, Travis, and Victoria Counties. The commission is adopting a March 1, 2013, compliance date for affected owners or operators to comply with the new or clarified requirements. The rulemaking reformats the existing rules in Chapter 115, Subchapter B, Division 1, to simplify and clarify the requirements. Some of these formatting changes include: clarifying rule applicability and definitions in §115.110; repealing §115.117 and adopting new §115.111 to move exemptions to the beginning of the division; repealing §115.115 and §115.116 and adopting new §115.115 and §115.118 to split monitoring and recordkeeping into separate sections; adopting new §115.116 to contain new clarifying requirements for testing; and adopting new §115.117 to move approved test methods after all test-related requirements.

The commission is specifically requiring control device testing, conducted in accordance with the approved test methods in §115.117, for control devices, except vapor recovery units or flares, used to comply with the control requirements in §115.112(a), (b), and (e). The commission is also requiring owners or operators in the DFW, HGB, and BPA areas and El Paso County to retest the control device within 60 days after any modification that could reasonably be expected to decrease the efficiency of the control device. The commission is also requiring the initial design verification specified in 40 CFR §60.18(f) for flares used to meet a control requirement in §115.112(a), (b), and (e). This initial control device testing is intended to be a clarification of the existing requirements and is not intended to impose any additional requirements on sources that were previously required to comply with these rules. This rulemaking was proposed with an inadvertent expansion of the testing requirements for control devices other than vapor recovery units to Aransas, Bexar, Calhoun, Matagorda, San Patricio, and Travis Counties. The commission has revised the rulemaking at adoption to specify the intent of the existing requirements.

The rulemaking clarifies requirements for devices that recover and devices that destroy VOC by defining *vapor recovery unit* and using this term in rules applicable after the March 1, 2013, compliance date. The terms *vapor recovery system* and *control device* are used synonymously in portions of the existing rules. Vapor recovery units are commonly used on crude oil and condensate storage tanks and this term is the industry standard phrase to describe this equipment. The rulemaking specifies design, operational parameters, and monitoring requirements for vapor recovery units. Throughout the division, wherever *vapor recovery unit or control device* was proposed, the wording has been changed to vapor control system.

The rule revisions allow the use of flares that are designed and operated in accordance with 40 CFR §60.18(b) - (f) (as amended through December 22, 2008 (73 FR 78209)). In addition to complying with the operating parameters in 40 CFR §60.18, the commission is requiring that flares be lit at all times when VOC vapors are routed to the device. Although 40 CFR §60.18 requires the pilot to be lit at all times and requires monitoring of the flare pilot flame, the commission is also specifically requiring the flare flame to be lit to clarify that the intent of the control requirement is for both the flare flame and the pilot to be lit at all times when VOC vapors are routed to the device.

Section by Section Discussion

In addition to the adopted rules, the commission adopts grammatical, stylistic, and various other non-substantive changes to update the rules in accordance with current *Texas Register* style and format requirements, improve readability, establish consistency in the rules, and conform to the standards in the *Texas Leg-*

islative Council Drafting Manual, February 2011. Such changes include appropriate and consistent use of acronyms, punctuation, section references, and certain terminology like *that, which, shall,* and *must.* References to the *Dallas/Fort Worth area,* the *Houston/Galveston area,* and the *Beaumont/Port Arthur area* have been updated to the *Dallas-Fort Worth area,* the *Houston-Galveston-Brazoria* area, and the *Beaumont-Port Arthur area,* respectively, to be consistent with current terminology for the region. Throughout this division, the commission replaces plural phrasing for storage tanks and tank batteries with singular phrasing of a storage tank or tank battery to clarify that each exemption applies to an individual tank or tank battery. Throughout this division, the commission specifies that *true vapor pressure* has the meaning defined in 30 TAC §101.1, the absolute aggregate partial vapor pressure, measured in pounds per square inch absolute (psia), of all VOC at the temperature of storage, handling, or processing. The commission deletes the caveat in this division that true vapor pressure is *at storage conditions* since this requirement is included in the definition. The commission replaces the phrase internal floating *roof* with internal floating *cover* throughout this division. The commission contends that both phrases refer to the same equipment and *internal floating cover* is a defined term in §101.1 and §115.10. The commission also removes parenthetical equivalent metric units such as pressure measurements in kilopascals, volume measurements in liters, and distance measurements in meters. These units are not commonly used and omitting them improves rule readability. As proposed, the compliance dates for new requirements were listed in §115.119(c) - (h) and referenced in rule language throughout the division. However, in response to comments, the compliance dates have been specified in the rule language in addition to §115.119 to improve readability and facilitate compliance. These non-substantive changes are not intended to alter the existing rule requirements in any way and are not specifically discussed in this preamble.

The commission has restructured portions of this division. Sections 115.115 - 115.117 have been repealed. The exemptions from repealed §115.117 have been moved to new §115.111. Monitoring and recordkeeping requirements from repealed §115.116 have been split into new §115.115 and §115.118, respectively. Approved test methods from repealed §115.115 have been moved to new §115.117. Amended §115.110 relates to applicability and definitions, and new §115.116 contains testing requirements. A source that is currently exempt under §115.117(a)(1) and (3) - (9) will still qualify for exemption under new §115.111(a), provided the source still meets the appropriate conditions for exemption.

§115.110, Applicability and Definitions

The commission changes the title of §115.110 from *Definitions* to *Applicability and Definitions* to clarify the Chapter 115, Subchapter B, Division 1 rule. This title establishes consistency with other rules in Chapter 115 and improves the readability of the rule by first defining the sources affected by and terms used in the subsequent requirements.

The commission adopts subsection (a) to specify that, unless exempted in §115.111, the provisions in this division apply to any storage tank storing VOC that is located in the counties and areas listed in this subsection. Paragraph (1) lists the BPA area. Paragraph (2) lists the DFW area. Paragraph (3) lists the El Paso area. Paragraph (4) lists the HGB area. Paragraph (5) lists Aransas, Bexar, Calhoun, Gregg, Matagorda, Nueces, San Patricio, Travis, and Victoria Counties. This subsection clearly states that all storage tanks in the affected counties are subject to this rule unless the tanks are exempt. This revision clarifies the applicability requirements that are currently only stated within the control requirements of §115.112(a)(1), (b)(1), (c)(1), and (d)(1).

To accommodate adopted subsection (a), the commission moves the definitions currently located in §115.110(1) - (10) to adopted §115.110(b)(1) - (9) and (b)(12), respectively, without revision.

Adopted subsection (b) indicates that unless the context clearly indicates otherwise or unless specifically defined in the Texas Clean Air Act (Texas Health and Safety Code, Chapter 382), or in 30 TAC §§3.2, 101.1, or 115.10, the terms used in this division have the meanings commonly used in the field of air pollution control. Subsection (b) also indicates that in addition, the following meanings apply in this division unless the context clearly indicates otherwise.

Adopted paragraphs (1) - (9) incorporate the corresponding definitions in existing §115.110(1) - (9), respectively, without revision.

Adopted paragraph (10) defines *storage capacity* as the volume of a storage tank as determined by multiplying the internal cross-sectional area of the tank by the average internal height of the tank shell. The commission intends for the definition to account for sloped floors and sumps in the average internal height component of this definition by assuming that the tank can be considered to be a cylinder whose volume is determined by area multiplied by an average height, or alternatively as the maximum amount of liquid the tank can hold if filled to the top of the tank shell with closed off inflow and outflow pipes and any floating roof or cover absent. Complicated tank geometries may require a calculus-based or integral calculation of the average height. The existing rules use several different undefined terms, including *capacity, storage capacity, and nominal storage capacity.* This rulemaking defines *storage capacity* and uses it consistently throughout this division. The change is not intended to alter any existing rule requirements or to cause any additional sources to be subject to the existing rule requirements.

Adopted paragraph (11) defines *storage tank* as a stationary vessel, reservoir, or container used to store VOC. This definition excludes the following: components that are not directly involved in the containment of liquids or vapors, subsurface caverns, porous rock reservoirs, process tanks, and process vessels. Process tanks and process vessels are containers designed to contain liquids undergoing a chemical or physical reaction that is part of a process. This definition is a rephrasing of the parallel definition in 40 CFR §60.111b (as of July 1, 2010) altered for consistency with *Texas Register* formatting requirements. 40 CFR Part 60, Subpart Kb is titled *Standards of Performance for Volatile Organic Liquid Storage Vessels (Including Petroleum Liquid Storage Vessels) for Which Construction, Reconstruction, or Modification Commenced After July 23, 1984.* The change is not intended to alter any existing rule requirements or to cause any additional sources to be subject to the existing rule requirements.

Adopted paragraph (12) incorporates the definition of *tank battery* in existing §115.110(10) without revision.

Adopted paragraph (13) defines *vapor recovery unit* as a device that transfers hydrocarbon vapors to a fuel liquid or gas system, a sales liquid or gas system, or a liquid storage tank. The commission intends for this term to apply to devices and associated piping that gather and transfer VOC for sale or other valuable use. While a vapor recovery unit may be interpreted as meet-

ing the collective definition of a vapor control system or a vapor recovery system in §115.10 and a control device in §101.1, the commission provides this definition because of the specific provisions in the adopted rule associated with use of this type of control system and to be clear that vapor recovery units are an acceptable method of control for the purposes of this rule. In many cases in the oil and natural gas industry, vapor recovery units are the preferred method of control of VOC emissions from storage tanks.

§115.111, Exemptions

The commission adopts new §115.111 that contains the exemptions currently listed in §115.117.

The commission adopts new subsection (a), moved from §115.117(a) and maintained without substantive changes except as described in this section by section discussion, listing the current exemptions that apply in the BPA, El Paso, HGB, and DFW areas. In a change since proposal, the commission has added exemptions applicable in the DFW area from proposed subsection (d) to this subsection in order to improve readability. The exemptions applicable to the DFW area in proposed subsection (d) are included in the exemptions in proposed subsection (a). Therefore, to improve readability, the commission has revised adopted subsection (a) to incorporate all applicable exemptions for the DFW area. Sources that are currently exempt under §115.117(a)(1) and (3) - (9) will still qualify for exemption under new §115.111(a), provided the sources still meet the appropriate conditions for exemption.

Adopted new paragraph (1), proposed as §115.111(a)(1) and (d)(1), contains the exemption currently located in §115.117(a)(1). Adopted paragraph (1) exempts a storage tank storing VOC with a true vapor pressure less than 1.5 psia from all requirements of this division except for the associated recordkeeping in §115.118.

Adopted new paragraph (2), currently §115.117(a)(2) and proposed as §115.111(a)(2), specifies that storage tanks with storage capacity less than 210,000 gallons storing crude oil or condensate prior to custody transfer in the BPA, DFW, and El Paso areas are exempt from the requirements of this division. The exemption currently in §115.117(a)(2) is no longer applicable in the HGB area and is not included in §115.111 since it specified a January 1, 2009, expiration date. This exemption will no longer apply in the DFW area beginning March 1, 2013.

Adopted new paragraphs (3) - (8) contain the exemptions currently located in §115.117(a)(3) - (8) and were proposed in §115.111(a)(3) - (8) and (d)(2) - (7), respectively, with substantive changes in paragraph (5) as further discussed.

Adopted new paragraph (3), currently located in §115.117(a)(3) and proposed as §115.111(a)(3) and (d)(2), exempts a storage tank with a storage capacity less than 25,000 gallons located at a motor vehicle fuel dispensing facility from the requirements of this division.

Adopted new paragraph (4), currently located in §115.117(a)(4) and proposed as §115.111(a)(4) and (d)(3), exempts a welded storage tank with a mechanical shoe primary seal that has a secondary seal from the top of the shoe seal to the tank wall (a shoe-mounted secondary seal) from the requirement for retrofitting with a rim-mounted secondary seal if the shoe-mounted secondary seal was installed or scheduled for installation before August 22, 1980.

Adopted new paragraph (5), currently located in §115.117(a)(5) and proposed as §115.111(a)(5) and (d)(4), exempts an external floating roof storage tank storing waxy, high pour point crude oils from any secondary seal requirements of §115.112(a), (d), and (e).

Adopted new paragraph (6), currently located in §115.117(a)(6) and proposed as §115.111(a)(6) and (d)(5), exempts a welded storage tank storing VOC with a true vapor pressure less than 4.0 psia from any external floating roof secondary seal requirement if any of the following types of primary seals were installed before August 22, 1980: a mechanical shoe seal; a liquid-mounted foam seal; or a liquid-mounted liquid filled type seal.

Adopted new paragraph (7), currently located in §115.117(a)(7) and proposed as §115.111(a)(7) and (d)(6), exempts a welded storage tank storing crude oil with a true vapor pressure equal to or greater than 4.0 psia and less than 6.0 psia from any external floating roof secondary seal requirement if any of the following types of primary seals were installed before December 10, 1982: a mechanical shoe seal; a liquid-mounted foam seal; or a liquid-mounted liquid filled type seal.

Adopted new paragraph (8), currently located in §115.117(a)(8) and proposed as §115.111(a)(8) and (d)(7), exempts a storage tank with storage capacity less than 1,000 gallons from the requirements of this division.

Adopted new paragraph (9), currently §115.117(a)(9) and proposed as §115.111(a)(9), exempts a storage tank or tank battery in the HGB area storing condensate prior to custody transfer with a condensate throughput exceeding 1,500 barrels per year on a rolling 12-month basis from the requirement in §115.112(d)(4) or (e)(4), to control flashed gases if the owner or operator demonstrates, using the test methods specified in §115.117, that uncontrolled VOC emissions from the individual storage tank or from the aggregate of storage tanks in a tank battery are less than 25 tpy on a rolling 12-month basis. In response to comment, the commission has added the phrase *prior to custody transfer* to clarify that the exemption and the referenced control requirement apply to the same storage tanks. The commission has also clarified the language from proposal to specify that throughput is on a rolling 12-month basis to be consistent with the required demonstration method in §115.112(d)(5) and (e)(6). In response to comment, the commission has also clarified that the trigger for the exemption is condensate throughput rather than total liquid throughput. Condensate throughput was the original intent of these requirements in the HGB area, as seen in the explanation of control requirement in §115.112(d)(4) and exemption in §115.117(a)(9) in the 2007 HGB rulemaking published in the June 8, 2007, issue of the *Texas Register* (32 TexReg 3180).

Adopted new paragraph (10) exempts a storage tank or tank battery in the DFW area storing condensate prior to custody transfer with a condensate throughput exceeding 3,000 barrels per year on a rolling 12-month basis from the requirement in §115.112(e)(4), to control flashed gases if the owner or operator demonstrates, using the test methods specified in §115.117, that uncontrolled VOC emissions from the individual storage tank or from the aggregate of storage tanks in a tank battery are less than 50 tpy on a rolling 12-month basis. As discussed elsewhere in this preamble, the requirements to control flash emissions from crude oil and condensate storage tanks, prior to custody transfer, in the DFW area will only apply to sites with a storage tank or tank battery with uncontrolled VOC emissions that equal or exceed 50 tpy. However, if the commission publishes notice in the *Texas Register* that the DFW area has been reclassified as

severe for the 1997 eight-hour ozone standard, the requirements to control flash emissions will apply to sites with uncontrolled VOC emissions that equal or exceed 25 tpy, and this exemption will no longer apply 15 months after this notice is published.

Adopted new paragraph (11), proposed as §115.111(d)(8), exempts a storage tank or tank battery in the DFW area storing condensate prior to custody transfer with a condensate throughput exceeding 1,500 barrels per year on a rolling 12-month basis from the requirement in §115.112(e)(4), to control flashed gases if the owner or operator demonstrates, using the test methods specified in §115.117, that uncontrolled VOC emissions from the individual storage tank, or from the aggregate of storage tanks in a tank battery, are less than 25 tpy on a rolling 12-month basis. As discussed elsewhere in this preamble, the requirements to control flash emissions from crude oil and condensate storage tanks, prior to custody transfer, in the DFW area will only apply to sites with a storage tank or tank battery with uncontrolled VOC emissions that equal or exceed 50 tpy. However, if the commission publishes notice in the *Texas Register* that the DFW area has been reclassified as severe for the 1997 eight-hour ozone standard, the requirements to control flash emissions will apply to sites with uncontrolled VOC emissions that equal or exceed 25 tpy, and this exemption will only apply 15 months after this notice is published.

The commission adopts new subsection (b), moved from §115.117(b) and maintained without substantive changes, listing exemptions that apply in Gregg, Nueces, and Victoria Counties. Adopted new paragraphs (1) - (8), contain the exemptions currently located in §115.117(b)(1) - (8), respectively.

The commission adopts new subsection (c), moved from §115.117(c) and maintained without substantive changes, listing exemptions that apply in Aransas, Bexar, Calhoun, Matagorda, San Patricio, and Travis Counties. Adopted new paragraph (1), contains the exemption currently located in §115.117(c)(1). Adopted new paragraph (2), currently §115.117(c)(2), specifies that slotted guidepoles installed in any floating roof or cover storage tank are exempt from the provisions of §115.112(c). The commission uses the term *slotted guidepoles* instead of the term *slotted sampling and gauge pipes* used in §115.117(c)(2). The commission contends that the definition of slotted guidepoles includes slotted sampling and gauge pipes, and this non-substantive change harmonizes terminology throughout this division. Adopted new paragraphs (3) - (5) contain the exemptions currently located in §115.117(c)(3) - (5), respectively.

As discussed previously in this preamble, the commission is not adopting proposed subsection (d), which has been incorporated into adopted subsection (a).

§115.112, Control Requirements

The commission amends subsection (a) to specify the control requirements applicable in the BPA, DFW, and El Paso areas. These requirements will no longer apply in the DFW area beginning March 1, 2013.

The commission replaces Tables I(a) and II(a) in §115.112(a)(1) that specify required control for storage tanks with new tables. The commission moves the title of each table from the first several rows to before the table to improve the accessibility of the table and to harmonize the wording of both table titles to start with *Required Control for Storage Tanks.* The commission uses terms consistent with the rest of this subsection in the column headers. Specifically, the header of the first column of Tables I(a) and II(a) in §115.112(a)(1) is *True Vapor Pressure* rather than *True Vapor Pressure of Compound at Storage Conditions.* The header of the second column of Tables I(a) and II(a) in §115.112(a)(1) is *Storage Capacity* rather than *Nominal Storage Capacity.* The header of the third column of Tables I(a) and II(a) in §115.112(a)(1) is *Control Requirements* rather than *Emission Control Requirements.* The commission removes parenthetical metric equivalent measurements of pressure and volume. The commission deletes the rows from existing Tables I(a) and II(a) in §115.112(a)(1) that listed the control requirement as *None* for tanks with storage capacity less than 1,000 gallons or storing VOC with true vapor pressure less than 1.5 psia since these situations are explicitly exempted in §115.111. The commission also repeats the true vapor pressure range in each row to comply with *Texas Register* style and format requirements.

The commission amends paragraph (2)(F) from the proposed language, *must be no greater than 1.0 square inch per foot,* to the adopted language, *may not be greater than 1.0 square inch per foot,* to be consistent with *Texas Register* style requirements.

The commission amends paragraph (3) to add as *defined in §115.10 of this title* after *vapor recovery systems* to clarify that the phrase *vapor recovery system* has the meaning specified in §115.10: any control system that utilizes vapor collection equipment to route VOC to a control device that reduces VOC emissions. The commission also explicitly requires that any flare used must be designed and operated according to 40 CFR §60.18(b) - (f). In addition to complying with the operating parameters in 40 CFR §60.18, the commission requires that flares must be lit at all times when VOC vapors are routed to the device. Although 40 CFR §60.18 requires the pilot to be lit at all times and requires monitoring of the flare pilot flame, the commission is also specifically requiring the flare flame to be lit to clarify that the intent of the control requirement is for both the flare flame and the pilot to be lit at all times when VOC vapors are routed to the device.

The commission amends subsection (b) to specify the control requirements in Gregg, Nueces, and Victoria Counties.

The commission adds clarifying language in paragraph (1) that references to Tables I(a) and II(a) are to the tables in §115.112(a)(1). The commission also explicitly requires that any flare used must be designed and operated according to 40 CFR §60.18(b) - (f). In addition to complying with the operating parameters in 40 CFR §60.18, the commission requires that flares must be lit at all times when VOC vapors are routed to the device. Although 40 CFR §60.18 requires the pilot to be lit at all times and requires monitoring of the flare pilot flame, the commission is also specifically requiring the flare flame to be lit to clarify that the intent of the control requirement is for both the flare flame and the pilot to be lit at all times when VOC vapors are routed to the device.

The commission amends paragraph (2)(F) from the proposed language, *must be no greater than 1.0 square inch per foot,* to the adopted language, *may not be greater than 1.0 square inch per foot,* to be consistent with *Texas Register* style requirements.

The commission amends subsection (c) to specify the control requirements in Aransas, Bexar, Calhoun, Matagorda, San Patricio, and Travis Counties.

In the amendment to paragraph (1), the commission specifies that no person may place, store, or hold in any storage tank any VOC other than crude oil or condensate unless the storage tank is capable of maintaining working pressure sufficient at all times to prevent any vapor or gas loss to the atmosphere or is in

compliance with the control requirements specified in Table I(b) of this paragraph. The commission is not adopting the proposed requirement for flares in Aransas, Bexar, Calhoun, Matagorda, San Patricio, and Travis Counties. These counties are currently in attainment of the ozone NAAQS and it is not necessary to make any clarifications to the rule at this time. However, the commission expects that a flare used to comply with the control requirements in this subsection will be lit at all times when VOC vapors are routed to the flare.

The commission replaces Table I(b) in §115.112(c)(1) and specifies that references to Table I(b) are to the table in §115.112(c)(1). The commission moves the title of the table from the first several rows to before the table to improve the accessibility of the table and to harmonize the wording of this table title with Tables I(a) and II(a) in subsection (a)(1) by starting all table titles with *Required Control for Storage Tanks.* The commission uses terms consistent with the rest of this subsection in the column headers. Specifically, the header of the first column of Table I(b) in subsection (c)(1) is *True Vapor Pressure* rather than *True Vapor Pressure of Compound at Storage Conditions.* The header of the second column of Table I(b) in subsection (c)(1) is *Storage Capacity* rather than *Nominal Storage Capacity.* The header of the third column of Table I(b) in subsection (c)(1) is *Control Requirements* rather than *Emission Control Requirements.* The commission deletes the rows from existing Table I(b) in subsection (c)(1) that listed the control requirement as *None* for tanks with storage capacity less than 1,000 gallons or storing VOC with true vapor pressure less than 1.5 psia since these situations are explicitly exempted in §115.111. The commission also repeats the true vapor pressure range for each row to comply with *Texas Register* style and format requirements.

The commission amends paragraph (3) to replace the phrase *vapor-loss control devices* with *control devices.* The commission contends that the phrase *vapor-loss control device(s)* in paragraph (3) has the same meaning as the phrase *control device* used in §115.112(a)(1) and (b)(1) because both include floating roofs, floating covers, and vapor recovery systems.

The commission amends subparagraph (A) to replace the phrase *control equipment* with *control devices* because both phrases refer to internal floating covers and external floating roofs. The commission revises the phrase *This control equipment shall not be permitted* to *These control devices will not be allowed* to maintain consistency of rule language and avoid confusion with the term *permitted.*

In the amendment to subparagraph (B), the commission is not adopting the proposed requirement for flares in Matagorda and San Patricio Counties. These counties are currently in attainment of the ozone NAAQS and it is not necessary to make any clarifications to the rule at this time. However, the commission expects that a flare used to comply with the control requirements in this subsection will be lit at all times when VOC vapors are routed to the flare.

The commission amends subsection (d) to specify control requirements applicable in the HGB area. These requirements will remain in effect until March 1, 2013, when the HGB area will transition to the control requirements in §115.112(e). The commission is including the HGB area in the control requirements of §115.112(e), which also apply in the DFW area. In response to comments, the commission is delaying the transition to compliance with the requirements in §115.112(e) until March 1, 2013, because compliance may require the installation of additional or different control equipment. In response to comments, the compliance date has been specified rather than referenced in §115.119(e)(2), as proposed, to improve readability and facilitate compliance.

The commission amends paragraph (2)(F) from the proposed language, *must be no greater than 1.0 square inch per foot,* to the adopted language, *may not be greater than 1.0 square inch per foot,* to improve readability.

The commission has changed paragraph (2)(G)(i) since proposal to change *seal* to *seal or wiper* because wiper was inadvertently omitted in the proposed language.

The commission amends paragraph (2)(H) to change clarifying references to a refill after the tank has been degassed and cleaned in accordance with §§115.541 - 115.547 to refer only to cleaning. This change is non-substantive and harmonizes the language with degassing requirements in Subchapter F, Division 3. If a storage tank is subject to the degassing rules, the owner or operator will need to comply with the requirement in Subchapter F, Division 3. The original language intended to clarify that the first time the tank is filled and any other time the tank is filled after cleaning are included exceptions. The new language accomplishes the same purpose while avoiding unnecessary connection between the two rules.

The commission adopts amended paragraph (4) to specify that condensate has the meaning defined in §101.1 when used to determine the need to route vapors from a storage tank or tank battery storing condensate prior to custody transfer to a vapor recovery system. Routing vapors to a vapor control system necessitates that all openings in the storage tank other than the connection to the vapor control system either are closed; only passing air into the storage tank; or open for a minimal time to relieve excess pressure or when gauging or sampling is conducted.

The commission amends adopted paragraph (5) to specify that a storage tank or tank battery storing condensate prior to custody transfer with uncontrolled VOC emissions over 25 tpy must route vapors to a vapor control system and specifies the emission estimation methods in subparagraphs (A) - (D). Routing vapors to a vapor control system necessitates that all openings in the storage tank other than the connection to the vapor control system either are closed; only passing air into the storage tank; or open for a minimal time to relieve excess pressure or when gauging or sampling is conducted.

The commission amends adopted subparagraphs (A) - (C) to add the phrase *the owner or operator may* to comply with *Texas Register* style requirements.

The commission adopts subsection (e) specifying control requirements applicable in the HGB and DFW areas after March 1, 2013. In response to comments, the compliance date has been specified, rather than referenced in §115.119(e) as proposed, to improve readability and facilitate compliance. These control requirements are based on requirements in §115.112(d) applicable prior to this rulemaking in the HGB area. The commission proposed control requirements for the DFW area in a separate subsection (f) which has been combined with this subsection in order to increase clarity and reduce redundant rule language. Adopted subsection (e)(3)(A) and (4) contains differentiations added at adoption between requirements applicable in the HGB and DFW areas.

Adopted paragraph (1), proposed as §115.112(e)(1) and (f)(1), specifies that no person shall place, store, or hold VOC in any

storage tank unless the storage tank is capable of maintaining working pressure sufficient at all times to prevent any vapor or gas loss to the atmosphere or is equipped with at least the control requirement specified in either Table 1 in §115.112(e)(1) for VOC other than crude oil and condensate or Table 2 in §115.112(e)(1) for crude oil and condensate. Tables 1 and 2 in §115.112(e)(1) are amended versions of Tables I(a) and II(a) in §115.112(a)(1).

The commission adopts paragraph (2), proposed as §115.112(e)(2) and (f)(2), specifying that for floating roof or cover storage tanks subject to the provisions of subsection (e)(1), the requirements in subparagraphs (A) - (J) apply. Paragraph (2) contains requirements currently applicable in the HGB area and located in §115.112(d)(2). Subparagraphs (A) and (B) together contain the requirements currently located in §115.112(d)(2)(A). Subparagraphs (C) - (I) contain requirements currently applicable in the HGB area and located in §115.112(d)(2)(B) - (H), respectively, with only non-substantive changes except as described in this Section by Section Discussion.

Adopted subparagraph (A) specifies that all openings in an internal floating cover or external floating roof, as defined in §115.10, must provide a projection below the liquid surface. This subparagraph contains the portions of the requirements in §115.112(d)(2)(A), applicable in the HGB area prior to this rulemaking that are not in subparagraph (B). The proposed phrase *except for automated bleeder vents (vacuum breaker vents) and rim space vents* has been moved to the end of this adopted subparagraph as a complete sentence to be consistent with the structure of other subparagraphs in this paragraph.

Adopted subparagraph (B) states that all openings in an internal floating cover or external floating roof except for automatic bleeder vents (vacuum breaker vents), rim space vents, leg sleeves, and roof or cover drains must be equipped with a deck cover. The deck cover must be equipped with a gasket in good operating condition between the cover and the deck. The deck cover must be closed (i.e., no gap of more than 1/8 inch) at all times, except when the cover must be open for access. The commission's intent is that the maximum gap requirement is an indication of a gasket in good operating condition. The proposed phrase *except for automatic bleeder vents (vacuum breaker vents), rim space vents, leg sleeves, and roof or cover drains* has been moved to the end of the subparagraph as a complete sentence to be consistent with the structure of other subparagraphs in this paragraph. This subparagraph contains the portions of the requirements in §115.112(d)(2)(A) applicable in the HGB area prior to this rulemaking that are not in subparagraph (A).

Adopted subparagraph (C) specifies that automatic bleeder vents (vacuum breaker vents) and rim space vents must be equipped with a gasketed lid, pallet, flapper, or other closure device and must be closed (i.e., no gap of more than 1/8 inch) at all times except when required to be open to relieve excess pressure or vacuum in accordance with the manufacturer's design. This subparagraph contains the same requirement as §115.112(d)(2)(B) applicable in the HGB area prior to this rulemaking.

The commission adopts subparagraph (D) allowing each opening into the internal floating cover for a fixed roof support column to be equipped with a flexible fabric sleeve seal instead of a deck cover. This subparagraph contains the same requirement as §115.112(d)(2)(C) applicable in the HGB area prior to this rulemaking.

Adopted subparagraph (E) specifies that any external floating roof drain that empties into the stored liquid must be equipped with a slotted membrane fabric cover that covers at least 90% of the area of the opening or an equivalent control that must be kept in a closed (i.e., no gap of more than 1/8 inch) position at all times except when the drain is in actual use. Stub drains on internal floating cover tanks are not subject to this requirement. This subparagraph contains the same requirement as §115.112(d)(2)(D) applicable in the HGB area prior to this rulemaking.

Adopted subparagraph (F) specifies there must be no visible holes, tears, or other openings in any seal or seal fabric. This subparagraph contains the same requirement as §115.112(d)(2)(E) applicable in the HGB area prior to this rulemaking.

The commission adopts subparagraph (G) specifying that for external floating roof storage tanks, secondary seals must be the rim-mounted type (the seal must be continuous from the floating roof to the tank wall with the exception of gaps that do not exceed the following specification). The accumulated area of gaps that exceed 1/8 inch in width between the secondary seal and storage tank wall may not be greater than 1.0 square inch per foot of storage tank diameter. The commission amends paragraph (2)(F) from the proposed language, *must be no greater than 1.0 square inch per foot,* to the adopted language, *may not be greater than 1.0 square inch per foot,* to improve readability. This subparagraph contains the same substantive requirements as §115.112(d)(2)(F) applicable in the HGB area prior to this rulemaking.

Adopted subparagraph (H) specifies that each opening for a slotted guidepole in an external floating roof storage tank must be equipped with one of the control devices in this subparagraph. Clause (i) lists the first option: a pole wiper and a pole float that has a seal or wiper at or above the height of the pole wiper. Clause (ii) lists the second option: a pole wiper and a pole sleeve. Clause (iii) lists the third option: an internal sleeve emission control system. Clause (iv) lists the fourth option: a retrofit to a solid guidepole system. Clause (v) lists the fifth option: a flexible enclosure system. Clause (vi) lists the sixth option: a cover on an external floating roof tank. Subparagraph (H)(i) - (vi) is identical to the requirements in §115.112(d)(2)(G), except for non-substantive grammatical changes. The commission has changed clause (i) since proposal by changing *seal* to *seal or wiper* to reflect the original language.

The commission adopts subparagraph (I) requiring an external floating roof or internal floating cover to be floating on the liquid surface at all times except as allowed under the circumstances in the clauses of this subparagraph. The subparagraph is substantively equivalent to current §115.112(d)(2)(H). Requirements in clauses (i), (iii), and (vii) of this subparagraph are substantively equivalent to requirements in §115.112(d)(2)(H) in effect in the HGB area prior to this rulemaking.

Adopted clause (i) allows the roof to not be floating on the liquid at the start of the initial fill or the refill after the tank has been cleaned. As proposed, this requirement was included in subparagraph (I).

Adopted clause (ii) allows a roof or cover landing when necessary for preventive maintenance, roof or cover repair, primary seal inspection, or removal and installation of a secondary seal, if product is not transferred into or out of the storage tank, emissions are minimized, and the repair is completed within seven calendar days. It clarifies the commission's intent that the ex-

isting allowance for maintenance or inspection in the HGB area means that product must not be transferred into or out of the storage tank, emissions must be minimized, and the repair must be completed within seven calendar days. The commission intends for the activities in this clause to harmonize with the exemption from applicable degassing requirements in Chapter 115, Subchapter F, Division 3.

Adopted clause (iii) allows a roof or cover landing when necessary for supporting a change in service to an incompatible liquid.

Adopted clause (iv) allows a roof or cover landing when the storage tank has a storage capacity less than 25,000 gallons. Clause (iv) does not include the allowance for roof or cover landings on tanks storing VOC with vapor pressure less than 1.5 psia included in §115.112(d)(2)(H) because this situation is explicitly exempted in §115.111.

Adopted clause (v) allows a roof or cover landing when the vapors are routed to a control device from the time the storage tank has been emptied to the extent practical or the drain pump loses suction until the floating roof or cover is within 10% by volume of being refloated. Clause (v) changes the start time of vapor control from the moment the floating roof or cover is landed to the time the storage tank has been emptied to the extent practical or the drain pump loses suction. This process allows time for a control device to be connected to the tank in a manner that can capture VOC from the vapor space beneath the landed roof or cover. The current language requires the control device to be connected and operating the moment the vapor space develops, which is an infeasible condition. This requirement will not result in additional VOC emissions since VOC vapors are not emitted because the vapor space below the landed roof or cover is enlarging when the liquid level is dropping. The commission requires vapors generated under the landed roof to be routed to the control device after it is connected. Routing vapors under a landed roof to a control device necessitates that all openings in the storage tank other than the connection to the vapor control system either are closed or only passing gases into the storage tank.

Adopted clause (vi) allows a roof or cover landing when all VOC emissions from the tank, including emissions from roof or cover landings, have been included in an emissions limit or cap first approved under 30 TAC Chapter 116 prior to March 1, 2013. The end date for permit approval coincides with the compliance date of the rule in order to allow those entities who have permitted these emissions to continue to land their floating roofs or covers as authorized. When the current language in §115.112(d)(2)(H) was first adopted in 2007, the commission was beginning the process of including landing emissions in permits. The permitting schedule for these emissions required all regulated entities in Standard Industrial Classifications (SIC code) listed in 30 TAC §101.221 to seek authorization for these emissions by January 5, 2012, with the majority of affected entities required to apply for authorization by January 5, 2008, and any entities in SIC codes that are not listed, including bulk fuel terminals, to apply for authorization by January 5, 2013. Requiring authorization of these emissions three months after the last permit application deadline and 14 months after adoption of the rule change should provide ample time for all entities that desire to apply for and receive authorization for these emissions. Owners or operators concerned about the timing of this provision are encouraged to contact the commission's Air Permits Division prior to submitting a permit application to ensure that the permit application and review process proceeds as quickly as possible.

Adopted clause (vii) allows a roof or cover landing when all VOC emissions from floating roof or cover landings at the regulated entity, as defined in §101.1, are less than 25 tpy. The 25 tpy limit coincides with the maximum amount of VOC emissions from a regulated entity that can be authorized by any Permit by Rule (PBR). In addition to complying with §115.112(e)(2)(H), a site must have its VOC emissions permitted by either a PBR or a permit approved under Chapter 116, which falls under clause (vi) of this subparagraph. Therefore, 25 tpy is the maximum amount of VOC emissions a site can operate with under this clause.

The commission adopts paragraph (3), proposed as §115.112(e)(3) and (f)(3), specifying that control devices used to comply with subsection (e) must meet one of the conditions in paragraph (3) at all times when VOC vapors are routed to the device.

Adopted subparagraph (A), proposed as §115.112(e)(3)(A) and (f)(3)(A) requires a control device, other than a vapor recovery unit or a flare, to maintain the control efficiency specified in this subparagraph.

Adopted clause (i), proposed as a portion of §115.112(e)(3)(A), specifies the minimum control efficiency in the HGB area as 90%. This clause contains the same requirement as §115.112(d)(3) applicable in the HGB area prior to this rulemaking except that this subparagraph applies to control devices other than vapor recovery units or flares.

Adopted clause (ii), proposed as a portion of §115.112(f)(3)(A), specifies the minimum control efficiency in the DFW area as 95%. The commission has determined that 95% control is RACT in the DFW area. Although 95% control is more stringent than the 90% control level currently required in the HGB area, the commission has determined that it is technologically and economically feasible to achieve 95% control of VOC emissions from these sources.

Adopted subparagraph (B) requires a vapor recovery unit to be designed to process all VOC vapor generated by the maximum crude oil and condensate throughput of the storage tank and that it transfer recovered vapors to a pipe or container that is vapor-tight, as defined in §115.10. This subparagraph contains requirements not currently applicable in the HGB area. In a change since proposal, the commission has substituted *VOC* throughput for *crude oil and condensate* throughput to clarify the commission's intent that vapor recovery units may be used for storage tanks storing VOC other than crude oil and condensate. The commission's intent is to assure that vapor recovery units will function effectively to capture and transfer all of the volatilizing VOC from a storage tank under normal operating conditions. Routing vapors to a vapor control system necessitates that all openings in the storage tank other than the connection to the vapor control system either are closed; only passing air into the storage tank; or open for a minimal time to relieve excess pressure or when gauging or sampling is conducted. The design capacity of the vapor recovery unit can be determined by applying the test methods in §115.117 for existing tanks or computer simulations of expected maximum throughput for new tanks. Owners or operators need to maintain records of the capacity determination in order to demonstrate compliance with this requirement. The requirement that the pipe or container be vapor-tight is included to assure that the vapors are used for the beneficial purpose of sale or fuel rather than merely emitted to the atmosphere.

Adopted subparagraph (C) requires a flare to be designed and operated in accordance with 40 CFR §60.18(b) - (f) (as amended through December 22, 2008 (73 FR 78209)) and be lit at all times when VOC vapors are routed to the flare. This subparagraph contains requirements not currently applicable in the HGB area. It separates flares from the 90% control efficiency requirement in §115.112(d)(3) currently applicable in the HGB area. Although 40 CFR §60.18 requires the pilot to be lit at all times and requires monitoring of the flare pilot flame, the commission is also specifically requiring the flare flame to be lit to clarify that the intent of the rule is for both the flare flame and the pilot to be lit at all times when VOC vapors are routed to the device.

The commission adopts paragraph (4), proposed as §115.112(e)(4) and (f)(4), requiring storage tanks storing condensate, as defined in §101.1, prior to custody transfer to route flashed gases to a vapor recovery unit or vapor control system if the liquid throughput of an individual tank or the aggregate of tanks in a tank battery exceeds a threshold listed in subparagraphs (A) and (B). The proposed phrase *throughput through an individual tank* has been replaced with *throughput of an individual tank* to improve readability. In response to comment, the commission has clarified that the throughput threshold is condensate rather than total liquid throughput. This clarification was the original intent of these requirements in the HGB area, as seen in the explanation of control requirement §115.112(d)(4) in the 2007 HGB rulemaking published in the June 8, 2007, issue of the *Texas Register* (32 TexReg 3180). Routing vapors to a vapor control system necessitates that all openings in the storage tank other than the connection to the vapor control system either are closed; only passing air into the storage tank; or open for a minimal time to relieve excess pressure or when gauging or sampling is conducted.

The commission adopts new subparagraphs (A) and (B), which were added in response to comment, to maintain thresholds at major source levels in the event of a reclassification of the DFW area. Subparagraph (A) implements the current threshold for the HGB severe nonattainment area, 1,500 barrels of condensate. Subparagraph (B) implements the threshold for the DFW area in clauses (i) and (ii). Clause (i) implements the threshold for a serious nonattainment area, 3,000 barrels of condensate. Clause (ii) implements the threshold at 1,500 barrels of condensate for the DFW area in the event that it is reclassified as a severe nonattainment area. Clause (ii) is only implemented in accordance with the compliance schedule in §115.119(b)(1)(C). The commission equates the major source threshold with a condensate throughput by applying a 33.3 pounds per barrel (lb/bbl) of VOC emission factor.

The commission adopts paragraph (5), proposed as §115.112(e)(5) and (f)(5), requiring that storage tanks storing crude oil or condensate prior to custody transfer or at a pipeline breakout station must have flashed gases routed to a vapor control system if the uncontrolled VOC emissions from an individual storage tank or from the aggregate of storage tanks in a tank battery equal or exceed a threshold on a rolling 12-month basis. Routing vapors to a vapor control system necessitates that all openings in the storage tank other than the connection to the vapor control system either are closed; only passing air into the storage tank; or open for a minimal time to relieve excess pressure or when gauging or sampling is conducted.

The commission adopts subparagraphs (A) and (B), which were added in response to comment, to maintain thresholds at major source levels in the event of a reclassification of the DFW area. Subparagraph (A) incorporates the current 25 tpy VOC threshold for the HGB severe nonattainment area. Subparagraph (B) implements the threshold for the DFW area in clauses (i) and (ii). Clause (i) implements a 50 tpy VOC threshold for the DFW area as a serious nonattainment area. Clause (ii) implements the 25 tpy threshold for the DFW area in the event that it is reclassified as a severe nonattainment area. Clause (ii) is only implemented in accordance with the compliance schedule in §115.119(b)(1)(C).

Adopted paragraph (6), proposed as part of §115.112(e)(5) and (f)(5), lists the required emission estimation methods for uncontrolled emissions from a storage tank or tank battery. As part of the split from proposed paragraph (5), the commission has copied the phrase *from storage tanks storing crude oil or condensate prior to custody transfer or at a pipeline breakout station* from paragraph (5) to paragraph (6) to specify which emission estimates are intended. If emissions determined using direct measurements or other methods approved by the executive director under paragraph (6)(A) or (B) are higher than emissions estimated using the default factors or charts in paragraph (6)(C) or (D), the higher value must be used.

The commission amends adopted paragraph (6) to add the phrase *the owner or operator may* to proposed subparagraphs (A) - (D) to comply with *Texas Register* style requirements.

Adopted subparagraph (A) lists the first option: direct measurement using the measuring instruments and methods specified in §115.117. This subparagraph contains the same requirements as §115.112(d)(5)(A) applicable in the HGB area prior to this rulemaking.

Adopted subparagraph (B) lists the second option: other test methods or computer simulations pre-approved by the executive director. The commission's Air Permits Division and Air Quality Division have produced guidance documents describing test methods and computer simulations to measure or estimate working, breathing, and flash emissions from storage tanks that are recommended for use in air permit applications and emissions inventory preparation. The guidance documents are Air Permits Division Reference Guide APDG 5942, *Calculating Volatile Organic Compounds Flash Emissions from Crude Oil and Condensate Tanks at Oil and Gas Production Sites,* and *Emission Inventory Guidelines, Appendix A, Technical Supplement 6,* TCEQ publication number RG-360A. Air Quality Division staff who review such calculations for emissions inventory reporting will review the simulation use. This subparagraph contains the same requirements as §115.112(d)(5)(D) applicable in the HGB area prior to this rulemaking.

Adopted subparagraph (C) lists the third option: using a factor of 33.3 pounds of VOC per barrel (42 gallons) of condensate produced or 1.6 pounds of VOC per barrel (42 gallons) of oil produced. These emission factors come from a commission-funded study, *VOC Emissions from Oil and Condensate Storage Tanks,* October 6, 2006. This subparagraph contains the same requirements as §115.112(d)(5)(B) applicable in the HGB area prior to this rulemaking.

Adopted subparagraph (D) lists the fourth option available for crude oil storage only, using the chart in Exhibit 2 of the EPA publication *Lessons Learned from Natural Gas Star Partners: Installing Vapor Recovery Units on Crude Oil Storage Tanks,* October 2003, and assuming that the hydrocarbon vapors have a molecular weight of 34 pounds per pound mole and are 48% by weight VOC. This subparagraph contains the same require-

ments as §115.112(d)(5)(C) applicable in the HGB area prior to this rulemaking. The chart in Exhibit 2 of the Natural Gas Star publication is also included in the September, 2009, version of the TCEQ's Air Permits Division Reference Guide APDG 5942, *Calculating Volatile Organic Compounds Flash Emissions from Crude Oil and Condensate Tanks at Oil and Gas Production Sites.*

As discussed elsewhere in the Section by Section Discussion portion of this preamble, the commission is not adopting proposed subsection (f) because the provisions in proposed subsection (f) have been combined with adopted subsection (e).

§115.113, Alternate Control Requirements

The commission adopts non-substantive changes to §115.113 necessary to comply with current rule formatting standards.

§115.114, Inspection Requirements

The commission adopts revisions to subsection (a) that amend inspection requirements effective prior to this rulemaking in the BPA, DFW, El Paso, and HGB areas.

Adopted paragraph (1) has been reformatted to increase clarity and readability. All requirements have been maintained. Paragraph (1) requires an annual inspection of an internal floating cover and its primary and secondary seal. Subparagraph (A) contains the specific items requiring inspection and the requirement to repair or degas within 60 days that are currently contained in paragraph (1). Degassing must be performed in accordance with Chapter 115, Subchapter F, Division 3, if the storage tank meets the applicability of Chapter 115, Subchapter F, Division 3. The commission includes a reference to Chapter 115, Subchapter F, Division 3 to remind owners or operators of potentially applicable regulations. Subparagraph (B) contains the requirements for an owner or operator to request extensions to the repair deadline. These requirements are currently located in paragraph (1).

Adopted paragraph (2) specifies that gaps in the secondary seal of an external floating roof tank must be measured annually. The paragraph contains an amendment adding §115.112(e)(2)(G) to the list of control requirements for a secondary seal gap measurement due to the addition of §115.112(e). Paragraph (2) has also been reformatted to increase clarity and readability. Subparagraph (A) contains the specific items requiring inspection and the requirement to repair or degas within 60 days that are currently contained in paragraph (2). Degassing must be performed in accordance with Chapter 115, Subchapter F, Division 3 if the storage tank meets the applicability of Chapter 115, Subchapter F, Division 3. The commission includes a reference to Chapter 115, Subchapter F, Division 3 to remind owners or operators of potentially applicable regulations. Subparagraph (B) contains the requirements for an owner or operator to request extensions for repair. These requirements are currently located in paragraph (2).

Adopted paragraph (3) contains an amendment that adds §115.112(e)(2)(G) to the list of control requirements for a secondary seal gap limit due to the addition of §115.112(e). The word *storage* has been added to the proposed rule language to improve consistency with other portions of this section in which tanks are referred to as storage tanks.

Adopted paragraph (4) specifies that the secondary seal of an external floating roof tank must be inspected at least every six months. The paragraph contains an amendment that adds §115.112(e)(2)(F) and (G) to the list of control requirements for seal integrity and a secondary seal gap limit due to the addition of §115.112(e). Paragraph (4) has also been reformatted to increase clarity and readability. Subparagraph (A) contains the specific items requiring inspection and the requirement to repair or degas within 60 days that are currently contained in paragraph (4). Degassing must be performed in accordance with Chapter 115, Subchapter F, Division 3, if the storage tank meets the applicability of Subchapter F, Division 3. The commission includes a reference to Subchapter F, Division 3, to remind owners or operators of potentially applicable regulations. Subparagraph (B) contains the requirements for an owner or operator to request extensions for repair. These requirements are currently located in paragraph (4).

The commission amends subsection (b) which specifies inspection requirements applicable in Gregg, Nueces, and Victoria Counties.

Adopted paragraph (1) contains inspection requirements for internal floating cover storage tanks and has been changed from proposal by non-substantively splitting its requirements into two subparagraphs to provide consistency with parallel paragraphs of this section. Subparagraph (A) contains the specific items requiring inspection and the requirement to repair or degas within 60 days. Subparagraph (B) contains the requirements for an owner or operator to request extensions to the repair deadline.

Adopted paragraph (2) specifies annual secondary seal gap measurement requirements for external floating roof storage tanks. This paragraph has been reformatted to increase clarity and readability. Subparagraph (A) contains the specific items requiring inspection and the requirement to repair or degas within 60 days that are currently contained in paragraph (2). Subparagraph (B) contains the requirements for an owner or operator to request extensions to the repair deadline. These requirements are currently located in paragraph (2).

Adopted paragraph (3) includes the word *storage* that has been added to the proposed rule language to improve consistency with other portions of this section in which tanks are referred to as storage tanks.

Adopted paragraph (4) specifies annual visual inspection requirements for secondary seals on external floating roof tanks. This paragraph has been reformatted to increase clarity and readability. Subparagraph (A) contains the specific items requiring inspection and the requirement to repair or degas within 60 days that are currently contained in paragraph (4). Subparagraph (B) contains the requirements for an owner or operator to request extensions to the repair deadline. These requirements are currently located in paragraph (4).

The commission amends subsection (c) which specifies inspection requirements applicable in Aransas, Bexar, Calhoun, Matagorda, San Patricio, and Travis Counties. No substantive changes are adopted for any of the paragraphs of subsection (c). The proposed phrase *requirements shall apply for all persons in* has been replaced with *requirements shall apply in* to improve readability and consistency with other portions of this division.

Adopted paragraph (1) contains inspection requirements for internal floating cover storage tanks and has been changed from proposal by non-substantively splitting its requirements into two subparagraphs to provide consistency with parallel paragraphs of this section. Subparagraph (A) contains the specific items requiring inspection and the requirement to repair or degas within

60 days. Subparagraph (B) contains the requirements for an owner or operator to request extensions to the repair deadline.

Adopted paragraph (2) contains inspection requirements for external floating roof storage tanks and has been changed from proposal by non-substantively splitting its requirements into two subparagraphs to provide consistency with parallel paragraphs of this section. Subparagraph (A) contains the specific items requiring inspection and the requirement to repair or degas within 60 days. Subparagraph (B) contains the requirements for an owner or operator to request extensions to the repair deadline.

§115.115, Monitoring Requirements

The commission adopts new §115.115 that contains the monitoring requirements currently located in existing §115.116 and amendments to add requirements for additional control devices as described in this Section by Section Discussion.

Throughout this section, where continuous monitoring is specified, the commission's intent is that a measurement be taken at least every 15 minutes.

Adopted new subsection (a) amends requirements currently located in §115.116(a). New subsection (a) also contains requirements currently in §115.116(a)(3), specifying that an affected owner or operator shall install and maintain monitors to measure operational parameters of any of the control devices listed in paragraphs of this subsection installed to meet applicable control requirements. Such monitors must be sufficient to demonstrate proper functioning of those devices to design specifications. The commission deleted the word continuously from this subsection because where continuous monitoring is required, it is specified elsewhere in this subsection.

The commission adopts new paragraph (1) that rephrases the requirement currently located in §115.116(a)(3)(A) without substantive change to specify that for a direct-flame incinerator, the owner or operator shall continuously monitor the exhaust gas temperature immediately downstream of the device.

Adopted new paragraph (2) amends the requirement currently located in §115.116(a)(3)(B) to require continuous monitoring of the outlet gas temperature of a condensation system to ensure that the temperature is below the system manufacturer's recommended operating temperature for controlling the VOC vapors routed to the device. The commission changes the word *chiller* in existing §115.116(a)(3)(B) to *condensation system* for uniformity with recent revisions in this chapter. The commission contends that a maximum temperature is necessary to ensure that the condensation system is operating at a sufficiently low temperature to assure collection of VOC vapors.

Adopted new paragraph (3) specifies that an owner or operator shall monitor a carbon adsorption system according to one of the options in subparagraphs (A) or (B). The language in this paragraph is clarification of the language in existing §115.116(a)(3)(C) that required continuous VOC concentration measurement to determine if breakthrough has occurred. Subparagraph (A) specifies that for the purposes of this rule, breakthrough is defined as a VOC concentration measured over 100 parts per million by volume (ppmv) above background expressed as methane. The 100 ppmv concentration defining breakthrough is chosen to coincide with the definition of VOC breakthrough from a carbon adsorption system in the commission's maintenance, startup, and shutdown model permit. Subparagraph (B) provides an alternative engineering safeguard to switch the vent gas flow to fresh carbon at a regular predetermined time interval that is less than the carbon replacement interval determined by the maximum design flow rate and the VOC concentration in the gas stream vented to the carbon adsorption system or carbon adsorber. The alternative requirement assures protection at least equivalent to the current language since owners or operators are required to switch to fresh carbon in all possible operating scenarios before the system reaches its absorption capacity rather than switching after measurements, which can be as much as 15 minutes apart, detect breakthrough. In conjunction with the testing requirements in §115.116, pre-breakthrough operation of the carbon adsorption system or carbon adsorber will be in compliance with applicable control requirements. The proposed phrase *replacement interval that is determined by* has been replaced with the phrase *replacement interval determined by* to improve readability.

Adopted new subparagraph (A) requires continuous monitoring of the exhaust gas VOC concentration of a carbon adsorption system to determine breakthrough. For the purpose of paragraph (3), breakthrough is defined as a measured VOC concentration exceeding 100 ppmv expressed as methane above background. The owner or operator choosing to conduct this monitoring using Method 21 shall monitor once every seven calendar days. The commission chooses this non-continuous frequency to provide reasonable assurance that the device is functioning effectively.

Adopted new subparagraph (B) requires the owner or operator to switch the vent gas flow to fresh carbon at a regular predetermined time interval that is less than the carbon replacement interval determined by the maximum design flow rate and the VOC concentration in the gas stream vented to the carbon adsorption system. Owners or operators choosing this option should be prepared to show how the interval was determined.

Adopted new paragraph (4) contains requirements currently located in existing §115.116(a)(3)(B) and specifies that for a catalytic incinerator, the owner or operator shall continuously monitor the inlet and outlet gas temperature.

Adopted new paragraph (5) specifies that the owner or operator of any stationary tank who is required to comply with §115.112(e)(3) shall continuously monitor at least one of the operational parameters listed in proposed new subparagraphs (A), (B), or (C) sufficient to demonstrate proper functioning to design specifications. This requirement will only be applicable after the compliance date for §115.112(e)(3) in affected areas, since compliance with the control requirement it references is only required after that date.

Adopted new subparagraphs (A) and (B) specify examples of operational parameters of a vapor recovery unit. Adopted subparagraph (A) specifies that the run-time of the compressor or motor in a vapor recovery unit is an operational parameter; adopted subparagraph (B) lists the amount of recovered vapors as another operational parameter; and adopted subparagraph (C) lists other parameters sufficient to demonstrate proper functioning to design specifications. The operational parameter in adopted subparagraph (A) will assure that a compressor or motor-driven vapor recovery unit is operating; adopted subparagraph (B) will assure that a vapor recovery unit is transferring vapors; and adopted subparagraph (C) provides flexibility for the owner or operator to identify other suitable parameters. The commission acknowledges that vapor recovery unit technology continues to evolve and chooses not to specify an operational parameter for each technology, but rather to require measurement of an appro-

priate operational parameter. The commission's standard permit for oil and gas sites includes examples of other parameters sufficient to demonstrate proper functioning to design specifications. The monitoring provisions for vapor recovery units claiming 95% VOC control in the oil and gas standard permit would be sufficient for the purposes of this rulemaking. Specifically, a vapor recovery unit utilizing mechanical compression needs to have a sensing device set to capture the vapor at peak intervals. This device is included in the design of the equipment and no additional monitoring is required. A vapor recovery unit utilizing chemical absorption into a liquid needs to be tested to assure that the liquid is absorbing VOC vapors to at least the minimum required control efficiency. For crude oil tanks, the standard permit requires bi-weekly inlet and outlet monitoring and condensate tanks require weekly monitoring to demonstrate 95% control. The replacement of the liquid must follow the manufacturer's recommended procedure. For the purposes of this rule, the commission will not allow the use of Method 21 to conduct this monitoring.

Adopted new paragraph (6) specifies that one or more operational parameters of a control device not listed in subsection (a) must be measured continuously. This provision specifies uniform monitoring requirements for emerging control technologies not specifically listed in this division. Continuous monitoring is also necessary to assure consistency with monitoring requirements in effect prior to this rulemaking for other control devices listed in existing §115.116(a)(3).

Adopted new subsection (b) contains monitoring requirements currently located in §115.116(b)(3) and specifies that in Victoria County, affected persons shall continuously monitor operational parameters of any of the emission control devices listed in this subsection installed to meet applicable control requirements. The commission deleted the word continuously from this subsection because where continuous monitoring is required, it is specified elsewhere in this subsection.

Adopted new paragraphs (1) - (3) have been revised from their proposed version to read *for a (control device name) the owner or operator shall monitor (operational parameter)* to improve readability and consistency with other monitoring provisions in this division.

Adopted new paragraph (1) contains monitoring requirements currently located in §115.116(b)(3)(A) and lists the exhaust gas temperature immediately downstream of a direct-flame incinerator as an operational parameter requiring monitoring.

Adopted new paragraph (2) contains monitoring requirements currently located in §115.116(b)(3)(B) and lists the inlet and outlet gas temperature of a condensation system or catalytic incinerator. The commission changes the word *chiller* from existing §115.116(b)(3)(B) to *condensation system* for uniformity with recent revisions in this chapter.

Adopted new paragraph (3) contains monitoring requirements currently located in §115.116(b)(3)(C) and lists the exhaust gas VOC concentration of any carbon adsorption system, as defined in §115.10, as an operational parameter requiring monitoring to determine if breakthrough has occurred. The owner or operator choosing to conduct this monitoring using Method 21 shall monitor once every seven calendar days. The commission chooses this non-continuous frequency to provide reasonable assurance that the device is functioning effectively.

§115.116, Testing Requirements

The commission adopts new subsection (a) that specifies testing requirements that begin on March 1, 2013, in the DFW, HGB, and BPA areas and El Paso County.

Adopted new paragraph (1), proposed as portions of subsection (a) and entire paragraphs (3) and (4), requires an initial test for a vapor control system, other than a vapor recovery unit or a flare, that must meet the control requirement in §115.112(a)(3) and (e)(3)(A) to be conducted in accordance with the approved test methods in §115.117. If the vapor control system is modified in any way that could reasonably be expected to decrease the control efficiency, the device must be retested within 60 days of the modification.

The commission is specifically requiring initial control device testing; however, the test is intended to be a clarification of the existing requirements and is not intended to impose any additional requirements on affected sources. Although not explicitly included in rule language, an initial test has been expected at least since revisions were made to this division in 1990, as stated in the February 2, 1990, issue of the *Texas Register* (15 TexReg 561). Testing already performed on existing sources and documented in accordance with test methods in §115.117 will be sufficient for this requirement. The retesting provision is necessary to demonstrate that the control device continues to meet the control requirement after modification.

The commission adopts paragraph (2), proposed as §115.116(b)(1), specifying testing requirements for a flare used to comply with §115.112(a)(3) and (e)(3)(A). The control requirements for flares include compliance with 40 CFR §60.18, including the design verification test. The design verification test is intended to be a clarification of the existing requirements and is not intended to impose any additional requirements on affected sources. Compliance with the testing provisions is not required until March 1, 2013. The commission contends that ample time is available for any owners or operators who have not already conducted this design verification test.

The commission is not adopting the provisions of proposed paragraph (2), which would have required that the test be conducted prior to the compliance date or within 60 days if the device is placed into service after the compliance date because adopted §115.119(f) specifies the same 60-day period for newly affected sources to come into compliance.

The commission is not adopting proposed paragraphs (3) and (4) because the provisions of these paragraphs have been included in paragraph (1).

The commission adopts new subsection (b) that specifies testing requirements in Gregg, Nueces, and Victoria Counties.

Adopted new paragraph (1) requires an initial test for a vapor control system, other than a vapor recovery unit or a flare, used to comply with the control requirements in §115.112(b) in accordance with the approved test methods in §115.117. The commission inadvertently omitted this provision at proposal for these counties. The commission proposed same testing requirements for the DFW, El Paso, and HGB areas. The test is intended to be a clarification of the existing requirements and is not intended to impose any additional requirements on affected sources. Although not explicitly included in rule language, an initial test has been expected at least since revisions were made to this division in 1990, as stated in the February 2, 1990, issue of the *Texas Register* (15 TexReg 561).

Adopted new paragraph (2), proposed as §115.116(b)(1) specifies that the flare must pass the design verification test required by 40 CFR §60.18(f).

The commission is not adopting proposed paragraph (2) which would have required that the test be conducted prior to the compliance date or within 60 days if the flare is placed into service after the compliance date because adopted §115.119(f) specifies the same 60-day period for newly affected sources to come into compliance.

Testing already performed on existing sources in accordance with test methods in §115.117 will be sufficient for this requirement. Although not required by §115.118, owners or operators are encouraged to maintain records of this testing as long as the vapor control system is in use in order to demonstrate compliance with this section.

§115.117, Approved Test Methods

The commission adopts new §115.117 specifying that all affected persons in the BPA, DFW, El Paso, and HGB areas and in Gregg, Nueces, and Victoria Counties shall determine compliance with the requirements in this division by applying the test methods in §115.117 as appropriate. Adopted §115.117 consolidates redundant requirements located in existing §115.115(a) that were applicable in the BPA, DFW, El Paso, and HGB areas; requirements in existing §115.115(b) that were applicable in Gregg, Nueces, and Victoria Counties; and requirements in existing §115.115(c) that contained additional test methods applicable only in the HGB area prior to this rulemaking. In addition, the language expands the applicability of the test methods from compliance with certain control requirements to compliance with all requirements in this division. The commission contends that this change assures a clear statement of the necessary test method in all situations. The commission has added clarification that this section only applied and continues to apply in the BPA, DFW, El Paso, and HGB areas and in Gregg, Nueces, and Victoria Counties because the proposed language inadvertently applied these requirements to all affected persons.

Adopted new paragraph (1) contains language currently located in §115.115(a)(1) and (b)(1) specifying use of test methods 1 - 4 for determining flow rate.

Adopted new paragraph (2) contains language currently located in §115.115(a)(2) and (b)(2) specifying use of Method 18 for determining gaseous organic compound emissions.

The commission adds adopted new paragraph (3) in response to comment specifying use of Method 21 for determining VOC concentrations for the purpose of checking for leaks, or to determine breakthrough on a carbon adsorption system or carbon adsorber. For the purposes of this rule, the commission will not allow the use of Method 21 to determine the efficiency of a control device.

Adopted new paragraph (4), proposed as §115.117(3), contains language currently located in §115.115(a)(3) and (b)(3) specifying use of Method 22 for determining visible emissions from flares. Adopted new paragraph (3) rephrases the applicability from *visual determination of fugitive emissions from material sources and smoke emissions from flares* to *determination of visible emissions from flares.* Although the current language contains the title of Method 22, the language more accurately depicts applications of the test method in this division.

Adopted new paragraph (5), proposed as §115.117(4), contains language currently located in §115.115(a)(4) and (b)(4) specifying Method 25 for determining total gaseous nonmethane organic emissions.

Adopted new paragraph (6), proposed as §115.117(5), contains language currently located in §115.115(a)(5) and (b)(5) specifying Methods 25A or 25B for determining total gaseous organic concentrations using flame ionization or nondispersive infrared analysis.

Adopted new paragraph (7), proposed as §115.117(6), contains language currently located in §115.115(a)(6) and (b)(6) for measuring storage tank seal gap.

Adopted new paragraph (8), proposed as §115.117(7), contains test methods currently located in §115.115(a)(7) and (b)(7) for determination of true vapor pressure. In addition to the consolidation, the commission adds use of standard reference texts and removes the 1989 reference year in American Society for Testing and Materials Test Method D323 in order to update the reference. The commission also specifies that true vapor pressure must be corrected to storage temperature according to the procedure in American Petroleum Institute Publication 2517. The commission has deleted the proposed reference to the third edition of American Petroleum Institute Publication 2517 to assure that the most recent version is used. The actual storage temperature of an unheated storage tank may be determined using the maximum local monthly average ambient temperature as reported by the National Weather Service. The National Weather Service data can be obtained from the Monthly Weather Summary published for each major observation location. These data are available online after the observation month in the Monthly Weather Summary for the nearest observation location. Since the temperature of a heated storage tank differs from ambient conditions, either the measured temperature, if available, or the set point of the heating system must determine this temperature. The proposed phrase *tank or vessel* has been replaced with *storage tank* because this division applies to storage tanks, not vessels.

Adopted new paragraphs (9) and (10), proposed as §115.117(8) and (9), were located in existing §115.115(c) prior to this rulemaking. The commission adopts minor phrasing amendments in paragraph (9) to clarify that working, breathing, and standing emissions must be measured along with flash emissions. The commission contends that this requirement is not new since the specified devices measuring flash emissions would, in practice, also be measuring working, breathing, and standing emissions.

The commission also adopts new paragraph (11), proposed as §115.117(10), which was not in existing §115.115, allowing use of test methods other than those specified in this section if validated by 40 CFR Part 63, Appendix A, Test Method 301 and approved by the executive director. This paragraph is added to allow additional flexibility for affected owners and operators and to harmonize this section with other portions of this chapter.

Adopted new paragraph (12), proposed as §115.117(11), contains language currently located in §115.115(a)(8), (b)(8), and (c)(8) concerning use of modified test methods.

§115.118, Recordkeeping Requirements

The commission adopts new §115.118 that contains recordkeeping requirements.

The commission adopts new subsection (a) that amends recordkeeping requirements currently located in existing §115.116(a) and applicable in the BPA, DFW, El Paso, and HGB areas prior to this rulemaking.

Adopted new paragraph (1) specifies that the owner or operator of a storage tank claiming an exemption in §115.111 shall maintain records sufficient to demonstrate continuous compliance with the applicable exemption criteria. Where applicable, true vapor pressure, VOC content type, or a combination of the two shall be recorded initially and at every change of service or when the storage tank is emptied and refilled. This requirement was not in existing §115.116 and is a clarification to enhance enforceability of this division. Records of true vapor pressure and VOC content type of stored material are the basis for all exemptions in §115.111 that are not based on tank size, tank purpose, or construction date and are the most commonly varying data.

Adopted new paragraph (2) contains the requirements located in existing §115.116(a)(1), that the owner or operator of any storage tank with an external floating roof that is exempt from the requirement for a secondary seal in §115.111(a)(1), (6), and (7) and is used to store VOC with a true vapor pressure greater than 1.0 psia shall maintain records of the type of VOC stored and the average monthly true vapor pressure of the stored liquid. Tanks qualifying for exemptions in §115.111(a)(6) or (7) must have had mechanical shoe, liquid-mounted foam, or liquid-mounted liquid filled seals installed prior to August 22, 1980, or December 10, 1982, respectively. The phrase *requirement for a secondary seal as specified in §115.111* has been replaced with *requirement of a secondary seal in §115.111* to improve readability.

Adopted new paragraph (3) contains the requirements currently located in existing §115.116(a)(2) specifying that the results of inspections required by §115.114(a) must be recorded. For secondary seal gaps that are required to be physically measured during inspection, these records must include a calculation of emissions for all secondary seal gaps that exceed 1/8 inch where the accumulated area of such gaps is greater than 1.0 square inch per foot of tank diameter. These calculated emissions inventory reportable emissions ($EI_{Reportable}$) must be reported in the annual emissions inventory submittal required by §101.10. The emissions must be calculated using the methodology described in the equation and explanation of this paragraph. This change is a reformatting of the method currently located in existing §115.116(a)(2)(A) - (J) designed to increase clarity and is not intended to change the calculation method. Explanations of the variables follow the equation.

Adopted new paragraph (4) contains rephrasing of the requirements currently located in existing §115.116(a)(3) that specify recordkeeping requirements for monitoring required by §115.115(a). Such records must be sufficient to demonstrate proper functioning of those devices to design specifications.

Adopted new subparagraph (A) rephrases the requirement currently located in existing §115.116(a)(3)(A) to specify that for a direct-flame incinerator, the owner or operator shall continuously record the exhaust gas temperature immediately downstream of the device.

Adopted new subparagraph (B) expands upon the recordkeeping language currently located in existing §115.116(a)(3)(B). The former description for the control device was a chiller. The commission uses the phrase *condensation system* to describe this equipment in order to maintain consistency with other portions of this chapter. The language requires continuous recording of the outlet gas temperature of a condensation system to ensure that the temperature is below the system manufacturer's recommended operating temperature for controlling the VOC vapors routed to the device.

Adopted new subparagraph (C) expands upon the recordkeeping language currently located in existing §115.116(a)(3)(C) by specifying owners or operators using a carbon adsorption system or carbon adsorber shall maintain records of the system operation specified in clause (i) or (ii). New clause (i) requires the owner or operator to continuously record the exhaust gas VOC concentration of any carbon adsorption system monitored according to §115.115(a)(3)(A). New clause (ii) requires the owner or operator to record the date and time each carbon container is used if the carbon adsorption system or carbon adsorber is switched on a predetermined interval according to §115.115(a)(3)(B) and to document how they calculated the replacement interval specified in §115.115(a)(3)(B). The language of subparagraph (C) is a clarification of the existing language that required continuous VOC concentration recording to determine if breakthrough has occurred because the option in §115.115(a)(3)(B) to switch the vent gas flow is designed to occur prior to breakthrough. The commission added documentation of the carbon replacement interval calculation after proposal to ensure rule enforceability.

Adopted new subparagraph (D) contains some of the recordkeeping language currently located in existing §115.116(a)(3)(B) and specifies that for a catalytic incinerator, the owner or operator shall continuously record the inlet and outlet gas temperature.

Adopted new subparagraph (E), proposed as a portion of §115.118(a)(5), specifies that the owner or operator shall keep records of the continuous operational parameter monitoring of a vapor recovery unit required by §115.115(a)(5). This subparagraph and subparagraph (F) were split to provide separate recordkeeping requirements for monitoring requirements §115.115(a)(5) and (6).

Adopted new subparagraph (F), proposed as a portion of §115.118(a)(5), requires owners or operators to maintain records of the continuous operational parameter monitoring required in §115.115(a)(6) sufficient to demonstrate proper functioning of the control device to design specifications.

Adopted new paragraph (5), proposed as §115.118(a)(6), amends the requirements currently located in existing §115.116(a)(4) to specify that the results of any testing conducted in accordance with §115.116 or §115.117 must be maintained. A provision is included to allow off-site record storage under the condition that such records must be made available for review within 24 hours. This requirement provides operational flexibility to owners or operators with unstaffed locations not equipped for record storage.

Adopted new paragraph (6), proposed as §115.118(a)(7), contains the recordkeeping requirements currently located in existing §115.116(c).

Adopted new subparagraph (A) amends language currently located in existing §115.116(c)(1) and specifies that the owner or operator of any fixed roof storage tank that is not required in §115.112(d)(1) or (e)(1) to be equipped with an external floating roof, internal floating cover, or vapor control system to maintain records of the type of VOC stored, the starting and ending dates when the material is stored, and the true vapor pressure at the average monthly storage temperature of the stored liquid. This requirement does not apply to storage tanks with storage capacity of 25,000 gallons or less storing volatile organic liquids other than crude oil or condensate, or to storage tanks with storage capacity of 40,000 gallons or less storing crude oil or condensate. These records are necessary to document that material stored

in fixed roof tanks meets the criteria for exemption from control requirements.

Adopted new subparagraph (B) amends language currently located in existing §115.116(c)(2) and specifies that the owner or operator of any storage tank that stores crude oil or condensate prior to custody transfer or at a pipeline breakout station and is not equipped with a vapor recovery unit or other device that recovers VOC vapors shall maintain records of the estimated uncontrolled emissions from the storage tank on a 12-month rolling basis. The records must be made available for review within 72 hours upon request by authorized representatives of the executive director, the EPA, or any local air pollution control agency with jurisdiction. The commission intends for this requirement to document that the entity is not required to install a vapor control system because the entity is below an applicability threshold for VOC emissions. Records must be sufficient to allow investigators to determine whether emissions have been calculated by an appropriate method. In a change from the current requirement, the commission is requiring the emission estimation to be made on a 12-month rolling basis to match the control requirements in §115.112(d)(4) and (5) and (e)(4) and (5). If a computer simulation is used, records of the input and output must be retained.

Adopted new subparagraph (C) added in response to comment specifies that owners or operators extending the compliance deadline because a storage tank must be emptied and degassed are required to maintain records of the last time the storage tank was emptied and degassed. Owners and operators of storage tanks may already be required to keep such records for other purposes and these records will suffice for this purpose.

Adopted new paragraph (7) amends the language currently located in existing §115.116(a)(5) and specifies that all records must be maintained for two years and be made available for review upon request by authorized representatives of the executive director, the EPA, or any local air pollution control agency with jurisdiction. In the DFW area, any records created on or after March 1, 2011, must be maintained for at least five years. The language extends the record retention time from two years to five years starting with records that would be two years old on the compliance date of the rule.

Adopted new subsection (b) contains language located in existing §115.116(b) specifying the recordkeeping requirements in effect in Gregg, Nueces, and Victoria Counties.

Adopted new paragraphs (1) - (5) contain the recordkeeping portions of requirements currently located in existing §115.116(b)(1) - (5) without revision except for updating references to the new rules. Tanks qualifying for exemptions in §115.111(b)(6) or (7) must have had mechanical shoe, liquid-mounted foam, or liquid-mounted liquid filled seals installed prior to August 22, 1980, or December 10, 1982, respectively.

The commission is not adopting proposed subsection (c) because the provisions in proposed subsection (c) have been incorporated into adopted subsection (a).

§115.119, Compliance Schedules

In response to comment, the commission adopts changes in the DFW area with a later compliance date, March 1, 2013, to provide additional time for owners and operators to implement necessary changes. Since this rulemaking is not included in the RFP SIP revision, the proposed December 1, 2012, compliance date is no longer necessary. Recent similar rule changes were implemented in the HGB area at the beginning of the HGB ozone season one year after adoption of the rule changes, January 1, 2009, which was 18 months after adoption. While three months shorter, the beginning of the ozone season in the DFW area one year after adoption of these rule changes, March 1, 2013, follows the precedent set in the HGB area while allowing sufficient time for owners and operators to implement necessary changes. For consistency, all other affected counties are on the same implementation schedule.

Adopted subsection (a) states the compliance date for the HGB area, consisting of Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties, has already passed and the affected owner or operator must remain in compliance with this division unless specified in paragraphs (1) - (3).

Adopted paragraph (1), proposed as §115.119(d), contains the language currently in portions of §115.119(c) with modification for sections that have been moved or added and specifies that compliance with §115.112(d), existing monitoring provision now in §§115.115(a), 115.117, and 115.118(a) was required by January 1, 2009, except as specified in subparagraphs (A) and (B). Owners or operators subject to §115.112(d) prior to March 1, 2013, will continue to be subject to §115.112(d) until they comply with the requirements of §115.112(e). The existence of §115.112(e) does not constitute an extension of requirements to comply with §115.112(d). Instead, it provides a transition between the two sets of requirements.

Subparagraph (A), proposed as §115.119(d)(1), specifies that storage tanks that would need to be emptied and degassed in order to comply with this division can delay compliance until the next emptying and degassing activity, but no later than January 1, 2017. In a change from the proposed language, the adopted language consistently specifies emptying and degassing, as a single triggering event, which was the intent of the 2007 rule revision, as stated in the June 8, 2007, issue of the *Texas Register* (32 TexReg 3293). Additional emissions that would arise from emptying and degassing a tank could negate the benefit of the emission controls and therefore would not be required solely for the purpose of installing controls. Because floating roof tanks are taken out of service at least once every ten years, the controls must be installed no later than ten years from the date these rules were proposed. Regulated entities that use the delay of compliance provision should be prepared to justify why tank emptying and degassing were necessary to comply with the rules.

Subparagraph (B), proposed as §115.119(d)(2), contains language currently in §115.119(c) requiring compliance by January 1, 2009, for a storage tank with a storage capacity less than 210,000 gallons storing crude oil and condensate prior to custody transfer regardless if compliance with these requirements would require emptying and degassing of the storage tank.

Paragraph (2) specifies the compliance date for this rulemaking. It requires compliance with §§115.112(e), 115.115(a)(3)(B), (5), and (6), and 115.116 by March 1, 2013.

Subparagraph (A), proposed as §115.119(e)(1), specifies that storage tanks that would need to be emptied and degassed in order to comply with this division can delay compliance until the next emptying and degassing activity, but no later than January 1, 2017. In a change from the proposed language, the adopted language consistently specifies emptying and degassing, as a single triggering event, which was the intent of the 2007 rule revision, as stated in the June 8, 2007, issue of the *Texas Register* (32 TexReg 3293). Additional emissions that would arise from emptying and degassing a tank could negate the benefit of the

emission controls and therefore would not be required solely for the purpose of installing controls. Because floating roof tanks are taken out of service at least once every ten years, the controls must be installed no later than ten years from the date these rules were proposed. Regulated entities that use the delay of compliance provision should be prepared to justify why tank emptying and degassing were necessary to comply with the rules.

Subparagraph (B), proposed as §115.119(e)(4) with a different date, requires compliance by March 1, 2013, for a storage tank with a storage capacity less than 210,000 gallons storing crude oil and condensate prior to custody transfer regardless if compliance with these requirements would require emptying and degassing of the storage tank.

Subsection (b) states the compliance date for the DFW area consisting of Collin, Dallas, Denton, Ellis, Johnson, Kaufman, Parker, Rockwall, and Tarrant Counties. The previous rule change affecting these counties required compliance by March 1, 2009, for five of the counties as stated in current §115.119(b). The other four counties have been required to be in compliance with this division, as stated in current §115.119(a), that became effective June 14, 2007. This subsection combines the compliance obligations for all nine counties and specifies that owners or operators must be in compliance on or before March 1, 2009.

Paragraph (1), proposed as §115.119(c) and (c)(3) with a different date, requires compliance with new requirements applicable in the DFW area, §§115.112(e), 115.115(a)(3)(B), (5), and (6), 115.116, and 115.118(a)(6), by March 1, 2013. In response to comment, certain monitoring requirements in §115.115 were added to this list.

Subparagraph (A), proposed as §115.119(c)(1), specifies that storage tanks that would need to be emptied and degassed in order to comply with §§115.112(e), 115.115(a)(3)(B), (5), and (6), 115.116, and 115.118(a)(6) can delay compliance until the next emptying and degassing activity, but no later than January 1, 2021. In a change from the proposed language, the adopted language consistently specifies emptying and degassing, as a single triggering event, which was the intent of the 2007 rule revision, as stated in the June 8, 2007, issue of the *Texas Register* (32 TexReg 3293). Additional emissions that would arise from emptying and degassing a tank could negate the benefit of the emission controls and therefore would not be required solely for the purpose of installing controls. Because floating roof tanks are taken out of service at least once every ten years, the controls must be installed no later than ten years from the date these rules were adopted. Regulated entities that use the delay of compliance provision should be prepared to justify why tank emptying and degassing was necessary to comply with the rules.

Subparagraph (B), proposed as §115.119(c)(4) with a different date, requires compliance by March 1, 2013, for a storage tank with a storage capacity less than 210,000 gallons storing crude oil and condensate prior to custody transfer regardless if compliance with these requirements would require emptying and degassing of the storage tank.

Adopted subparagraph (C) was added in response to comment. It specifies if the commission publishes notice in the *Texas Register* that the DFW area has been reclassified as severe for the 1997 eight-hour ozone standard, the control requirements for flash emissions will apply to sites with uncontrolled VOC emissions that equal or exceed 25 tpy. Once the commission publishes notice in the *Texas Register,* affected sources will have 15 months to comply with these control requirements. The commission is adopting this provision to avoid a duplicative demonstration of the technological and economic feasibility of controlling flash emissions from crude oil and condensate storage tanks, prior to custody transfer, in the DFW area with uncontrolled VOC emissions that equal or exceed 25 tpy. The commission has determined these requirements represent RACT for major sources. The photochemical modeling and corroborative analyses show the DFW area will attain the 1997 eight-hour ozone standard in 2012. However, if in the future the DFW area were reclassified to severe for the 1997 eight-hour ozone standard, the commission would be required to implement RACT for sites with the potential to emit at least 25 tpy.

Paragraph (2), proposed as §115.119(c)(2) with a different date, states that storage tanks in the DFW area transition from compliance with §115.112(a) to §115.112(e) on March 1, 2013.

Subsection (c), proposed as §115.119(f) with a different date, specifies the compliance date for the BPA area consisting of Hardin, Jefferson, and Orange Counties. The previous rule change affecting these counties required compliance with all provisions of this division by March 7, 1997. This subsection requires compliance with the new provisions in §115.115(a)(3)(B), (5), and (6), and §115.116 by March 1, 2013.

Subsection (d), proposed as §115.119(g) with a different date, specifies the compliance date for El Paso County. The previous rule change affecting these counties required compliance with all provisions of this division by January 1, 1996. This subsection requires compliance with the new provisions in §115.115(a)(3)(B), (5), and (6), and §115.116 by March 1, 2013.

Subsection (e), proposed as §115.119(h) with a different date, specifies the compliance date for Aransas, Bexar, Calhoun, Gregg, Matagorda, Nueces, San Patricio, Travis, and Victoria Counties. The previous rule change affecting these counties required compliance with all provisions of this division by July 31, 1993. This subsection requires compliance with the new provisions in §115.116(b) by March 1, 2013.

Subsection (f) specifies that owner or operator that becomes subject to this division on or after the date specified in subsections (a) - (e) of this section, shall comply with the requirements in this division no later than 60 days after becoming subject. This provision was added after proposal to allow sufficient adjustment time for owners or operators of sites where production increases over an applicability threshold.

Final Draft Regulatory Impact Analysis

The commission reviewed the adopted rulemaking in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and determined that the adopted rulemaking does not meet the definition of a "major environmental rule" as defined in that statute. A "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. Although the adopted rulemaking is intended to protect air quality in ozone nonattainment areas, it is not expected to have any material adverse affect on 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. Instead, the primary purpose of the adopted rules is to increase the level of control for VOC storage in the DFW ozone nonattainment area. The adopted rules would be implemented as RACT in the

DFW ozone nonattainment area. RACT is required by FCAA, §172(c)(1) to be included in SIPs for nonattainment areas. The adopted rules are also intended to clarify the rule requirements for sources in all affected areas; provide additional flexibility for affected owners or operators by allowing for the use of alternative control options; and facilitate rule enforcement. This clarification specifies that flares used to meet the requirements of this division must meet 40 CFR §60.18, including requirements to verify the design of flare and ensure that the flare flame must be lit at all times when VOC vapors are routed to the device.

Additionally, the adopted rulemaking also does not meet any of the four applicability criteria for requiring a regulatory impact analysis for a major environmental rule, which are listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225, applies only to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. FCAA, §172(c)(1) requires that the DFW SIP revision incorporate all reasonably available control measures, including all RACT, for sources of relevant pollutants. The EPA defines RACT as the lowest emission limitation that a particular source is capable of meeting by the application of control technology that is reasonably available considering technological and economic feasibility (44 FR 53761, September 17, 1979). The rulemaking will implement RACT for VOC storage in the DFW area as required by FCAA, §172(c)(1).

In 2007, the stringency of the VOC storage regulations in the HGB 1997 eight-hour ozone nonattainment area was increased after results from the second Texas Air Quality Study (May 2005) indicated unreported and underreported VOC emissions from storage tanks, including flash emissions and floating roof or cover landing loss emissions. On May 23, 2007, the commission adopted revisions to the VOC storage rules in Chapter 115, Subchapter B, Division 1, specific to the HGB area to reduce these unreported and underreported VOC emissions from storage tanks. The current level of control for VOC storage required by the commission in the HGB 1997 eight-hour ozone nonattainment area has been demonstrated to be reasonably available and technologically feasible through the installation and use of controls to meet those requirements since the implementation of the 2007 rule revisions. The commission is proposing to increase the stringency of the required controls for the DFW 1997 eight-hour ozone nonattainment area. Because the increased stringency is economically feasible, the commission is adopting these rules to be implemented as RACT for VOC storage controls in the DFW ozone nonattainment area. The adopted rulemaking will also address the concerns raised by stakeholders by revising Chapter 115, Subchapter B, Division 1 by clarifying the rule requirements for sources in all affected areas; providing additional flexibility for affected owners or operators by allowing for the use of alternative control options; and facilitating rule enforcement. This clarification specifies that flares used to meet the requirements of this division must meet 40 CFR §60.18, including requirements to verify the design of flare and ensure that the flare flame must be lit at all times when VOC vapors are routed to the device.

The adopted rulemaking implements requirements of 42 United States Code (USC), §7410, which requires states to adopt a SIP that provides for the implementation, maintenance, and enforcement of the NAAQS in each air quality control region of the state. While 42 USC, §7410 generally does not require specific programs, methods, or reductions in order to meet the standard, the SIP must include enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance as may be necessary or appropriate to meet the applicable requirements of this chapter (42 USC, Chapter 85, Air Pollution Prevention and Control). The provisions of the FCAA recognize that states are in the best position to determine what programs and controls are necessary or appropriate in order to meet the NAAQS. This flexibility allows states, affected industry, and the public to collaborate on the best methods for attaining the NAAQS for the specific regions in the state. Even though the FCAA allows states to develop their own programs, this flexibility does not relieve a state from developing a program that meets the requirements of 42 USC, §7410. States are not free to ignore the requirements of 42 USC, §7410, and must develop programs to assure that their contributions to nonattainment areas are reduced so that these areas can be brought into attainment on schedule. Additionally, FCAA, §172(c)(1) provides that SIPs for nonattainment areas must include "reasonably available control measures," including RACT, for sources of emissions. The adopted rules will be implemented as RACT in the DFW ozone nonattainment area.

The requirement to provide a fiscal analysis of proposed regulations in the Texas Government Code was amended by Senate Bill (SB) 633 during the 75th Legislature, 1997. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis of extraordinary rules. These are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program, or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 concluding that "based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for the agency due to its limited application." The commission also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted proposed rules from the full analysis unless the rule was a major environmental rule that exceeds a federal law.

As discussed earlier in this preamble, the FCAA does not always require specific programs, methods, or reductions in order to meet the NAAQS; thus, states must develop programs for each area contributing to nonattainment to help ensure that those areas will meet the attainment deadlines. Because of the ongoing need to address nonattainment issues, and to meet the requirements of 42 USC, §7410, the commission routinely proposes and adopts SIP revisions that include specific enforceable rules. The legislature is presumed to understand this federal scheme. If each rule proposed for inclusion in the SIP was considered to be a major environmental rule that exceeds federal law, then every SIP rule would require the full regulatory impact analysis contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board (LBB) in its fiscal

notes. Since the legislature is presumed to understand the fiscal impacts of the bills it passes, and that presumption is based on information provided by state agencies and the LBB, the commission believes that the intent of SB 633 was only to require the full regulatory impact analysis for rules that are extraordinary in nature. While the SIP rules will have a broad impact, the impact is no greater than is necessary or appropriate to meet the requirements of the FCAA. For these reasons, rules adopted for inclusion in the SIP fall under the exception in Texas Government Code, §2001.0225(a), because these rules are required by, and do not exceed, federal law. In addition, these rules do not exceed any contract between the state and a federal agency.

The commission has consistently applied this construction to its rules since this statute was enacted in 1997. Since that time, the legislature has revised the Texas Government Code, but left this provision substantially unamended. It is presumed that "when an agency interpretation is in effect at the time the legislature amends the laws without making substantial change in the statute, the legislature is deemed to have accepted the agency's interpretation." Central Power & Light Co. v. Sharp, 919 S.W.2d 485, 489 (Tex. App. Austin 1995), writ denied with per curiam opinion respecting another issue, 960 S.W.2d 617 (Tex. 1997); Bullock v. Marathon Oil Co., 798 S.W.2d 353, 357 (Tex. App. Austin 1990, no writ). Cf. Humble Oil & Refining Co. v. Calvert, 414 S.W.2d 172 (Tex. 1967); Dudney v. State Farm Mut. Auto Ins. Co., 9 S.W.3d 884, 893 (Tex. App. Austin 2000); Southwestern Life Ins. Co. v. Montemayor, 24 S.W.3d 581 (Tex. App. Austin 2000, pet. denied); and Coastal Indust. Water Auth. v. Trinity Portland Cement Div., 563 S.W.2d 916 (Tex. 1978).

The commission's interpretation of the regulatory impact analysis requirements is also supported by a change made to the Texas Administrative Procedure Act (APA) by the legislature in 1999. In an attempt to limit the number of rule challenges based upon APA requirements, the legislature clarified that state agencies are required to meet these sections of the APA against the standard of "substantial compliance." The legislature specifically identified Texas Government Code, §2001.0225, as falling under this standard. The commission has substantially complied with the requirements of Texas Government Code, §2001.0225.

As defined in the Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: exceed a standard set by federal law, unless the rule is specifically required by state law; exceed an express requirement of state law, unless the rule is specifically required by federal law; exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking action does not meet any of these four applicability requirements of a "major environmental rule." The adopted rules will be implemented as RACT for VOC storage in the DFW 1997 eight-hour ozone nonattainment area. The adopted rules also clarify the rule requirements for sources in all affected areas; provide additional flexibility for affected owners or operators by allowing for the use of alternative control options; and facilitate rule enforcement. This clarification specifies that flares used to meet the requirements of this division must meet 40 CFR §60.18, including requirements to verify the design of flare and ensure that the flare flame must be lit at all times when VOC vapors are routed to the device. This rulemaking action does not exceed an express requirement of state law or a requirement of a delegation agreement, and was not developed solely under the general powers of the agency, but was specifically developed to meet the NAAQS established under federal law and authorized under Texas Health and Safety Code, §§382.011, 382.012, and 382.017, as well as under 42 USC, §7410(a)(2)(A).

The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period. No comments were received on the draft regulatory impact analysis determination.

Takings Impact Assessment

The commission evaluated the adopted rulemaking and performed an assessment of whether Texas Government Code, Chapter 2007, is applicable. The adopted rules would be implemented as RACT in the DFW ozone nonattainment area. RACT is required by FCAA, §172(c)(1) to be included in SIPs for nonattainment areas. The adopted rules also clarify the rule requirements for sources in all affected areas; provide additional flexibility for affected owners or operators by allowing for the use of alternative control options; and facilitate rule enforcement. This clarification specifies that flares used to meet the requirements of this division must meet 40 CFR §60.18, including requirements to verify the design of flare and ensure that the flare flame must be lit at all times when VOC vapors are routed to the device. Texas Government Code, §2007.003(b)(4), provides that Texas Government Code, Chapter 2007 does not apply to this adopted rulemaking because it is an action reasonably taken to fulfill an obligation mandated by federal law.

In addition, the commission's assessment indicates that Texas Government Code, Chapter 2007 does not apply to these adopted rules because this assessment is an action that is taken in response to a real and substantial threat to public health and safety; that is designed to significantly advance the health and safety purpose; and that does not impose a greater burden than is necessary to achieve the health and safety purpose. Thus, this action is exempt under Texas Government Code, §2007.003(b)(13). The specific intent of the adopted rulemaking is to apply as RACT more stringent VOC storage tank control requirements in the DFW area to reduce VOC emissions from storage tanks. These requirements are control measures for VOC, a precursor of ozone, and are essential for attainment and maintenance of the ozone NAAQS. The adopted rules also clarify the rule requirements for sources in all affected areas, including clarification of the requirements for using flares as a control device under this division; provide additional flexibility for affected owners or operators by allowing for the use of alternative control options; and facilitate rule enforcement.

Consequently, the adopted rulemaking meets the exemption criteria in Texas Government Code, §2007.003(b)(4) and (13). For these reasons, Texas Government Code, Chapter 2007 does not apply to this adopted rulemaking.

Consistency with the Coastal Management Program

The commission reviewed the rulemaking and found that it is subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act, Texas Natural Resources Code, §§33.201 *et seq.,* and therefore must be consistent with all applicable CMP goals and policies. The commission conducted a consistency determination for the adopted rules in accordance with Coastal Coordination Act Implementation Rules, 31 TAC §505.22 and found the rulemaking is consistent with the applicable CMP goals and policies.

The CMP goal applicable to the adopted rulemaking is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(l)). The CMP policy applicable to the adopted rulemaking is the policy that commission rules comply with federal regulations in 40 CFR, to protect and enhance air quality in the coastal areas (31 TAC §501.32). The adopted rulemaking will not increase emissions of air pollutants and is therefore consistent with the CMP goal in §501.12(1) and the CMP policy in §501.32.

Promulgation and enforcement of these rules will not violate or exceed any standards identified in the applicable CMP goals and policies because the adopted rules are consistent with these CMP goals and policies and because these rules do not create or have a direct or significant adverse effect on any coastal natural resource areas. Therefore, in accordance with §505.22(e), the commission affirms that this rulemaking action is consistent with CMP goals and policies.

The commission invited public comment regarding the consistency with the coastal management program during the public comment period. No comments were received regarding the consistency of this rulemaking with the coastal management program.

Effects on Sites Subject to the Federal Operating Permits Program

Chapter 115 is an applicable requirement under 30 TAC Chapter 122, Federal Operating Permits Program. Owners or operators subject to the federal operating permit program must, consistent with the revision process in Chapter 122, upon the effective date of the rulemaking, revise their operating permit to include the adopted Chapter 115 requirements.

Public Comment

Public hearings on the proposal were held on July 14, 2011, at 10:00 a.m. and 6:30 p.m. at the Arlington City Council Chambers in Arlington; on July 18, 2011, at 6:30 p.m. at the Houston-Galveston Area Council offices in Houston; and on July 22, 2011, at 10:00 a.m. and 2:00 p.m. at the Texas Commission on Environmental Quality headquarters in Austin. The July 22, 2011, hearing scheduled for 10:00 a.m. was not officially opened because no party indicated a desire to provide comment. Oral comments regarding Chapter 115 were presented by Barnett Shale Energy Education Council (BSEEC), Earthworks Oil & Gas Accountability Project (Earthworks), Lone Star Chapter of the Sierra Club (LSCSC), and North Texas Clean Air Steering Committee (NTCASC) and nine individuals.

Written comments regarding Chapter 115 were provided by BSEEC, COPPs for Clean Air (COPPs), Commissioners Court of Denton County (Denton), Emission Reduction Systems (ERS), KIDS for Clean Air (KIDS), LSCSC, NTCASC, REM Technology Inc (REM), Texas Oil and Gas Association (TxOGA), Texas Pipeline Association (TPA), and the EPA and 370 individuals.

RESPONSE TO COMMENTS

General Comments

Comment

An individual expressed concern that the requirements of this rulemaking would place additional burdens on natural gas producers who are already attempting to minimize emissions.

Response

The commission is adopting these rules to implement FCAA RACT requirements for the storage of VOC in the DFW area. As discussed in the preamble for the proposed rulemaking (36 TexReg 3817, June 24, 2011), the commission determined these requirements are economically feasible and will not place an undue burden on owners or operators of storage tanks storing condensate. In many cases, owners or operators can choose a control device that will generate additional revenue or offset operational expenses. The commission makes no change in response to this comment.

Comment

EPA requested an explanation of the calculation methodology used to determine any credit that may be taken for emission reductions from this rule in the reasonable further progress or attainment demonstration SIP. In particular, EPA requested an explanation of how the emission reduction credit has been appropriately prorated to reflect that many storage tanks may not be controlled until after the RFP or attainment deadline because of the extended period allowed for compliance.

Response

The commission proposed to control flash emissions from crude oil and condensate storage tanks, prior to custody transfer, in the DFW area with uncontrolled VOC emissions that equal or exceed 25 tpy because preliminary analysis indicated that additional VOC reductions were necessary to help meet FCAA RFP requirements. The commission has since determined that these additional VOC emission reductions are not necessary to meet RFP requirements. The commission is adopting requirements for VOC storage tanks in the DFW area as necessary to implement FCAA RACT requirements but is not taking credit for any emission reductions associated with this rulemaking. The commission makes no change in response to this comment.

Comment

TPA commented that regulatory efforts to attain the ozone NAAQS should not focus on VOC emissions. TPA commented that the need for increased controls on VOC emissions has not been demonstrated through the use of reliable data. The HARC51C VOC emission factor of 33.3 lb/bbl of condensate is based on faulty data and is being applied by TCEQ for all condensate production regardless of the separator letdown pressure at the site or whether the flash emissions are being controlled. The November 2010 Eastern Research Group (ERG) study should not be the basis for any additional controls on VOC emissions because it greatly overstates statewide VOC emissions from oil and gas production sources by relying on the 33.3 lb/bbl emission factor and the unfounded assumption that emissions are not controlled by flares or vapor recovery units.

Response

The commission is adopting this rulemaking to fulfill the FCAA requirement to implement RACT for major sources of VOC emissions in the DFW area. The commission's Point Source Emissions Inventory includes storage tanks with VOC emissions that exceed the 50 tpy major source threshold for areas classified as serious for the 1997 eight-hour ozone standard and therefore these rules are necessary to fulfill FCAA RACT requirements at these sites. The commission is not relying on information from the HARC 51C study or the 2010 ERG study to demonstrate the necessity of this rulemaking.

The commission is continuing to use the HARC51C emission factor of 33.3 lb/bbl of condensate in this rulemaking. The production-based applicability threshold (barrels per year) for the requirement to control flash emissions from condensate storage tanks in the DFW area is based on the HARC51C emission factor of 33.3 lb/bbl of condensate. This emission factor is an average of a wide range of test results and provides a conservative estimate of the production threshold below which a regulated entity is exempt from demonstrating that the uncontrolled VOC emissions from an affected storage tank or tank battery are below 50 tpy. Above this production threshold, the regulated entity must demonstrate that the uncontrolled VOC emissions from the affected storage tank or tank battery are below 50 tpy or install controls in accordance with the rule requirements. The commission acknowledges that, in some cases, the factor may overestimate VOC emissions, which is one reason why the rule provides the regulated entity with the alternative to use direct measurement or approved computer simulations to demonstrate that the VOC emissions from the condensate storage tank or tank battery are less than 50 tpy. This process allows owners or operators the choice of using the most accurate data, which comes with additional expense, or the 33.3 lb/bbl emission factor. Direct measurements made for submission to the Barnett Shale Special Inventory may be used if the measurements were made with the measuring instruments and methods specified in §115.117. Likewise, other test methods or computer simulations approved by the executive director may be used. Computer simulations used to demonstrate compliance with the rule must account for differences in separator pressure. Regardless of the emission estimation method, the regulated entity must update the estimate of uncontrolled emissions if additional wells are connected to the storage tank or tank battery that increase throughput. The commission makes no change in response to this comment.

Comment

BSEEC commented that condensate tanks in the DFW area emit significantly less than the 33 lb/bbl emission factor used in this rulemaking. Data from the Barnett Shale Special Inventory Phase Two should be used to estimate the amount of VOC emissions from condensate storage tanks in this rulemaking. Alternatively, separate emission factors should be used for high pressure (over 200 psia) and low pressure (less than 50 psia) separators producing condensate. Use of voluntary controls such as vapor recovery units and flares by most operators has not been considered by the commission in estimating VOC emissions from storage tanks. The vast majority of production in the DFW area is dry natural gas with little to no VOC content. Therefore, there is little condensate storage in the area.

Response

As explained elsewhere in this section, the commission is adopting requirements for VOC storage tanks in the DFW area as necessary to implement FCAA RACT requirements but is not taking credit for any associated emission reductions. The commission is continuing to use the HARC51C emission factor of 33.3 lb/bbl of condensate in this rulemaking. The production-based applicability threshold (barrels per year) for the requirement to control flash emissions from condensate storage tanks in the DFW area is based on the HARC51C emission factor of 33.3 lb/bbl of condensate. This emission factor provides a conservative estimate of the production threshold below which a regulated entity is exempt from demonstrating that the uncontrolled VOC emissions from an affected storage tank or tank battery are below 50 tpy. Above this production threshold, the regulated entity has the option to use site-specific emission factors generated by direct measurement or computer simulations to demonstrate that the uncontrolled VOC emissions from the affected storage tank or tank battery are below 50 tpy.

The commission continues to evaluate the Barnett Shale Special Inventory data at this time to assure data quality. However, new data from Phase II of the Barnett Shale Special Inventory indicate that a lower emission factor may be more representative of the average VOC emissions per barrel of condensate in the 23-county Barnett Shale area, which includes the DFW area. The commission acknowledges that, in some cases, the 33.3 lb/bbl emission factor may overestimate VOC emissions, which is one reason why the rule provides alternative options for demonstrating compliance. This process allows the regulated entity to use site-specific emission factors generated by direct measurement or computer simulations, which comes with additional expense, or use the 33.3 lb/bbl emission factor. Direct measurement and computer simulations will account for differences in separator pressure. Direct measurements made for submission to the Barnett Shale Special Inventory may be used if the measurements were made with the measuring instruments and methods specified in §115.117. The commission makes no change in response to this comment.

Comment

TPA commented that TCEQ should consult data recently collected during the Barnett Shale Special Inventory process. These data show that the total VOC inventory in the DFW area could be expected to amount to far less than the estimates reached in reports cited by TCEQ.

Response

The commission continues to evaluate the Barnett Shale Special Inventory data at this time to assure data quality. As explained elsewhere in this section, the commission is adopting this rulemaking to fulfill FCAA RACT requirements in the DFW area. The commission's Point Source Emissions Inventory includes storage tanks with VOC emissions that exceed the 50 tpy major source threshold for areas classified as serious for the 1997 eight-hour ozone standard and therefore these rules are necessary to fulfill FCAA RACT requirements at these sites. The commission makes no change in response to this comment.

Comment

BSEEC commented that the Texas Railroad Commission may inaccurately apportion condensate production to gas wells. This inaccuracy is because the Railroad Commission allocates condensate recovered by salt water injection operators back to the wells where the produced water was generated. Since salt water injection operators have no way to determine which of the many wells that they service produced the "skim" condensate, it is often allocated to all wells contracted for water disposal by a salt water disposal operator. BSEEC and TPA commented that for dry gas wells with little or no VOC, this produced water does not contain any significant amount of condensate. There can be some "skim" condensate in the water produced at a wet gas well such as those in Wise, western Denton, and Parker Counties.

Response

The commission agrees that there may be little condensate stored in some tank batteries. However, there are other tank batteries in the DFW area with appreciable amounts of stored condensate. The commission's Point Source Emissions Inventory includes storage tanks with VOC emissions that exceed the

50 tpy major source threshold for areas classified as serious for the 1997 eight-hour ozone standard. The adopted rules apply to individual tanks and tank batteries. Controls are required for those tanks or tank batteries over the applicability threshold.

If a storage tank contains both produced water and condensate, it is a storage tank storing condensate. For such tanks storing condensate prior to custody transfer, §115.112(d)(4) and (5) and (e)(4) and (e)(5) require vapors to be routed to a control device if uncontrolled VOC emissions from the individual storage tank or VOC emissions from the aggregate of all storage tanks in the tank battery exceed the applicability threshold. The commission makes no change in response to this comment.

Comment

BSEEC and TPA suggested that TCEQ evaluate if the proposed NSPS from EPA would make adoption of new requirements on condensate storage tanks in the DFW area a moot point. TPA suggested that TCEQ should ensure that regulated parties are not subject to conflicting federal and state rules on the subject of VOC storage emissions.

Response

Because the NSPS is in the proposal stage and is not yet an enforceable regulation, the commission cannot rely on any emission reductions or control strategies in that rule to satisfy current obligations under this rule package. Additionally, the control requirements for storage tanks in the proposed NSPS rule would only apply to new or modified existing sources and not to all existing major sources. Therefore, even if the EPA's proposed NSPS rule were adopted at this time, the commission could not rely upon the NSPS rule to satisfy RACT requirements, which must address all major sources. As discussed elsewhere in this preamble, the control requirements adopted with this rulemaking for crude oil and condensate tanks prior to custody transfer are necessary to fulfill RACT requirements of the FCAA for the 1997 eight-hour ozone standard DFW attainment demonstration SIP revision. The commission makes no change in response to this comment.

Comment

TPA disagreed that the fact that the controls have been installed on some facilities in some counties constitutes a global demonstration of economic feasibility. A more useful and realistic definition of "economic feasibility" would be one that takes into account the cost of the proposed measures balanced against the potential benefit of and need for them. TPA commented that the TCEQ was downplaying the fiscal impact of this rulemaking by stating that some of the proposed new requirements "should ensure that tank owners or operators are recovering additional product, the sale of which is expected to help offset the costs of the vapor recovery units." If it is the case that a substantial amount of product would be recovered through the proposed controls, such that the controls would pay for themselves, then companies can be expected to implement those technologies on their own, without the need for regulatory imperatives.

The technological feasibility of the proposed controls has not been demonstrated. TPA believed, however, that the study, TCEQ Project 2010-43, does not lend support to TCEQ's proposal as claimed. In that study, 316 HGB sources reported their control status, but only 109 - only about 1/3 - reported having employed any controls at all. TPA believed that such a small sampling should not be taken as any sort of proof as to the technological or economic feasibility of the controls proposed by TCEQ in this rulemaking.

Response

The commission respectfully disagrees with TPA's assertion that the technological feasibility of the controls has not been demonstrated. The commission's study, TCEQ Project 2010-43, available at *http://www.tceq.texas.gov/assets/public/implementation/air/am/contracts/reports/ei/5820784005FY1022-20100831-environ-flash_emission.pdf,* found that the reported controls for all storage tanks in the HGB, BPA, and Haynesville Shale areas were a vapor recovery unit, a flare, or both. Since the rule does not specify which control device technology is required, the information provided by survey respondents and the fact that these devices have been operating for multiple years clearly indicates that these devices are technologically feasible. The responses included 65% of HGB area condensate production, which is a substantial portion of the sampling universe. Of the respondents, 36% (88) of the tank batteries had installed controls. This survey indicates that only a minority of owners and operators are affected by the rule in the HGB area rather than indicating that a majority of applicable sites have failed to implement the rule due to issues with technological feasibility of vapor recovery units or flares. Of the respondents with installed controls, 40% (35) had installed the controls prior to the adoption date of the rule in the HGB area, and 60% installed the controls after the adoption date, presumably because of the rule. In order for a technology to be RACT, it does not need to be economically desirable, such that it is expected to be installed in all situations; rather it is required to be merely economically feasible, such that the expense of installing it is reasonable. The fact that owners or operators chose the same technologies for the additional 60% of the controls installed because of the rule in the HGB area supports the economic feasibility of these controls. Since upstream oil and gas storage tanks are not covered by a Control Techniques Guidelines or Alternative Control Techniques document from EPA, RACT controls cannot be defined below the major source threshold, which varies with the classification of the nonattainment area. The commission contends that vapor recovery units and flares are technologically and economically feasible when applied to storage tanks storing condensate prior to custody transfer with uncontrolled VOC emissions over 25 tpy, including sources affected by the current rule in the HGB area, where the major source threshold is 25 tpy, and sources affected by the adopted rule in the DFW area, where the major source threshold is 50 tpy. The commission makes no change in response to this comment.

Comment

TPA commented that the need to impose additional controls on minor sources has not been demonstrated. It is inappropriate to subject minor sources to the proposed requirements without a demonstrated need for the additional emissions reduction from sources below major source levels.

Response

In response to comment and because additional reductions from this rulemaking are not required for RFP purposes, the commission has raised the applicability threshold for storage tanks storing condensate and crude oil to the major source threshold. The DFW area is currently classified as a serious nonattainment area for the 1997 eight-hour ozone standard with a major source threshold of 50 tpy of uncontrolled VOC emissions. The FCAA

requires that SIP revisions include application of RACT to major sources of VOC in the DFW area. If the DFW area is reclassified to severe nonattainment, the commission is including a provision in §115.119(b)(1)(C) that adjusts the applicability threshold to match the lower 25 tpy major source threshold.

Comments on §115.110, Applicability and Definitions

Comment

TXOGA requested the addition of refined products, such as gasoline and distillates, to the list of materials handled by pipeline breakout stations, as defined in §115.110(5).

Response

The term *pipeline breakout station,* defined in §115.110(5), is used in Chapter 115, Subchapter B, Division 1 in the context of crude oil and condensate storage. The requested list of refined products is not needed to understand the meaning of the definition as it is applied in this division and could create confusion regarding the applicability of the rule if the definition was revised as requested. The commission makes no change in response to this comment.

Comment

An individual commented that the exemptions in §115.111(a)(3), (b)(3), and (d)(2) for storage tanks with storage capacity less than 25,000 gallons located at motor vehicle fuel dispensing facilities were unclear and questioned whether a motor vehicle fuel dispensing facility also included equipment at sites with other primary functions, such as fueling islands at trucking companies. The commenter pointed out that Chapter 115 did not have a definition of "motor vehicle fuel dispensing facility" and requested that the commission define or clarify the term. The commenter also suggested clarification as to whether the amount of fuel dispensed is a factor in the exemption.

Response

The definition of motor vehicle fuel dispensing facility in §101.1 applies to this division. It includes all sites where gasoline is dispensed to motor vehicle fuel tanks from stationary storage tanks, whether dispensing fuel is the sole purpose or an ancillary purpose of the site. The definition only includes gasoline and therefore excludes diesel and other fuels commonly dispensed to trucks. Storage tanks are exempt from the requirements of this division if the storage capacity is less than 25,000 gallons. The exemption is not dependent upon the amount of gasoline dispensed. The commission makes no change in response to this comment.

Comment

An individual commented that the term produced water was not defined in §115.10 or §101.1 and questioned if the commission considered produced water and condensate to be interchangeable.

Response

The commission has not defined the phrase *produced water* in either Chapter 101 or Chapter 115 and uses its common meaning in the fields of crude oil and natural gas production and air pollution control. The EPA defines produced water applicable in offshore oil and gas production in 40 CFR §435.11(bb) as *"Produced water means the water (brine) brought up from the hydrocarbon-bearing strata during the extraction of oil and gas, and can include formation water, injection water, and any chemicals added down hole or during the oil/water separation process."* This definition differs from the definition of condensate in §101.1, *"Liquids that result from the cooling and/or pressure changes of produced natural gas. Once these liquids are processed at gas plants or refineries or in any other manner, they are no longer considered condensates."* The definition of condensate implies that it is a liquid hydrocarbon, unlike water. The commission does not consider the terms "produced water" and "condensate" interchangeable for the purposes of this rule. Owners or operators storing produced water and condensate, crude oil, or other VOCs in the same storage tank must consider the amount, vapor pressure, and VOC emissions of condensate, crude oil, or other VOCs in determining applicability of this division. The commission makes no change in response to this comment.

Comment

An individual questioned if a fracking tank is considered to be a container or otherwise included in the definition of storage tank in §115.110(b)(11).

Response

A storage tank is defined in §115.110(b)(11) as a stationary vessel, reservoir, or container used to store volatile organic compounds. This definition does not include components that are not directly involved in the containment of liquids or vapors; subsurface caverns or porous rock reservoirs; or process tanks or vessels. Fracking tanks that have wheels and are transported from site to site to hold liquids during and shortly after temporary hydraulic fracturing operations are not stationary containers and are not considered storage tanks for the purposes of this division. If a tank designed to be permanently installed at a single location is used to store fracturing fluids containing VOC before a hydraulic fracturing operation or flowback fluids containing VOC after a hydraulic fracturing operation, such a tank would be considered to be a storage tank. The commission makes no change in response to this comment.

Comments on §115.111, Exemptions

Comment

An individual commented that salt water disposal wells typically receive comingled condensate and produced water with unknown minority amounts of condensate and large total volume annual throughput. The individual questioned whether the control requirement exemption for storage tanks or tank batteries in the DFW area with throughput exceeding 1,500 barrels per year and demonstrated uncontrolled emissions less than 25 tpy applied to throughput of condensate, produced water, or the mixture of both received by salt water disposal wells. The commenter also questioned whether a site with intermingled liquids would have to demonstrate that either the true vapor pressure of the liquid was less than 1.5 psia or the uncontrolled emissions were less than 25 tons to be exempt.

Response

Produced water can contain some VOC, including condensate and crude oil, thus affecting its true vapor pressure. If VOC are present, the tank is considered to be storing VOC. For stored liquids including produced water with true vapor pressure over 1.5 psia, Tables I(a), I(b), 1, and 2 of §115.112 contain control requirements including a submerged fill pipe or a vapor control system. If the produced water contains enough condensate that rises and covers the surface, it will vaporize as if the storage tank only contained condensate. The comingled condensate throughput of an individual produced water storage tank may be low enough that the uncontrolled emissions are below

the level to be exempt from the control requirements if the storage tank is located alone and not part of a larger tank battery. However, if the storage tank storing produced water comingled with crude oil or condensate is part of a tank battery containing storage tanks storing crude oil or condensate prior to custody transfer or at a pipeline breakout station with VOC emissions from all such storage tanks exceeding the threshold in §115.112(e)(5), vapors from the storage tank storing produced water comingled with condensate or crude oil must be routed to a vapor control system. The owner or operator can choose any of the emission estimation methods in §115.112(e)(6), including direct measurement, to determine VOC emissions. True vapor pressure must be determined according to §115.117(8). In response to comments, the commission is adding standard reference texts to the list of approved test methods. These include equations for determining the true vapor pressure of mixtures. Additionally, the commission is revising the phrasing of the exemptions and control requirements to clarify the commission's intent for the production-based (throughput) applicability threshold. The current language describes the applicability as 1,500 barrels of liquid throughput or 25 tpy in the HGB area, implicitly assuming that the 1,500 barrels are condensate with 33.3 lbs of VOC each. In response to comment, the commission is revising the exemptions in §115.111(a)(9) and (10), and the control requirement in §115.112(e)(4) to specify condensate throughput. This change explicitly states the commission's original intent as shown in June 8, 2007, issue of the *Texas Register* (32 TexReg 3180).

Comment

An individual requested clarification of how owners or operators storing condensate after custody transfer, including saltwater disposal injection wells, will be affected by this rulemaking. Particularly, the compliance schedule in the DFW area in §115.119 includes the phrase, 'prior to custody transfer', but §115.111 which exempts storage tanks or tank batteries storing condensate in the DFW area with liquid throughput over the throughput threshold and VOC emissions less than the VOC emission threshold from the requirement in §115.112 to control VOC emissions does not include the phrase 'prior to custody transfer'. The individual asked if §115.111 makes tank batteries at saltwater disposal injection wells in the DFW area subject to this division.

Response

The control requirement to route VOC vapors from storage tanks storing condensate with condensate throughput greater than the throughput threshold applies only to condensate storage prior to custody transfer. Likewise, when this provision exempts storage tanks or tank batteries with emissions below the emission threshold from the control requirement, it is exempting storage tanks storing condensate prior to custody transfer. Custody transfer is defined in §101.1 as "The transfer of produced crude oil and/or condensate, after processing and/or treating in the producing operations, from storage tanks or automatic transfer facilities to pipelines or any other forms of transportation." If the comingled condensate and produced water have been transported by pipeline, truck, or other form of transportation to the injection well, the injection well is after custody transfer. Storage tanks storing condensate after custody transfer are not required to comply with §115.112(e)(4). In response to this comment, the commission is adding the phrase 'prior to custody transfer' to §115.111(a)(10) to clarify the intent that the control requirement and the exemption apply to the same storage tanks. A parallel change is being made to the exemption in §115.111(a)(9) applicable in the HGB area. Storage tanks at saltwater disposal injection wells in the DFW and HGB areas are subject to this division; however, these tanks are not required to comply with provisions applicable to material stored prior to custody transfer.

Comment

An individual questioned whether the exemption in §115.111(a)(10) required analysis on a monthly basis to prove that total VOC emissions are less than the threshold on a rolling 12-month basis.

Response

Estimates of VOC emissions from storage tanks storing crude oil or condensate must be made according to §115.112(d)(5) or (e)(6), as applicable. These paragraphs specify all allowed measurement methods including direct measurement, approved test methods or computer simulations, emission factors, and a chart for crude oil production. Each of these methods estimate an amount of VOC emission per barrel of material stored. The rolling 12-month analysis in §115.111(a)(9) and (10) are to be made by applying this emission factor to the amount of material stored in the tanks each month and adding it to the estimated emissions from the previous 11 months. The commission makes no change in response to this comment.

Comments on §115.112, Control Requirements

Comment

EPA expressed support for 95% control of VOC emissions from storage tanks in the DFW area.

Response

The commission appreciates EPA's support for 95% VOC control in the DFW area.

Comment

REM technology commented that the proposal preamble did not include reciprocating internal combustion engines fired by natural gas used primarily for other purposes as potential control devices capable of controlling VOC vapors by over 95% from storage tanks storing crude oil and condensate.

Response

The commission appreciates the information that additional control devices potentially capable of meeting 95% control of VOCs are available. The commission is not specifying which control devices may be used to control VOC vapors from storage tanks storing crude oil and condensate prior to custody transfer. Elsewhere in this preamble, vapor recovery units and flares are mentioned as typical control devices used in this application; however, these devices are not the only control devices used or allowed. Owners or operators can use any control device capable of meeting the applicable design, minimum control efficiency, testing, and monitoring requirements. Certain commonly used control devices are listed with specific monitoring requirements, and §115.115(a)(6) specifies monitoring requirements for unlisted control devices. The commission makes no change in response to this comment.

Comment

LSCSC also commented that the City of Fort Worth's air quality study released July 13, 2011, showed few storage tanks or tank batteries with uncontrolled emissions over 25 tpy and far greater emission reduction potential from applying 95% control

to tanks with uncontrolled emissions less than 25 tpy. LSCSC, COPPs, KIDS, and 362 individuals commented that the commission should require 95% VOC control on storage tanks with condensate throughput of one barrel per day, or five tpy of VOC emissions and include the EPA-proposed controls on the other emission sources discussed in the EPA NSPS proposal for oil and natural gas production sites. LSCSC requested that the applicability threshold for control requirements on oil and gas storage tanks be lowered to five or ten tpy of VOC emissions because the City of Fort Worth's air quality study found few sites with emissions over 25 tpy. LSCSC stated that the emission reductions from the rule would be much greater with controls at five tpy. Two individuals commented that vapor recovery units should be required to capture and control all VOC emissions from all natural gas wells. One of the individuals suggested that vapor recovery units should be required on all natural gas wells in the entire state to reduce ozone concentrations, especially ozone in the DFW area.

Response

The commission respectfully disagrees with the applicability and control requirements suggested by the commenters. It is not technologically feasible to capture and control all VOC emissions from all natural gas wells. The proposed rulemaking specified a 25 tpy VOC threshold below which owners or operators would not be required to control VOC emissions from storage tanks storing condensate, which comes from natural gas wells. Lowering this threshold and including control requirements for natural gas well completions, pneumatic valves, or any other controls listed in EPA docket EPA-HQ-OAR-2010-0505 would affect owners or operators of additional storage tanks and processing equipment who have not been given the necessary notice and opportunity to comment on such a change. In response to other comments, the commission has chosen a 50 tpy applicability threshold, which is higher than the 25 tpy threshold that has been demonstrated to be technologically and economically feasible in the HGB area. The Texas Health and Safety Code, §382.017, prohibits the commission from adopting rules that require specific types of control equipment or manufacturing processes unless required by federal law or regulation. The commission must allow the use of any device capable of meeting the requirements. Furthermore, as control efficiencies rise significantly above 95% and concentration of VOC in the vent gas decreases, a control device utilizing combustion requires increasing amounts of supplemental fuel and produces increasing amounts of nitrogen oxides that contribute to increased ozone levels.

The commission is adopting the rule to require controls on storage tanks storing condensate and crude oil in the DFW area. In the HGB area, requirements for controls on these tanks already exist. Expanding the requirements to all other counties in Texas is outside the scope of this rulemaking. The commission cannot expand the rules at adoption to apply in other counties because those potentially affected owners and operators were not provided adequate notice and proper opportunity to comment on the rule. The commission makes no change in response to this comment.

Comment

NTCASC, Denton, and an individual commented that VOC emissions from storage tanks storing condensate or crude oil in the DFW area should be controlled by 95% if their emissions exceed a 15 tpy threshold. COPPs, KIDS, and 362 individuals recommended emission recovery controls on all newly fractured or refractured natural gas well completions; dry seal systems on all centrifugal compressors; replacement of rod packing systems every 26,000 hours of reciprocating compressor operation; VOC emission limits for pneumatic valves controllers; and a requirement for strengthened leak detection and repair requirements at natural gas processing plants. NTCASC, Denton and an individual recommended formalizing current industry best practices, including recommended controls on natural gas well completions to recover emissions; control requirements specifying that all pneumatic valves regulating gas flow and pressure meet a low-bleed definition; and a requirement to use plunger lifts that use gas pressure buildup in a well to lift a column of accumulated fluid out of a well. LSCSC also recommends that other controls on other emission sources as required in the Oil and Gas PBR be included in this rulemaking. Earthworks stated the TCEQ could cut 114 tons per day (tpd) of VOC from the natural gas industry instead of the 14 tpd of VOC reductions proposed. An individual suggested that the fiscal impact of mandating these best practices would be offset by additional revenue generation.

Response

The commission appreciates the support for the 95% control requirement. The commission has not proposed controls of VOCs from storage tanks storing crude oil and condensate prior to custody transfer and at pipeline breakout stations down to a level of 15 tpy of VOC emissions, control requirements for natural gas well completions or recompletions, specified seal requirements for centrifugal compressors, maintenance requirements for rod packing on reciprocating compressors, emission limits for pneumatic valves, plunger lifts, or leak detection and repair requirements for natural gas processing plants. The commission has not proposed to include in this rulemaking all of the controls on oil and gas production sites in the TCEQ's standard permit for oil and gas sites. These potential controls are beyond the scope of this rulemaking and cannot be added at this point in the rulemaking process since necessary notice has not been provided to potentially affected persons. The commission has noted in the fiscal note of this rulemaking proposal published in the June 24, 2011, issue of the *Texas Register* (36 TexReg 3817), that some controls such as vapor recovery units would generate additional revenue for owners or operators. The commission acknowledges that some oil and gas companies have voluntarily implemented controls and practices to reduce VOC emissions, such as those recommended by the EPA in the Natural Gas Star Program. The TCEQ has revised Chapter 5 of the DFW attainment demonstration SIP revision (Project Number 2010-0220-SIP-NR) to formalize use of these practices by including discussion about the voluntary practices being employed by the oil and gas industry. The commission continues to study the amount and effects of VOC emission from these activities and may address these ideas in future rulemakings. The commission makes no change in response to this comment.

Comment

NTCASC and Denton requested that the commission review existing regulations to be sure that the regulations are adequate to achieve their intended purpose.

Response

The commission maintains these regulations adequately address the FCAA obligations. The commission continues to review existing regulations and may address additional ideas in future rulemakings. The commission makes no change in response to this comment.

Comments on §115.115, Monitoring Requirements

Comment

TXOGA requested that references to carbon adsorption system also include carbon adsorber because carbon adsorption system, as defined in §101.1(10), is limited to regenerative systems, whereas carbon adsorber, as defined in §101.1(9), includes activated carbon systems that are not regenerated on-site, such as carbon canisters.

Response

The commission acknowledges the unintended confusion in use of the phrase *carbon adsorption system* in §115.115(a)(3) and (b)(3) and §115.118(a)(5)(C) and has added the phrase *carbon adsorber* to these references in response to comment to properly account for the use of adsorbers such as carbon canisters that lack a system to regenerate the saturated adsorbent.

Comment

An individual commented that the commission has not, but should, conduct or require continuous monitoring and recording of actual VOC and hazardous air pollution emissions from all oil and natural gas sites and compare actual emissions with permit requirements, including PBR. Because the commission is not doing this, the individual asserts that the commission is encouraging these emissions by not enforcing and verifying compliance.

Response

This rule includes continuous monitoring requirements and recordkeeping requirements for appropriate operating parameters of control devices required on storage tanks with uncontrolled emissions over the threshold in §115.112(e). Required vapor control devices are designed to be the emission point for storage tanks and the operating parameters are chosen to assure that the devices are operating sufficient to meet applicable control requirements. The commission's compliance investigation staff perform inspections on oil and gas sites subject to this rule and checks required records, as appropriate, to determine compliance with all applicable commission rules, including permits claimed by or granted to the site. The commission vigorously enforces violations it finds. The commission makes no change in response to this comment.

Comments on §115.117, Approved Test Methods

Comment

TXOGA and ERS commented that Method 21 should be included in §115.117 as an approved test method.

Response

The commission agrees that Method 21 is an appropriate method for certain testing requirements in the rule and is adding Method 21 to the list of approved test methods in §115.117 in response to these comments. Owners or operators may use this method where appropriate to determine compliance with this division, such as measuring VOC concentrations to determine leaks, breakthrough of carbon adsorbers or carbon adsorption systems. However, Method 21 is not appropriate for testing the efficiency of certain control devices by measuring the inlet and outlet VOC concentrations because the specified devices do not have a linear response factor across the range of inlet and outlet VOC concentrations required to demonstrate a 90% or 95% control efficiency.

Comments on §115.118, Recordkeeping Requirements

Comment

EPA suggested additional recordkeeping is necessary for enforcement to show when a floating roof storage tank not in yet compliance with §115.112(e)(2) was last emptied and degassed in order to show that compliance was not necessary until an emptying and degassing event or December 1, 2021, whichever comes first.

Response

The commission agrees that additional recordkeeping will improve enforceability. The commission is adding a requirement to record the most recent instance of emptying or degassing the storage tank to §115.118(a)(6)(C) for sources relying on §115.119(a)(1)(A) and (b)(1)(A) to delay compliance for floating roof storage tanks in the DFW and HGB areas beyond March 1, 2013.

Comment

An individual requested that all copies of PBR submissions, test results, and everything done by the company should be publicly available and should be shared with local governments.

Response

The rulemaking includes requirements for owners or operators to maintain records of control device monitoring results, product throughput and emission estimates when claiming an exemption, and required testing conducted. Owners or operators must make these records available for review upon request by the EPA, state, and local air pollution control agencies with jurisdiction. The TCEQ has also discussed this rulemaking with local governments that are part of the North Texas Clean Air Steering Committee. In addition, the commission maintains ambient air monitors located throughout the state and hourly results of monitored ozone, VOC, and hazardous air pollutants are available to the public on the commission's Web site. Monitoring results in the Barnett Shale area can be found at *http://www.tceq.texas.gov/airquality/barnettshale/bshale-main.* The commenter's request to make all PBR submissions public is beyond the scope of this rulemaking. Documents submitted to the TCEQ for a PBR requiring registration are subject to public information requests. Documents describing the technical review of PBR submissions requiring registration are available on the TCEQ Web site at *http://www.tceq.texas.gov/permitting/air/remotedocs.html.* The commission makes no change in response to this comment.

Comments on §115.119, Compliance Schedules

Comment

TXOGA requested that the compliance schedule in §115.119 for the HGB area add changes in the monitoring requirements in §115.115 to the list of requirements with a compliance schedule of December 1, 2012.

Response

The commission agrees that some monitoring changes in §115.115 will require additional time to implement and is adding portions of new §115.115(a) to the compliance schedules for the HGB and DFW areas with a compliance date of March 1, 2013. The commission is granting additional time since the VOC reductions are no longer needed during 2012 for RFP purposes.

Comment

An individual commented that the proposed statement of compliance dates for the DFW area in proposed §115.119(c) and references to these dates in §115.111 created confusion and uncertainty about which exemptions apply prior to and after December 1, 2012.

Response

The commission's intent is to maintain rule language applicability until the compliance date for this rulemaking in certain subsections of this division and adopt new rule language applicable after the compliance date. In response to comment, the commission is replacing proposed references to the compliance date in §115.119 with the actual compliance date throughout §115.111 to §115.118 to improve readability and facilitate compliance.

Comment

TPA commented that it would not be possible for many companies to meet this deadline because of the extent of new controls that would have to be put in place to comply with the proposed rules. TPA asserted that the proposed controls, if adopted, would require a substantial amount of testing and alteration in many cases and that more time to comply would be needed.

Response

The commission has evaluated the amount of time that is necessary to comply with this rule and is extending the compliance deadline to March 1, 2013. This revision extends the amount of time allowed for installation of controls to give owners or operators a total of 14 months to comply and ensures that controls will be in place and operational by the beginning of the 2013 ozone season in the DFW area.

30 TAC §§115.110 - 115.119

Statutory Authority

The amendments and new sections are adopted under Texas Water Code (TWC), §5.102, concerning General Powers, that provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, that authorizes the commission to adopt rules necessary to carry out its powers and duties under TWC; TWC, §5.105, concerning General Policy, that authorizes the commission by rule to establish and approve all general policy of the commission; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, that authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amended and new sections are also adopted under THSC, §382.002, concerning Policy and Purpose, that establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, that authorizes the commission to control the quality of the state's air; and THSC, §382.012, concerning State Air Control Plan, that authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air. The amendments and new sections are also adopted under THSC, §382.016, concerning Monitoring Requirements; Examination of Records, that authorizes the commission to prescribe reasonable requirements for the measuring and monitoring of air contaminant emissions; and THSC, §382.021, concerning Sampling Methods and Procedures, that authorizes the commission to prescribe sampling methods. The amendments and new sections are also adopted under Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7401, *et seq.,* which requires states to submit state implementation plan revisions that specify the manner in which the National Ambient Air Quality Standards will be achieved and maintained within each air quality control region of the state.

The amendments and new sections implement THSC, §§382.002, 382.011, 382.012, 382.016, 382.017, and 382.021; and FCAA, 42 USC, §§7401 *et seq.*

§115.111. Exemptions.

(a) The following exemptions apply in the Beaumont-Port Arthur, Dallas-Fort Worth, El Paso, and Houston-Galveston-Brazoria areas, as defined in §115.10 of this title (relating to Definitions), except as noted in paragraphs (2), (9) - (11) of this subsection.

(1) Except as provided in §115.118 of this title (relating to Recordkeeping Requirements), a storage tank storing volatile organic compounds (VOC) with a true vapor pressure less than 1.5 pounds per square inch absolute (psia) is exempt from the requirements of this division.

(2) A storage tank with storage capacity less than 210,000 gallons storing crude oil or condensate prior to custody transfer in the Beaumont-Port Arthur, Dallas-Fort Worth, or El Paso areas is exempt from the requirements of this division. This exemption no longer applies in the Dallas-Fort Worth area beginning March 1, 2013.

(3) A storage tank with a storage capacity less than 25,000 gallons located at a motor vehicle fuel dispensing facility is exempt from the requirements of this division.

(4) A welded storage tank with a mechanical shoe primary seal that has a secondary seal from the top of the shoe seal to the tank wall (a shoe-mounted secondary seal) is exempt from the requirement for retrofitting with a rim-mounted secondary seal if the shoe-mounted secondary seal was installed or scheduled for installation before August 22, 1980.

(5) An external floating roof storage tank storing waxy, high pour point crude oils is exempt from any secondary seal requirements of §115.112(a), (d), and (e) of this title (relating to Control Requirements).

(6) A welded storage tank storing VOC with a true vapor pressure less than 4.0 psia is exempt from any external floating roof secondary seal requirement if any of the following types of primary seals were installed before August 22, 1980:

(A) a mechanical shoe seal;

(B) a liquid-mounted foam seal; or

(C) a liquid-mounted liquid filled type seal.

(7) A welded storage tank storing crude oil with a true vapor pressure equal to or greater than 4.0 psia and less than 6.0 psia is exempt from any external floating roof secondary seal requirement if any of the following types of primary seals were installed before December 10, 1982:

(A) a mechanical shoe seal;

(B) a liquid-mounted foam seal; or

(C) a liquid-mounted liquid filled type seal.

(8) A storage tank with storage capacity less than 1,000 gallons is exempt from the requirements of this division.

(9) In the Houston-Galveston-Brazoria area, a storage tank or tank battery storing condensate, as defined in §101.1 of this title (relating to Definitions), prior to custody transfer with a condensate throughput exceeding 1,500 barrels (63,000 gallons) per year on a rolling 12-month basis is exempt from the requirement in

§115.112(d)(4) or (e)(4)(A) of this title, to control flashed gases if the owner or operator demonstrates, using the test methods specified in §115.117 of this title (relating to Approved Test Methods), that uncontrolled VOC emissions from the individual storage tank, or from the aggregate of storage tanks in a tank battery, are less than 25 tons per year on a rolling 12-month basis.

(10) In the Dallas-Fort Worth area, a storage tank or tank battery storing condensate prior to custody transfer with a condensate throughput exceeding 3,000 barrels (126,000 gallons) per year on a rolling 12-month basis is exempt from the requirement in §115.112(e)(4)(B) of this title, to control flashed gases if the owner or operator demonstrates, using the test methods specified in §115.117 of this title, that uncontrolled VOC emissions from the individual storage tank, or from the aggregate of storage tanks in a tank battery, are less than 50 tons per year on a rolling 12-month basis. This exemption no longer applies 15 months after the date the commission publishes notice in the *Texas Register* as specified in §115.119(b)(1)(C) of this title (relating to Compliance Schedules) that the Dallas-Fort Worth area has been reclassified as a severe nonattainment area for the 1997 Eight-Hour Ozone National Ambient Air Quality Standard.

(11) In the Dallas-Fort Worth area, on or after the date specified in §115.119(b)(1)(C) of this title, a storage tank or tank battery storing condensate prior to custody transfer with a condensate throughput exceeding 1,500 barrels (63,000 gallons) per year on a rolling 12-month basis is exempt from the requirement in §115.112(e)(4)(B) of this title, to control flashed gases if the owner or operator demonstrates, using the test methods specified in §115.117 of this title, that uncontrolled VOC emissions from the individual storage tank, or from the aggregate of storage tanks in a tank battery, are less than 25 tons per year on a rolling 12-month basis.

(b) The following exemptions apply in Gregg, Nueces, and Victoria Counties.

(1) Except as provided in §115.118 of this title, a storage tank storing VOC with a true vapor pressure less than 1.5 psia is exempt from the requirements of this division.

(2) A storage tank with storage capacity less than 210,000 gallons storing crude oil or condensate prior to custody transfer is exempt from the requirements of this division.

(3) A storage tank with storage capacity less than 25,000 gallons located at a motor vehicle fuel dispensing facility is exempt from the requirements of this division.

(4) A welded storage tank with a mechanical shoe primary seal that has a secondary seal from the top of the shoe seal to the tank wall (a shoe-mounted secondary seal) is exempt from the requirement for retrofitting with a rim-mounted secondary seal if the shoe-mounted secondary seal was installed or scheduled for installation before August 22, 1980.

(5) An external floating roof storage tank storing waxy, high pour point crude oils is exempt from any secondary seal requirements of §115.112(b) of this title.

(6) A welded storage tank storing VOC with a true vapor pressure less than 4.0 psia is exempt from any external secondary seal requirement if any of the following types of primary seals were installed before August 22, 1980:

(A) a mechanical shoe seal;

(B) a liquid-mounted foam seal; or

(C) a liquid-mounted liquid filled type seal.

(7) A welded storage tank storing crude oil with a true vapor pressure equal to or greater than 4.0 psia and less than 6.0 psia is exempt from any external secondary seal requirement if any of the following types of primary seals were installed before December 10, 1982:

(A) a mechanical shoe seal;

(B) a liquid-mounted foam seal; or

(C) a liquid-mounted liquid filled type seal.

(8) A storage tank with storage capacity less than 1,000 gallons is exempt from the requirements of this division.

(c) The following exemptions apply in Aransas, Bexar, Calhoun, Matagorda, San Patricio, and Travis Counties.

(1) A storage tank storing VOC with a true vapor pressure less than 1.5 psia is exempt from the requirements of this division.

(2) Slotted guidepoles installed in a floating roof or cover storage tank are exempt from the provisions of §115.112(c) of this title.

(3) A storage tank with storage capacity between 1,000 gallons and 25,000 gallons is exempt from the requirements of §115.112(c)(1) of this title if construction began before May 12, 1973.

(4) A storage tank with storage capacity less than or equal to 420,000 gallons is exempt from the requirements of §115.112(c)(3) of this title.

(5) A storage tank with storage capacity less than 1,000 gallons is exempt from the requirements of this division.

§115.112. Control Requirements.

(a) The following requirements apply in the Beaumont-Port Arthur, Dallas-Fort Worth, and El Paso areas, as defined in §115.10 of this title (relating to Definitions). The control requirements in this subsection no longer apply in the Dallas-Fort Worth area beginning March 1, 2013.

(1) No person shall place, store, or hold in any storage tank any volatile organic compounds (VOC) unless the storage tank is capable of maintaining working pressure sufficient at all times to prevent any vapor or gas loss to the atmosphere or is in compliance with the control requirements specified in Table I(a) of this paragraph for VOC other than crude oil and condensate or Table II(a) of this paragraph for crude oil and condensate.
Figure: 30 TAC §115.112(a)(1)

(2) For an external floating roof or internal floating cover storage tank subject to the provisions of paragraph (1) of this subsection, the following requirements apply.

(A) All openings in an internal floating cover or external floating roof except for automatic bleeder vents (vacuum breaker vents) and rim space vents must provide a projection below the liquid surface or be equipped with a cover, seal, or lid. Any cover, seal, or lid must be in a closed (i.e., no visible gap) position at all times except when the device is in actual use.

(B) Automatic bleeder vents (vacuum breaker vents) must be closed at all times except when the roof or cover is being floated off or landed on the roof or cover leg supports.

(C) Rim vents, if provided, must be set to open only when the roof or cover is being floated off the roof or cover leg supports or at the manufacturer's recommended setting.

(D) Any roof or cover drain that empties into the stored liquid must be equipped with a slotted membrane fabric cover that covers at least 90% of the area of the opening.

(E) There must be no visible holes, tears, or other openings in any seal or seal fabric.

(F) For an external floating roof storage tank, secondary seals must be the rim-mounted type (the seal must be continuous from the floating roof to the tank wall). The accumulated area of gaps that exceed 1/8 inch in width between the secondary seal and storage tank wall may not be greater than 1.0 square inch per foot of tank diameter.

(3) Vapor control systems, as defined in §115.10 of this title, used as a control device on any storage tank must maintain a minimum control efficiency of 90%. If a flare is used, it must be designed and operated in accordance with 40 Code of Federal Regulations §60.18(b) - (f) (as amended through December 22, 2008 (73 FR 78209)) and be lit at all times when VOC vapors are routed to the flare.

(b) The following requirements apply in Gregg, Nueces, and Victoria Counties.

(1) No person shall place, store, or hold in any storage tank any VOC, unless the storage tank is capable of maintaining working pressure sufficient at all times to prevent any vapor or gas loss to the atmosphere or is in compliance with the control requirements specified in Table I(a) in subsection (a)(1) of this section for VOC other than crude oil and condensate or Table II(a) in subsection (a)(1) of this section for crude oil and condensate. If a flare is used as a vapor recovery system, as defined in §115.10 of this title, it must be designed and operated in accordance with 40 Code of Federal Regulations §60.18(b) - (f) (as amended through December 22, 2008 (73 FR 78209)) and be lit at all times when VOC vapors are routed to the flare.

(2) For an external floating roof or internal floating cover storage tank subject to the provisions of paragraph (1) of this subsection, the following requirements apply.

(A) All openings in an internal floating cover or external floating roof, except for automatic bleeder vents (vacuum breaker vents) and rim space vents, must provide a projection below the liquid surface or be equipped with a cover, seal, or lid. Any cover, seal, or lid must be in a closed (i.e., no visible gap) position at all times, except when the device is in actual use.

(B) Automatic bleeder vents (vacuum breaker vents) must be closed at all times except when the roof or cover is being floated off or landed on the roof or cover leg supports.

(C) Rim vents, if provided, must be set to open only when the roof or cover is being floated off the roof or cover leg supports or at the manufacturer's recommended setting.

(D) Any roof or cover drain that empties into the stored liquid must be equipped with a slotted membrane fabric cover that covers at least 90% of the area of the opening.

(E) There must be no visible holes, tears, or other openings in any seal or seal fabric.

(F) For an external floating roof storage tank, secondary seals must be the rim-mounted type (the seal shall be continuous from the floating roof to the tank wall). The accumulated area of gaps that exceed 1/8 inch in width between the secondary seal and tank wall may not be greater than 1.0 square inch per foot of tank diameter.

(c) The following requirements apply in Aransas, Bexar, Calhoun, Matagorda, San Patricio, and Travis Counties.

(1) No person may place, store, or hold in any storage tank any VOC, other than crude oil or condensate, unless the storage tank is capable of maintaining working pressure sufficient at all times to prevent any vapor or gas loss to the atmosphere or is in compliance with the control requirements specified in Table I(b) of this paragraph for VOC other than crude oil and condensate.
Figure: 30 TAC §115.112(c)(1)

(2) For an external floating roof or internal floating cover storage tank subject to the provisions of paragraph (1) of this subsection, the following requirements apply.

(A) There must be no visible holes, tears, or other openings in any seal or seal fabric.

(B) All tank gauging and sampling devices must be vapor-tight except when gauging and sampling is taking place.

(3) No person in Matagorda or San Patricio Counties shall place, store, or hold crude oil or condensate in any storage tank unless the storage tank is a pressure tank capable of maintaining working pressures sufficient at all times to prevent vapor or gas loss to the atmosphere or is equipped with one of the following control devices, properly maintained and operated:

(A) an internal floating cover or external floating roof, as defined in §115.10 of this title. These control devices will not be allowed if the VOC has a true vapor pressure of 11.0 psia or greater. All tank-gauging and tank-sampling devices must be vapor-tight, except when gauging or sampling is taking place; or

(B) a vapor control system as defined in §115.10 of this title.

(d) The following requirements apply in the Houston-Galveston-Brazoria area, as defined in §115.10 of this title. The requirements in this subsection no longer apply beginning March 1, 2013.

(1) No person shall place, store, or hold in any storage tank any VOC unless the storage tank is capable of maintaining working pressure sufficient at all times to prevent any vapor or gas loss to the atmosphere or is in compliance with the control requirements specified in either Table I(a) of subsection (a)(1) of this section for VOC other than crude oil and condensate or Table II(a) of subsection (a)(1) of this section for crude oil and condensate.

(2) For an external floating roof or internal floating cover storage tank subject to the provisions of paragraph (1) of this subsection, the following requirements apply.

(A) All openings in an internal floating cover or external floating roof as defined in §115.10 of this title except for automatic bleeder vents (vacuum breaker vents), and rim space vents must provide a projection below the liquid surface. All openings in an internal floating cover or external floating roof except for automatic bleeder vents (vacuum breaker vents), rim space vents, leg sleeves, and roof or cover drains must be equipped with a deck cover. The deck cover must be equipped with a gasket in good operating condition between the cover and the deck. The deck cover must be closed (i.e., no gap of more than 1/8 inch) at all times, except when the cover must be open for access.

(B) Automatic bleeder vents (vacuum breaker vents) and rim space vents must be equipped with a gasketed lid, pallet, flapper, or other closure device and must be closed (i.e., no gap of more than 1/8 inch) at all times except when required to be open to relieve excess pressure or vacuum in accordance with the manufacturer's design.

(C) Each opening into the internal floating cover for a fixed roof support column may be equipped with a flexible fabric sleeve seal instead of a deck cover.

(D) Any external floating roof drain that empties into the stored liquid must be equipped with a slotted membrane fabric

cover that covers at least 90% of the area of the opening or an equivalent control that must be kept in a closed (i.e., no gap of more than 1/8 inch) position at all times except when the drain is in actual use. Stub drains on an internal floating cover storage tank are not subject to this requirement.

(E) There must be no visible holes, tears, or other openings in any seal or seal fabric.

(F) For an external floating roof storage tank, secondary seals must be the rim-mounted type (the seal must be continuous from the floating roof to the tank wall with the exception of gaps that do not exceed the following specification). The accumulated area of gaps that exceed 1/8 inch in width between the secondary seal and storage tank wall may not be greater than 1.0 square inch per foot of storage tank diameter.

(G) Each opening for a slotted guidepole in an external floating roof storage tank must be equipped with one of the following control device configurations:

(i) a pole wiper and pole float that has a seal or wiper at or above the height of the pole wiper;

(ii) a pole wiper and a pole sleeve;

(iii) an internal sleeve emission control system;

(iv) a retrofit to a solid guidepole system;

(v) a flexible enclosure system; or

(vi) a cover on an external floating roof tank.

(H) The external floating roof or internal floating cover must be floating on the liquid surface at all times except as specified in this subparagraph. The external floating roof or internal floating cover may be supported by the leg supports or other support devices, such as hangers from the fixed roof, during the initial fill or refill after the storage tank has been cleaned or as allowed under the following circumstances:

(i) when necessary for maintenance or inspection;

(ii) when necessary for supporting a change in service to an incompatible liquid;

(iii) when the storage tank has a storage capacity less than 25,000 gallons or the vapor pressure of the material stored is less than 1.5 psia;

(iv) when the vapors are routed to a control device from the time the floating roof or cover is landed until the floating roof or cover is within ten percent by volume of being refloated;

(v) when all VOC emissions from the tank, including emissions from roof or cover landings, have been included in a floating roof or cover storage tank emissions limit or cap approved under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification); or

(vi) when all VOC emissions from floating roof or cover landings at the regulated entity, as defined in §101.1 of this title, are less than 25 tons per year.

(3) Vapor control systems, as defined in §115.10 of this title, used as a control device on any storage tank must maintain a minimum control efficiency of 90%.

(4) For a storage tank storing condensate, as defined in §101.1 of this title, prior to custody transfer, flashed gases must be routed to a vapor control system if the liquid throughput through an individual tank or the aggregate of tanks in a tank battery exceeds 1,500 barrels (63,000 gallons) per year.

(5) For a storage tank storing crude oil or condensate prior to custody transfer or at a pipeline breakout station, flashed gases must be routed to a vapor control system if the uncontrolled VOC emissions from an individual storage tank, or from the aggregate of storage tanks in a tank battery, equal or exceed 25 tons per year on a rolling 12-month basis. Uncontrolled emissions must be estimated by one of the following methods; however, if emissions determined using direct measurements or other methods approved by the executive director under subparagraphs (A) or (D) of this paragraph are higher than emissions estimated using the default factors or charts in subparagraphs (B) or (C) of this paragraph, the higher values must be used.

(A) The owner or operator may make direct measurements using the measuring instruments and methods specified in §115.117 of this title (relating to Approved Test Methods).

(B) The owner or operator may use a factor of 33.3 pounds of VOC per barrel (42 gallons) of condensate produced or 1.6 pounds of VOC per barrel (42 gallons) of oil produced.

(C) For crude oil storage only, the owner or operator may use the chart in Exhibit 2 of the United States Environmental Protection Agency publication *Lessons Learned from Natural Gas Star Partners: Installing Vapor Recovery Units on Crude Oil Storage Tanks*, October 2003, and assuming that the hydrocarbon vapors have a molecular weight of 34 pounds per pound mole and are 48% by weight VOC.

(D) Other test methods or computer simulations may be allowed if approved by the executive director.

(e) The control requirements in this subsection apply in the Houston-Galveston-Brazoria and Dallas-Fort Worth areas beginning March 1, 2013, except as specified in §115.119 of this title (relating to Compliance Schedules).

(1) No person shall place, store, or hold VOC in any storage tank unless the storage tank is capable of maintaining working pressure sufficient at all times to prevent any vapor or gas loss to the atmosphere or is in compliance with the control requirements specified in Table 1 of this paragraph for VOC other than crude oil and condensate or Table 2 of this paragraph for crude oil and condensate.
Figure: 30 TAC §115.112(e)(1)

(2) For an external floating roof or internal floating cover storage tank subject to the provisions of paragraph (1) of this subsection, the following requirements apply.

(A) All openings in an internal floating cover or external floating roof must provide a projection below the liquid surface. Automatic bleeder vents (vacuum breaker vents) and rim space vents are not subject to this requirement.

(B) All openings in an internal floating cover or external floating roof must be equipped with a deck cover. The deck cover must be equipped with a gasket in good operating condition between the cover and the deck. The deck cover must be closed (i.e., no gap of more than 1/8 inch) at all times, except when the cover must be open for access. Automatic bleeder vents (vacuum breaker vents), rim space vents, leg sleeves, and roof or cover drains are not subject to this requirement.

(C) Automatic bleeder vents (vacuum breaker vents) and rim space vents must be equipped with a gasketed lid, pallet, flapper, or other closure device and must be closed (i.e., no gap of more than 1/8 inch) at all times except when required to be open to relieve excess pressure or vacuum in accordance with the manufacturer's design.

(D) Each opening into the internal floating cover for a fixed roof support column may be equipped with a flexible fabric sleeve seal instead of a deck cover.

(E) Any external floating roof drain that empties into the stored liquid must be equipped with a slotted membrane fabric cover that covers at least 90% of the area of the opening or an equivalent control that must be kept in a closed (i.e., no gap of more than 1/8 inch) position at all times except when the drain is in actual use. Stub drains on an internal floating cover storage tank are not subject to this requirement.

(F) There must be no visible holes, tears, or other openings in any seal or seal fabric.

(G) For an external floating roof storage tank, secondary seals must be the rim-mounted type. The seal must be continuous from the floating roof to the tank wall with the exception of gaps that do not exceed the following specification. The accumulated area of gaps that exceed 1/8 inch in width between the secondary seal and storage tank wall may not be greater than 1.0 square inch per foot of storage tank diameter.

(H) Each opening for a slotted guidepole in an external floating roof storage tank must be equipped with one of the following control device configurations:

(i) a pole wiper and pole float that has a seal or wiper at or above the height of the pole wiper;

(ii) a pole wiper and a pole sleeve;

(iii) an internal sleeve emission control system;

(iv) a retrofit to a solid guidepole system;

(v) a flexible enclosure system; or

(vi) a cover on an external floating roof tank.

(I) The external floating roof or internal floating cover must be floating on the liquid surface at all times except as allowed under the following circumstances:

(i) during the initial fill or refill after the storage tank has been cleaned;

(ii) when necessary for preventive maintenance, roof or cover repair, primary seal inspection, or removal and installation of a secondary seal, if product is not transferred into or out of the storage tank, emissions are minimized, and the repair is completed within seven calendar days;

(iii) when necessary for supporting a change in service to an incompatible liquid;

(iv) when the storage tank has a storage capacity less than 25,000 gallons;

(v) when the vapors are routed to a control device from the time the storage tank has been emptied to the extent practical or the drain pump loses suction until the floating roof or cover is within 10% by volume of being refloated;

(vi) when all VOC emissions from the storage tank, including emissions from floating roof or cover landings, have been included in an emissions limit or cap approved under Chapter 116 of this title prior to March 1, 2013; or

(vii) when all VOC emissions from floating roof or cover landings at the regulated entity are less than 25 tons per year.

(3) A control device used to comply with this subsection must meet one of the following conditions at all times when VOC vapors are routed to the device.

(A) A control device, other than a vapor recovery unit or a flare, must maintain the following minimum control efficiency:

(i) in the Houston-Galveston-Brazoria area, 90%; and

(ii) in the Dallas-Fort Worth area, 95%.

(B) A vapor recovery unit must be designed to process all vapor generated by the maximum liquid throughput of the storage tank or the aggregate of storage tanks in a tank battery and must transfer recovered vapors to a pipe or container that is vapor-tight, as defined in §115.10 of this title.

(C) A flare must be designed and operated in accordance with 40 Code of Federal Regulations §60.18(b) - (f) (as amended through December 22, 2008 (73 FR 78209)) and be lit at all times when VOC vapors are routed to the flare.

(4) For a storage tank storing condensate prior to custody transfer, flashed gases must be routed to a vapor control system if the condensate throughput of an individual tank or the aggregate of tanks in a tank battery exceeds:

(A) in the Houston-Galveston-Brazoria area, 1,500 barrels (63,000 gallons) per year on a rolling 12-month basis; and

(B) in the Dallas-Fort Worth area:

(i) 3,000 barrels (126,000 gallons) per year on a rolling 12-month basis; or

(ii) 15 months after the date the commission publishes notice in the *Texas Register* as specified in §115.119(b)(1)(C) of this title that the Dallas-Fort Worth area has been reclassified as a severe nonattainment area for the 1997 Eight-Hour Ozone National Ambient Air Quality Standard, 1,500 barrels (63,000 gallons) per year on a rolling 12-month basis.

(5) For a storage tank storing crude oil or condensate prior to custody transfer or at a pipeline breakout station, flashed gases must be routed to a vapor control system if the uncontrolled VOC emissions from an individual storage tank, or from the aggregate of storage tanks in a tank battery, equal or exceed:

(A) in the Houston-Galveston-Brazoria area, 25 tons per year on a rolling 12-month basis; and

(B) in the Dallas-Fort Worth area:

(i) 50 tons per year on a rolling 12-month basis; or

(ii) 15 months after the date the commission publishes notice in the *Texas Register* as specified in §115.119(b)(1)(C) of this title that the Dallas-Fort Worth area has been reclassified as a severe nonattainment area for the 1997 Eight-Hour Ozone National Ambient Air Quality Standard, 25 tons per year on a rolling 12-month basis.

(6) Uncontrolled emissions from a storage tank or tank battery storing crude oil or condensate prior to custody transfer or at a pipeline breakout station must be estimated by one of the following methods. However, if emissions determined using direct measurements or other methods approved by the executive director under subparagraphs (A) or (B) of this paragraph are higher than emissions estimated using the default factors or charts in subparagraphs (C) or (D) of this paragraph, the higher values must be used.

(A) The owner or operator may make direct measurements using the measuring instruments and methods specified in §115.117 of this title.

(B) The owner or operator may use other test methods or computer simulations approved by the executive director.

(C) The owner or operator may use a factor of 33.3 pounds of VOC per barrel (42 gallons) of condensate produced or 1.6 pounds of VOC per barrel (42 gallons) of oil produced.

(D) For crude oil storage only, the owner or operator may use the chart in Exhibit 2 of the United States Environmental Protection Agency publication *Lessons Learned from Natural Gas Star Partners: Installing Vapor Recovery Units on Crude Oil Storage Tanks*, October 2003, and assuming that the hydrocarbon vapors have a molecular weight of 34 pounds per pound mole and are 48% by weight VOC.

§115.114. Inspection Requirements.

(a) The following inspection requirements apply in the Beaumont-Port Arthur, Dallas-Fort Worth, El Paso, and Houston-Galveston-Brazoria areas, as defined in §115.10 of this title (relating to Definitions).

(1) For an internal floating cover storage tank, the internal floating cover and the primary seal or the secondary seal (if one is in service) must be visually inspected through a fixed roof inspection hatch at least once every 12 months.

(A) If the internal floating cover is not resting on the surface of the volatile organic compounds (VOC) inside the storage tank and is not resting on the leg supports; or liquid has accumulated on the internal floating cover; or the seal is detached; or there are holes or tears in the seal fabric; or there are visible gaps between the seal and the wall of the storage tank, within 60 days of the inspection the owner or operator shall repair the items or shall empty and degas the storage tank in accordance with Subchapter F, Division 3 of this chapter (relating to Degassing of Storage Tanks, Transport Vessels, and Marine Vessels).

(B) If a failure cannot be repaired within 60 days and if the storage tank cannot be emptied within 60 days, the owner or operator may submit written requests for up to two extensions of up to 30 additional days each to the appropriate regional office. The owner or operator shall submit a copy to any local air pollution control program with jurisdiction. Each request for an extension must include a statement that alternate storage capacity is unavailable and a schedule that will assure that the repairs will be completed as soon as possible.

(2) For an external floating roof storage tank, the secondary seal gap must be physically measured at least once every 12 months to insure compliance with §115.112(a)(2)(F), (d)(2)(F), and (e)(2)(G) of this title (relating to Control Requirements).

(A) If the secondary seal gap exceeds the limitations specified by §115.112(a)(2)(F), (d)(2)(F), and (e)(2)(G) of this title, within 60 days of the inspection the owner or operator shall repair the items or shall empty and degas the storage tank in accordance with Subchapter F, Division 3 of this chapter.

(B) If a failure cannot be repaired within 60 days and if the storage tank cannot be emptied within 60 days, the owner or operator may submit written requests for up to two extensions of up to 30 additional days each to the appropriate regional office. The owner or operator shall submit a copy to any local air pollution control program with jurisdiction. Each request for an extension must include a statement that alternate storage capacity is unavailable and a schedule that will assure that the repairs will be completed as soon as possible.

(3) If the storage tank is equipped with a mechanical shoe or liquid-mounted primary seal, compliance with §115.112(a)(2)(F), (d)(2)(F), and (e)(2)(G) of this title can be determined by visual inspection.

(4) For an external floating roof storage tank, the secondary seal must be visually inspected at least once every six months to ensure compliance with §115.112(a)(2)(E) and (F), (d)(2)(E) and (F), and (e)(2)(F) and (G) of this title.

(A) If the external floating roof is not resting on the surface of the VOC inside the storage tank and is not resting on the leg supports; or liquid has accumulated on the external floating roof; or the seal is detached; or there are holes or tears in the seal fabric; or there are visible gaps between the seal and the wall of the storage tank, within 60 days of the inspection the owner or operator shall repair the items or shall empty and degas the storage tank in accordance with Subchapter F, Division 3 of this chapter.

(B) If a failure cannot be repaired within 60 days and if the storage tank cannot be emptied within 60 days, the owner or operator may submit written requests for up to two extensions of up to 30 additional days each to the appropriate regional office. The owner or operator shall submit a copy to any local air pollution control program with jurisdiction. Each request for an extension must include a statement that alternate storage capacity is unavailable and a schedule that will assure that the repairs will be completed as soon as possible.

(b) The following inspection requirements apply in Gregg, Nueces, and Victoria Counties.

(1) For an internal floating cover storage tank, the following inspection requirements apply.

(A) If during an inspection of an internal floating cover storage tank, the internal floating cover is not resting on the surface of the VOC inside the storage tank and is not resting on the leg supports; or liquid has accumulated on the internal floating cover; or the seal is detached; or there are holes or tears in the seal fabric; or there are visible gaps between the seal and the wall of the storage tank, within 60 days of the inspection the owner or operator shall repair the items or shall empty and degas the storage tank.

(B) If a failure cannot be repaired within 60 days and if the storage tank cannot be emptied within 60 days, the owner or operator may submit written requests for up to two extensions of up to 30 additional days each to the appropriate regional office. The owner or operator shall submit a copy to any local air pollution control program with jurisdiction. Each request for an extension must include a statement that alternate storage capacity is unavailable and a schedule that will assure that the repairs will be completed as soon as possible.

(2) For an external floating roof storage tank, the secondary seal gap must be physically measured at least once every 12 months to insure compliance with §115.112(b)(2)(F) of this title.

(A) If the secondary seal gap exceeds the limitations specified by §115.112(b)(2)(F) of this title, within 60 days of the inspection the owner or operator shall repair the items or shall empty and degas the storage tank.

(B) If a failure cannot be repaired within 60 days and if the storage tank cannot be emptied within 60 days, the owner or operator may submit written requests for up to two extensions of up to 30 additional days each to the appropriate regional office. The owner or operator shall submit a copy to any local air pollution control program with jurisdiction. Each request for an extension must include a statement that alternate storage capacity is unavailable and a schedule that will assure that the repairs will be completed as soon as possible.

(3) If the storage tank is equipped with a mechanical shoe or liquid-mounted primary seal, compliance with §115.112(b)(2)(F) of this title can be determined by visual inspection.

(4) For an external floating roof storage tank, the secondary seal must be visually inspected at least once every 12 months to insure compliance with §115.112(b)(2)(E) - (F) of this title.

(A) If the external floating roof is not resting on the surface of the VOC inside the storage tank and is not resting on the leg supports; or liquid has accumulated on the external floating roof; or the seal is detached; or there are holes or tears in the seal fabric; or there are visible gaps between the seal and the wall of the storage tank, within 60 days of the inspection the owner or operator shall repair the items or shall empty and degas the storage tank.

(B) If a failure cannot be repaired within 60 days and if the storage tank cannot be emptied within 60 days, the owner or operator may submit written requests for up to two extensions of up to 30 additional days each to the appropriate regional office. The owner or operator shall submit a copy to any local air pollution control program with jurisdiction. Each request for an extension must include a statement that alternate storage capacity is unavailable and a schedule that will assure that the repairs will be completed as soon as possible.

(c) The following inspection requirements apply in Aransas, Bexar, Calhoun, Matagorda, San Patricio, and Travis Counties.

(1) For an internal floating cover storage tank, the following inspection requirements apply.

(A) If during an inspection of an internal floating cover storage tank, the internal floating cover is not resting on the surface of the VOC inside the storage tank and is not resting on the leg supports; or liquid has accumulated on the internal floating cover; or the seal is detached; or there are holes or tears in the seal fabric; or there are visible gaps between the seal and the wall of the storage tank, within 60 days of the inspection the owner or operator shall repair the items or shall empty and degas the storage tank.

(B) If a failure cannot be repaired within 60 days and if the storage tank cannot be emptied within 60 days, the owner or operator may submit written requests for up to two extensions of up to 30 additional days each to the appropriate regional office. The owner or operator shall submit a copy to any local air pollution control program with jurisdiction. Each request for an extension must include a statement that alternate storage capacity is unavailable and a schedule that will assure that the repairs will be completed as soon as possible.

(2) For an external floating roof storage tank, the following inspection requirements apply.

(A) If during an inspection of an external floating roof storage tank, the external floating roof is not resting on the surface of the VOC inside the storage tank and is not resting on the leg supports; or liquid has accumulated on the external floating roof; or the seal is detached; or there are holes or tears in the seal fabric; or there are visible gaps between the seal and the wall of the storage tank, within 60 days of the inspection the owner or operator shall repair the items or shall empty and degas the storage tank.

(B) If a failure cannot be repaired within 60 days and if the storage tank cannot be emptied within 60 days, the owner or operator may submit written requests for up to two extensions of up to 30 additional days each to the appropriate regional office. The owner or operator shall submit a copy to any local air pollution control program with jurisdiction. Each request for an extension must include a statement that alternate storage capacity is unavailable and a schedule that will assure that the repairs will be completed as soon as possible.

§115.115. Monitoring Requirements.

(a) The following monitoring requirements apply in the Beaumont-Port Arthur, Dallas-Fort Worth, El Paso, and Houston-Galveston-Brazoria areas, as defined in §115.10 of this title (relating to Definitions). An affected owner or operator shall install and maintain monitors to measure operational parameters of any of the following control devices installed to meet applicable control requirements. Such monitors must be sufficient to demonstrate proper functioning of those devices to design specifications.

(1) For a direct-flame incinerator, the owner or operator shall continuously monitor the exhaust gas temperature immediately downstream of the device.

(2) For a condensation system, the owner or operator shall continuously monitor the outlet gas temperature to ensure the temperature is below the manufacturer's recommended operating temperature for controlling the volatile organic compounds (VOC) vapors routed to the device.

(3) For a carbon adsorption system or carbon adsorber, as defined in §101.1 of this title (relating to Definitions), the owner or operator shall:

(A) continuously monitor the exhaust gas VOC concentration of a carbon adsorption system that regenerates the carbon bed directly to determine breakthrough. For the purpose of this paragraph, breakthrough is defined as a measured VOC concentration exceeding 100 parts per million by volume above background expressed as methane. The owner or operator may conduct this monitoring using Method 21, as specified in §115.117 of this title (relating to Approved Test Methods), if the monitoring is conducted once every seven calendar days; or

(B) switch the vent gas flow to fresh carbon at a regular predetermined time interval that is less than the carbon replacement interval determined by the maximum design flow rate and the VOC concentration in the gas stream vented to the carbon adsorption system or carbon adsorber.

(4) For a catalytic incinerator, the owner or operator shall continuously monitor the inlet and outlet gas temperature.

(5) For a vapor recovery unit used to comply with §115.112(e)(3) of this title (relating to Control Requirements), the owner or operator shall continuously monitor at least one of the following operational parameters:

(A) run-time of the compressor or motor in a vapor recovery unit;

(B) total volume of recovered vapors; or

(C) other parameters sufficient to demonstrate proper functioning to design specifications.

(6) For a control device not listed in this subsection, the owner or operator shall continuously monitor one or more operational parameters sufficient to demonstrate proper functioning of the control device to design specifications.

(b) In Victoria County, the owner or operator shall monitor operational parameters of any of the emission control devices listed in this subsection installed to meet applicable control requirements.

(1) For a direct-flame incinerator, the owner or operator shall continuously monitor the exhaust gas temperature immediately downstream of the device.

(2) For a condensation system or catalytic incinerator, the owner or operator shall continuously monitor the inlet and outlet gas temperature.

(3) For a carbon adsorption system or carbon adsorber, the owner or operator shall continuously monitor the exhaust gas VOC concentration to determine if breakthrough has occurred. The owner or operator may conduct this monitoring using Method 21, as specified in §115.117 of this title, if the monitoring is conducted once every seven calendar days.

§115.116. Testing Requirements.

(a) The testing requirements in this subsection apply in the Dallas-Fort Worth, Houston-Galveston-Brazoria, Beaumont-Port Arthur, and El Paso areas, as defined in §115.10 of this title (relating to Definitions).

(1) For a vapor control system, other than a vapor recovery unit or a flare, used to comply with the control requirements in §115.112(a)(3) and (e)(3)(A) of this title (relating to Control Requirements), an initial control efficiency test must be conducted in accordance with the approved test methods in §115.117 of this title (relating to Approved Test Methods). If the vapor control system is modified in any way that could reasonably be expected to decrease the control efficiency, the device must be retested within 60 days of the modification.

(2) A flare used to comply with the control requirements in §115.112(a)(3) and (e)(3)(A) of this title must meet the design verification test requirements in 40 Code of Federal Regulations §60.18(f) (as amended through December 22, 2008 (73 FR 78209)).

(b) The testing requirements in this subsection apply in Gregg, Nueces, and Victoria Counties.

(1) For a vapor control system, other than a vapor recovery unit or a flare, compliance with the control requirements in §115.112(b) of this title must be demonstrated in accordance with the approved test methods in §115.117 of this title.

(2) A flare must meet the design verification test requirements in 40 Code of Federal Regulations §60.18(f) (as amended through December 22, 2008 (73 FR 78209)).

§115.117. Approved Test Methods.

For the Beaumont-Port Arthur, Dallas-Fort Worth, El Paso, and Houston-Galveston-Brazoria areas, as defined in §115.10 of this title (relating to Definitions) and Gregg, Nueces, and Victoria Counties, compliance with the requirements in this division must be determined by applying the following test methods, as appropriate:

(1) Methods 1 - 4 (40 Code of Federal Regulations (CFR) Part 60, Appendix A) for determining flow rates, as necessary;

(2) Method 18 (40 CFR Part 60, Appendix A) for determining gaseous organic compound emissions by gas chromatography;

(3) Method 21 (40 CFR Part 60, Appendix A-7) for determining volatile organic compounds concentrations for the purposes of determining the presence of leaks and determining breakthrough on a carbon adsorption system or carbon adsorber. If the owner or operator chooses to conduct a test to verify a vapor-tight requirement, Method 21 is acceptable;

(4) Method 22 (40 CFR Part 60, Appendix A) for determination of visible emissions from flares;

(5) Method 25 (40 CFR Part 60, Appendix A) for determining total gaseous nonmethane organic emissions as carbon;

(6) Methods 25A or 25B (40 CFR Part 60, Appendix A) for determining total gaseous organic concentrations using flame ionization or nondispersive infrared analysis;

(7) test method described in 40 CFR §60.113a(a)(1)(ii) (effective April 8, 1987) for measurement of storage tank seal gap;

(8) true vapor pressure must be determined using standard reference texts or American Society for Testing and Materials Test Method D323, D2879, D4953, D5190, or D5191 for the measurement of Reid vapor pressure, adjusted for actual storage temperature in accordance with American Petroleum Institute Publication 2517. For the purposes of temperature correction, the owner or operator shall use the actual storage temperature. Actual storage temperature of an unheated storage tank may be determined using the maximum local monthly average ambient temperature as reported by the National Weather Service. Actual storage temperature of a heated storage tank must be determined using either the measured temperature or the temperature set point of the storage tank;

(9) mass flow meter, positive displacement meter, or similar device for measuring the volumetric flow rate of flash, working, breathing, and standing emissions from crude oil and condensate over a 24-hour period representative of normal operation. For crude oil and natural gas production sites, volumetric flow rate measurements must be made while the producing wells are operational;

(10) test methods referenced in paragraphs (2), (5), and (6) of this section or Gas Processors Association Method 2286, Tentative Method of Extended Analysis for Natural Gas and Similar Mixtures by Temperature Programmed Gas Chromatography, to measure the concentration of volatile organic compounds in flashed gases from crude oil and condensate storage;

(11) test methods other than those specified in this section may be used if validated by 40 CFR Part 63, Appendix A, Test Method 301 and approved by the executive director; or

(12) minor modifications to these test methods approved by the executive director.

§115.118. Recordkeeping Requirements.

(a) The following recordkeeping requirements apply in the Beaumont-Port Arthur, Dallas-Fort Worth, El Paso, and Houston-Galveston-Brazoria areas, as defined in §115.10 of this title (relating to Definitions).

(1) The owner or operator of storage tank claiming an exemption in §115.111 of this title (relating to Exemptions) shall maintain records sufficient to demonstrate continuous compliance with the applicable exemption criteria. Where applicable, true vapor pressure, volatile organic compounds (VOC) content type, or a combination of the two must be recorded initially and at every change of service or when the storage tank is emptied and refilled.

(2) The owner or operator of an external floating roof storage tank that is exempt from the requirement for a secondary seal in accordance with §115.111(a)(1), (6), and (7) of this title and is used to store VOC with a true vapor pressure greater than 1.0 pounds per square inch absolute (psia) shall maintain records of the type of VOC stored and the average monthly true vapor pressure of the stored liquid.

(3) The owner or operator shall maintain records of the results of inspections required by §115.114(a) of this title (relating to Inspection Requirements). For secondary seal gaps that are required to be physically measured during inspection, these records must include a calculation of emissions for all secondary seal gaps that exceed 1/8 inch where the accumulated area of such gaps is greater than 1.0 square inch per foot of tank diameter. These calculated emissions inventory

reportable emissions must be reported in the annual emissions inventory submittal required by §101.10 of this title (relating to Emissions Inventory Requirements). The emissions must be calculated using the following equation.
Figure: 30 TAC §115.118(a)(3)

(4) The owner or operator shall maintain records of any operational parameter monitoring required in §115.115(a) of this title (relating to Monitoring Requirements). Such records must be sufficient to demonstrate proper functioning of those devices to design specifications and must include, but are not limited to, the following.

(A) For a direct-flame incinerator, the owner or operator shall continuously record the exhaust gas temperature immediately downstream of the device.

(B) For a condensation system, the owner or operator shall continuously record the outlet gas temperature to ensure the temperature is below the manufacturer's recommended operating temperature for controlling the VOC vapors routed to the device.

(C) For a carbon adsorption system or carbon adsorber, the owner or operator shall:

(i) continuously record the exhaust gas VOC concentration of any carbon adsorption system monitored according to §115.115(a)(3)(A) of this title; or

(ii) record the date and time of each switch between carbon containers and the method of determining the carbon replacement interval if the carbon adsorption system or carbon adsorber is switched according to §115.115(a)(3)(B) of this title.

(D) For a catalytic incinerator, the owner or operator shall continuously record the inlet and outlet gas temperature.

(E) For a vapor recovery unit, the owner or operator shall maintain records of the continuous operational parameter monitoring required in §115.115(a)(5) of this title.

(F) For any other control device not listed in this paragraph, the owner or operator shall maintain records of the continuous operational parameter monitoring required in §115.115(a)(6) of this title sufficient to demonstrate proper functioning of the control device to design specifications.

(5) The owner or operator shall maintain the results of any testing conducted in accordance with §115.116 of this title (relating to Testing Requirements) or §115.117 of this title (relating to Approved Test Methods) at an affected site. Results may be maintained at an off-site location if made available for review within 24 hours.

(6) In the Houston-Galveston-Brazoria and Dallas-Fort Worth areas, the owner or operator shall maintain the following additional records.

(A) The owner or operator of a fixed roof storage tank that is not required in §115.112(d)(1) or (e)(1) of this title (relating to Control Requirements) to be equipped with an external floating roof, internal floating cover, or vapor control system shall maintain records of the type of VOC stored, the starting and ending dates when the material is stored, and the true vapor pressure at the average monthly storage temperature of the stored liquid. This requirement does not apply to a storage tank with storage capacity of 25,000 gallons or less storing VOC other than crude oil or condensate, or to a storage tank with storage capacity of 40,000 gallons or less storing crude oil or condensate.

(B) The owner or operator of any storage tank that stores crude oil or condensate prior to custody transfer or at a pipeline breakout station and is not equipped with a vapor control system shall maintain records of the estimated uncontrolled emissions from the storage tank on a rolling 12-month basis. The records must be made available for review within 72 hours upon request by authorized representatives of the executive director, the United States Environmental Protection Agency, or any local air pollution control agency with jurisdiction.

(C) The owner or operator of an external floating roof or internal floating cover storage tank meeting the extended compliance date in §115.119(a)(1)(A) or (b)(1)(A) of this title (relating to Compliance Schedules) shall maintain records of the date of the last time the storage tank was emptied and degassed.

(7) All records must be maintained for two years and be made available for review upon request by authorized representatives of the executive director, the United States Environmental Protection Agency, or any local air pollution control agency with jurisdiction. In the Dallas-Fort Worth area, any records created on or after March 1, 2011, must be maintained for at least five years.

(b) The following recordkeeping requirements apply in Gregg, Nueces, and Victoria Counties.

(1) The owner or operator of an external floating roof storage tank that is exempt from the requirement for a secondary seal in accordance with §115.111(b)(1), (6), and (7) of this title and used to store VOC with a true vapor pressure greater than 1.0 psia shall maintain records of the type of VOC stored and the average monthly true vapor pressure of the stored liquid.

(2) The owner or operator shall record the results of inspections required by §115.114(b) of this title.

(3) In Victoria County, the owner or operator shall continuously record operational parameters of any of the following emission control devices installed to meet applicable control requirements in §115.112 of this title. Such records must be sufficient to demonstrate proper functioning of those devices to design specifications, including:

(A) the exhaust gas temperature immediately downstream of a direct-flame incinerator;

(B) the inlet and outlet gas temperature of a condensation system or catalytic incinerator; and

(C) the exhaust gas VOC concentration of any carbon adsorption system or carbon adsorber, to determine if breakthrough has occurred.

(4) The owner or operator shall maintain records of the results of any testing conducted in accordance with §115.117 of this title at an affected site.

(5) All records must be maintained for two years and be made available for review upon request by authorized representatives of the executive director, the United States Environmental Protection Agency, or any local air pollution control agency with jurisdiction.

§115.119. Compliance Schedules.

(a) In Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties, the compliance date has already passed and the owner or operator of each storage tank in which any volatile organic compounds (VOC) is placed, stored, or held shall continue to comply with this division except as follows.

(1) The affected owner or operator shall comply with the requirements of §§115.112(d); 115.115(a)(1), (2), (3)(A), and (4); 115.117, and 115.118(a) of this title (relating to Control Requirements; Monitoring Requirements; Approved Test Methods; and Recordkeeping Requirements, respectively) no later than January 1, 2009. Section 115.112(d) of this title no longer applies in the Houston-Galveston-Brazoria area beginning March 1, 2013. Prior to March

1, 2013, the owner or operator of a storage tank subject to §115.112(d) of this title shall continue to comply with §115.112(d) of this title until compliance has been demonstrated with the requirements of §115.112(e) of this title.

(A) If compliance with these requirements would require emptying and degassing of the storage tank, compliance is not required until the next time the storage tank is emptied and degassed but no later than January 1, 2017.

(B) The owner or operator of each storage tank with a storage capacity less than 210,000 gallons storing crude oil and condensate prior to custody transfer shall comply with the requirements of this division no later than January 1, 2009, regardless if compliance with these requirements would require emptying and degassing of the storage tank.

(2) The affected owner or operator shall comply with §§115.112(e), 115.115(a)(3)(B), (5), and (6), and 115.116 of this title (relating to Testing Requirements) as soon as practicable, but no later than March 1, 2013.

(A) If compliance with these requirements would require emptying and degassing of the storage tank, compliance is not required until the next time the storage tank is emptied and degassed but no later than January 1, 2017.

(B) The owner or operator of each storage tank with a storage capacity less than 210,000 gallons storing crude oil and condensate prior to custody transfer shall comply with these requirements no later than March 1, 2013, regardless if compliance with these requirements would require emptying and degassing of the storage tank.

(b) In Collin, Dallas, Denton, Ellis, Johnson, Kaufman, Parker, Rockwall, and Tarrant Counties, the owner or operator of each storage tank in which any VOC is placed, stored, or held was required to be in compliance with this division on or before March 1, 2009, and shall continue to comply with this division, except as follows.

(1) The affected owner or operator shall comply with §§115.112(e), 115.115(a)(3)(B), (5), and (6), 115.116, and 115.118(a)(6) of this title as soon as practicable, but no later than March 1, 2013.

(A) If compliance with §115.112(e) of this title would require emptying and degassing of the storage tank, compliance is not required until the next time the storage tank is emptied and degassed but no later than December 1, 2021.

(B) The owner or operator of a storage tank with a storage capacity less than 210,000 gallons storing crude oil and condensate prior to custody transfer shall comply with these requirements no later than March 1, 2013, regardless if compliance with these requirements would require emptying and degassing of the storage tank.

(C) As soon as practicable but no later than 15 months after the commission publishes notice in the *Texas Register* that the Dallas-Fort Worth area has been reclassified as a severe nonattainment area for the 1997 Eight-Hour Ozone National Ambient Air Quality Standard the owner or operator of a storage tank storing crude oil or condensate prior to custody transfer or at a pipeline breakout station is required to be in compliance with the control requirements in §115.112(e)(4)(B) and (5)(B) of this title except as specified in §115.111(a)(11) of this title (relating to Exemptions).

(2) The owner or operator is no longer required to comply with §115.112(a) of this title beginning March 1, 2013.

(c) In Hardin, Jefferson, and Orange Counties, the owner or operator of each storage tank in which any VOC is placed, stored, or held was required to be in compliance with this division by March 7, 1997, and shall continue to comply with this division, except that compliance with §115.115(a)(3)(B), (5), and (6), and §115.116 of this title is required as soon as practicable, but no later than March 1, 2013.

(d) In El Paso County, the owner or operator of each storage tank in which any VOC is placed, stored, or held was required to be in compliance with this division by January 1, 1996, and shall continue to comply with this division, except that compliance with §115.115(a)(3)(B), (5), and (6), and §115.116 of this title is required as soon as practicable, but no later than March 1, 2013.

(e) In Aransas, Bexar, Calhoun, Gregg, Matagorda, Nueces, San Patricio, Travis, and Victoria Counties, the owner or operator of each storage tank in which any VOC is placed, stored, or held was required to be in compliance with this division by July 31, 1993, and shall continue to comply with this division, except that compliance with §115.116(b) of this title is required as soon as practicable, but no later than March 1, 2013.

(f) The owner or operator of each storage tank in which any VOC is placed, stored, or held that becomes subject to this division on or after the date specified in subsections (a) - (e) of this section, shall comply with the requirements in this division no later than 60 days after becoming subject.

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 December 9, 2011.

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Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
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Proposal publication date: June 24, 2011
For further information, please call: (512) 239-0779

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30 TAC §§115.115 - 115.117

Statutory Authority

The repeals are adopted under Texas Water Code (TWC), §5.102, concerning General Powers, that provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, that authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; TWC, §5.105, concerning General Policy, that authorizes the commission by rule to establish and approve all general policy of the commission; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, that authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The repeals are also adopted under THSC, §382.002, concerning Policy and Purpose, that establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, that authorizes the commission to control the quality of the state's air; and THSC, §382.012, concerning State Air Control Plan, that authorizes the commission to prepare and develop a general, comprehensive plan for the proper control

of the state's air. The repeals are also adopted under THSC, §382.016, concerning Monitoring Requirements; Examination of Records, that authorizes the commission to prescribe reasonable requirements for the measuring and monitoring of air contaminant emissions; and THSC, §382.021, concerning Sampling Methods and Procedures, that authorizes the commission to prescribe sampling methods. The repeals are also adopted under Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7401, *et seq.,* which requires states to submit state implementation plan revisions that specify the manner in which the National Ambient Air Quality Standards will be achieved and maintained within each air quality control region of the state.

The adopted repeals implement THSC, §§382.002, 382.011, 382.012, 382.016, 382.017, 382.021, and FCAA, 42 USC, §§7401 *et seq.*

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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SUBCHAPTER E. SOLVENT-USING PROCESSES

The Texas Commission on Environmental Quality (commission) adopts the repeal of §115.437; amendments to §§115.433, 115.435 and 115.439; and new §115.469, *without changes* to the proposed text and will not be republished. The commission adopts the amendments to §§115.422, 115.427, 115.429, 115.430, 115.432, and 115.436; and new §§115.431, 115.450, 115.451, 115.453 - 115.455, 115.458 - 115.461, 115.463 - 115.465, 115.468, 115.470, 115.471, 115.473 - 115.475, 115.478, and 115.479 *with changes* to the proposed text as published in the June 24, 2011, issue of the *Texas Register* (36 TexReg 3834).

The adopted repealed, amended, and new sections will be submitted to the United States Environmental Protection Agency (EPA) as revisions to the state implementation plan (SIP).

Background and Summary of the Factual Basis for the Adopted Rules

The 1990 Federal Clean Air Act (FCAA) Amendments (42 United States Code (USC), §§7401 *et seq.)* require the EPA to establish primary National Ambient Air Quality Standards (NAAQS) that protect public health and to designate areas exceeding the NAAQS as nonattainment areas. For each designated nonattainment area, the state is required to submit a SIP revision to the EPA that provides for attainment and maintenance of the NAAQS.

FCAA, §172(c)(1) requires that the SIP incorporate all reasonably available control measures, including reasonably available control technology (RACT), for sources of relevant pollutants. The EPA defines RACT as the lowest emission limitation that a particular source is capable of meeting by the application of control technology that is reasonably available considering technological and economic feasibility (44 FR 53761, September 17, 1979). For nonattainment areas classified as moderate and above, FCAA, §182(b)(2) requires the state to submit a SIP revision that implements RACT for sources of volatile organic compounds (VOC) addressed in a control techniques guidelines (CTG) document issued from November 15, 1990, through the area's attainment date.

The CTG documents provide information to assist states and local air pollution control authorities in determining RACT for specific emission sources. The CTG documents describe the EPA's evaluation of available information, including emission control options and associated costs, and provide the EPA's RACT recommendations for controlling emissions from these sources. The CTG documents do not impose any legally binding regulations or change any applicable regulations. The EPA's guidance on RACT indicates that states can choose to implement the CTG recommendations, implement an alternative approach, or demonstrate that additional control for the CTG emission source category is not technologically or not economically feasible in the area.

FCAA, §183(e) directs the EPA to regulate VOC emissions from certain consumer and commercial product categories by issuing national regulations or by issuing CTG documents in lieu of regulations. The EPA published CTG documents in lieu of national regulations for VOC emissions in 2006 from Industrial Cleaning Solvents (EPA 453/R-06-001) and Flexible Package Printing (EPA 453/R-06-003); in 2007 from Paper, Film, and Foil Coatings (EPA 453/R-07-003), Large Appliance Coatings (EPA 453/R-07-004), and Metal Furniture Coatings (EPA 453/R-07-005); and in 2008 from Miscellaneous Metal and Plastic Parts Coatings (EPA-453/R-08-003), Miscellaneous Industrial Adhesives (EPA-453/R-08-005), and Automobile and Light-Duty Truck Assembly Coatings (EPA-453/R-08-006).

Flexible Package Printing CTG, Group II Issued in 2006

The adopted Chapter 115 rules include restricting the VOC content limits of materials; increasing the overall control efficiency of add-on controls used in flexible package printing operations; and establishing work practice procedures for associated cleaning activities. Additionally, the adopted rules expand rule applicability beginning March 1, 2013, to include flexible package printing lines that were previously exempt from the rules.

The EPA's 2006 Flexible Package Printing CTG recommends exempting flexible package printing operations from all VOC coating content limits if the operations have total actual VOC emissions less than 15 pounds per day from inks, coatings, and adhesives. For the Houston-Galveston-Brazoria 1997 eight-hour ozone nonattainment area (HGB area) (Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties), the existing Chapter 115 rules provide an exemption for combined flexographic and rotogravure printing operations with the potential to emit less than 25 tons per year (tpy) of VOC from inks and for the Dallas-Fort Worth 1997 eight-hour ozone nonattainment area (DFW area) (Collin, Dallas, Denton, Ellis, Johnson, Kaufman, Parker, Rockwall, and Tarrant Counties), the existing Chapter 115 rules provide an exemption for combined flexographic and rotogravure printing operations with the potential to emit less than 50 tpy of VOC emissions from inks. Calculating only the VOC emissions

resulting from flexible package printing operations to determine exemption from the required controls may create backsliding issues for properties already complying with the current Chapter 115 rules because sources currently subject to the Chapter 115 rules could potentially become exempt. The existing Chapter 115 exemption limit is equal to or potentially more stringent than the 2006 CTG-recommended exemption threshold for properties conducting multiple flexographic and rotogravure printing operations and is retained in the adopted rules.

Additionally, the EPA's 2006 CTG recommends exempting individual flexible package printing lines from complying with VOC coating content limits if the line has the potential to emit less than 25 tpy of uncontrolled VOC emissions from the dryer, from inks, coatings, and adhesives. As discussed elsewhere in this preamble, the current Chapter 115 rules require combining the VOC emissions from all flexographic and rotogravure printing lines to determine exemption from the VOC coating content limits. Implementing the 2006 CTG recommendation may exempt flexible package printing lines co-located on a property with other flexographic and rotogravure printing lines that are currently required to comply with the VOC control limits. The adopted Chapter 115 rules retain the existing VOC content limits for a flexible package printing line with VOC emissions below the 2006 CTG-recommended exemption threshold.

The EPA's 2006 CTG recommends requiring control equipment to have an overall control efficiency ranging from 65% to 80% depending on the first installation date of the press and control equipment. The commission disagrees with the 2006 CTG recommendation to correlate control device efficiency requirements with the first installation date of the printing press or control device regardless of where the equipment was first installed. Imposing this policy may encourage the installation of older, less efficient equipment and may create potential backsliding issues. The policy may also create significant practical enforceability issues for commission investigators with regard to verifying the first installation date of the control equipment. Instead, the adopted rules implement the CTG-recommended 80% overall control efficiency, regardless of the first installation date.

The adopted rulemaking implements the recommendations in the EPA's 2006 Flexible Package Printing CTG that the commission has determined are RACT in the DFW and HGB areas, except as specifically discussed in this preamble.

Industrial Cleaning Solvents CTG, Group II Issued in 2006

The adopted new rules in Chapter 115, Subchapter E, Division 6 establish VOC content limits for cleaning solvents used in general cleaning activities; provide exemptions for certain cleaning operations from all or portions of the rules; and require certain work practice procedures for the use, storage, and disposal of cleaning solvents. The adopted rules affect industrial cleaning solvent operations in the DFW and HGB areas beginning March 1, 2013, located on a property with total actual VOC emissions of at least 3.0 tpy, when uncontrolled, from all cleaning solvents.

In response to comments on the proposed industrial cleaning solvents rules, the commission is adopting new §115.461(c) to exempt any solvent cleaning operation that is controlled by the control requirements or emission specifications in another division in Chapter 115 from the requirements in this division. The adopted new exemption provides flexibility and reduces the compliance burden for affected sources. Additionally, the commission expects that complying with requirements in other Chapter 115 rules is at least as effective as meeting the industrial cleaning solvents rule requirements. The adopted exemption is consistent with the EPA's CTG recommendation to ensure that a particular cleaning activity is not subject to duplicative requirements.

The adopted rulemaking implements the recommendations in the EPA's 2006 Industrial Cleaning Solvents CTG that the commission has determined are RACT in the DFW and HGB areas, except as specifically discussed in this preamble.

Large Appliance Coatings CTG, Group III Issued in 2007

The adopted Chapter 115 rules reduce the VOC content limits of coatings; increase the overall control efficiency for add-on controls used in large appliance coating operations; and establish minimum transfer efficiency for coating application methods. The adopted rules also require certain work practice procedures for coating-related activities and materials used during associated cleaning operations.

The EPA's 2007 CTG recommends exempting large appliance coating processes from the coating VOC limits and work practice standards if total uncontrolled VOC emissions from coatings and associated cleaning solvents are less than 15 pounds per day. The current Chapter 115 rules provide an exemption from the coating VOC content limits for large appliance coating operations if total uncontrolled VOC emissions from all applicable coating processes on a property subject to Chapter 115, Subchapter E, Division 2, Surface Coating Processes, are less than 3.0 pounds per hour and 15 pounds per day. The existing exemption from the required VOC controls may be more stringent for properties conducting multiple coating processes specified in Division 2 because the exemption is not based on VOC emissions from a single coating category. To prevent potential backsliding for properties already required to comply with the state's regulations, the adopted Chapter 115 rules retain the existing exemption criteria.

Despite the full demonstration of noninterference provided in the proposed rule preamble, the EPA commented that in order for the proposed rules to be approved as RACT, the state must also demonstrate that the existing Chapter 115 VOC emission limits for large appliance coatings, which were based on the EPA's original 1977 CTG recommendations, are no longer technologically or economically feasible. The commission contends that by promulgating higher 2007 CTG-recommended RACT limits for large appliance coatings, the EPA has established that the original 1977 CTG-recommended limits, and thus the existing Chapter 115 limits, are not technologically or economically feasible. However, the EPA's 2007 CTG did not specifically explain why the lower limits, included in the original 1977 CTG recommendations, were no longer technologically or economically feasible. In absence of any specific information indicating that the commission's existing large appliance coating limits are no longer technologically or economically feasible, the adopted Chapter 115 rules in Subchapter E, Division 5 only include the 2007 CTG-recommended limits that are equivalent to or lower than the existing limit. For the coating categories in the 2007 CTG where the EPA recommended a less stringent limit than the general limit in the 1977 CTG, the adopted rules retain the original emission limit from the 1977 CTG.

The EPA's 2007 CTG document recommends exempting the following types of large appliance coatings and coating operations from the coating VOC limit requirements: stencil coatings; safety-indicating coatings; solid-film lubricants; electric-insulating and thermal-conducting coatings; and touch-up and repair

coatings. The commission is not adopting this exemption from the coating VOC limits for these coatings and coating operations because they are not provided specific exemption from the coating VOC emission limits in the commission's existing rules.

The adopted rules implement the recommendations in the EPA's 2007 Large Appliance Coatings CTG that the commission has determined are RACT in the DFW and HGB areas, except as specifically discussed in this preamble.

Metal Furniture Coatings CTG, Group III Issued in 2007

The adopted Chapter 115 rules reduce VOC content limits of coatings; increase the overall control efficiency for add-on controls used in metal furniture coating processes; and establish minimum transfer efficiency of coating application methods. The adopted rules also require certain work practice procedures for coating-related activities and materials used during associated cleaning operations.

The EPA's 2007 CTG recommends exempting metal furniture coating operations from the coating VOC limits and work practice standards if total uncontrolled VOC emissions from coatings and associated cleaning solvents are less than 15 pounds per day. The current Chapter 115 rules provide an exemption from the coating VOC emission limits for metal furniture coating operations if total uncontrolled VOC emissions from coatings in all applicable coating processes located on a property subject to Chapter 115, Subchapter E, Division 2, are less than 3.0 pounds per hour and 15 pounds per day. In the commission's existing rules, exemption from the required VOC controls may be more stringent for properties conducting multiple coating processes specified in Division 2 because the exemption is not based on VOC emissions from a single coating category. To prevent potential backsliding for properties already required to comply with the state's regulations, the adopted Chapter 115 rules retain the exemption criteria in the commission's existing rules.

Despite the full demonstration of noninterference provided in the proposed rule preamble, the EPA commented that in order for the proposed rules to be approved as RACT, the state must also demonstrate that the existing Chapter 115 VOC content limits for metal furniture coatings, which were based on EPA's original 1977 CTG recommendations, were no longer technologically or economically feasible. The commission contends that by promulgating higher 2007 CTG-recommended RACT limits for metal furniture coatings, the EPA has established that the original 1977 CTG-recommended limits, and thus the existing Chapter 115 limits, are not technologically or economically feasible. However, the EPA's 2007 CTG did not specifically explain why the lower limits included in the original 1977 CTG recommendations were no longer technologically or economically feasible. In absence of any specific information indicating that the commission's existing metal furniture coating limits are no longer technologically or economically feasible, the adopted Chapter 115 rules in Subchapter E, Division 5 only include the 2007 CTG-recommended limits that are equivalent to or lower than the existing limit. For the coating categories in the 2007 CTG that the EPA recommended a less stringent limit than the general limit in the 1977 CTG, the adopted rules retain the original emission limit from the 1977 CTG.

The EPA's 2007 CTG document recommends exempting the following types of metal furniture coatings and coating operations from the coating VOC limit requirements: stencil coatings; safety-indicating coatings; solid-film lubricants; electric-insulating and thermal-conducting coatings; and touch-up and repair coatings. No comments were received in response to the commission's request; therefore, the commission is not adopting this exemption from the coating VOC limits for these coatings and coating operations because they are not provided specific exemption from the coating VOC emission limits in the commission's existing rules.

The adopted rules implement the EPA's 2007 Metal Furniture Coatings CTG recommendations that the commission has determined are RACT in the DFW and HGB areas, except as specifically discussed in this preamble.

Paper, Film, and Foil Coatings CTG, Group III Issued in 2007

The adopted Chapter 115 rules incorporate new requirements into Chapter 115, Subchapter E, Division 5, affecting individual paper, film, and foil coating lines with the potential to emit from coatings, equal to or greater than 25 tpy of VOC, when uncontrolled. The adopted rules reduce the VOC content limits of coatings; increase the overall control efficiency for add-on controls used in paper, film, and foil coating processes; and establish work practice procedures for materials used during cleaning operations associated with paper, film, and foil coating.

The adopted rules revise Chapter 115, Subchapter E, Division 2 to incorporate new work practice procedures for materials used during cleaning operations associated with paper, film, and foil coating processes that are specifically exempt from the adopted new Subchapter E, Division 5 rules in the DFW and HGB areas.

The EPA's 2007 CTG recommends exempting all paper, film, and foil coating operations on a property from the coating VOC content limits and work practice standards if total uncontrolled VOC emissions from paper, film, and foil coatings and associated cleaning solvents are less than 15 pounds per day. The current Chapter 115 rules provide an exemption from the coating VOC emission limits for paper, film, and foil coating operations if total uncontrolled VOC emissions from all applicable surface coating processes on a property subject to Chapter 115, Subchapter E, Division 2, are less than 3.0 pounds per hour and 15 pounds per day. Implementing the 2007 CTG recommendation may exempt paper, film, and foil coating lines co-located on a property with other coating lines subject to Division 2 that are currently complying the coating VOC content limit. To prevent potential backsliding for properties conducting paper, film, and foil coating operations already required to comply with the state's regulations, the adopted Chapter 115 rules retain the exemption criteria in the commission's existing rules.

Additionally, the adopted rules do not implement the EPA's 2007 CTG recommendation to exempt a paper, film, and foil coating line from complying with coating VOC limits if the line has the potential to emit less than 25 tpy of uncontrolled VOC emissions from coatings. As previously stated, the current Chapter 115 rules require combining the VOC emissions from all applicable surface coating processes located on a property subject to Subchapter E, Division 2 to determine exemption from the VOC coating content limits. The existing exemption from the required VOC controls may be more stringent for properties conducting multiple coating processes specified in Division 2 because the exemption is not based on VOC emissions from a single coating category. To prevent backsliding, the adopted Chapter 115 rules retain the VOC content limits in the commission's existing rules for a paper, film, and foil coating line with VOC emissions below the 2007 CTG-recommended exemption threshold.

The adopted rules implement the EPA's 2007 Paper, Film, and Foil Coatings CTG recommendations that the commission has

determined are RACT in the DFW and HGB areas, except as specifically discussed in this preamble.

Miscellaneous Industrial Adhesives CTG, Group IV Issued in 2008

The adopted new rules in Chapter 115, Subchapter E, Division 7 establish VOC content limits used during specific adhesive application processes; provide various exemptions from all or portions of the rules for certain adhesives and adhesive application processes; and require certain work practice procedures for the use, storage, and disposal of adhesives, adhesive-related waste, solvent, and cleaning materials. The adopted rules affect adhesive application processes in the DFW and HGB areas beginning March 1, 2013, located on a property with total actual VOC emissions of at least 3.0 tpy when uncontrolled from adhesives and solvents.

The adopted rules implement the EPA's 2008 Miscellaneous Industrial Adhesives CTG recommendations that the commission has determined are RACT in the DFW and HGB areas, except as specifically discussed in this preamble.

Miscellaneous Metal and Plastic Parts Coatings CTG, Group IV Issued in 2008

The adopted Chapter 115 rules in Subchapter E, Division 5 expand the scope of the existing rule applicability to include the new coating categories recommended in the EPA's 2008 CTG and implement the recommendations for those coating categories. The adopted Chapter 115 rules reduce VOC content limits of coatings and increase the overall control efficiency of add-on controls used in miscellaneous metal and plastic part coating operations; establish minimum transfer efficiency of coating application methods; and incorporate a new test method. The adopted rules also require certain work practice procedures for coating-related activities and cleaning operations associated with miscellaneous metal and plastic parts coating.

The EPA's 2008 CTG recommends exempting miscellaneous metal and plastic parts coating operations from the VOC control requirements if total uncontrolled VOC emissions from miscellaneous metal and plastic parts coatings and cleaning solvents are less than 15 pounds per day. The current Chapter 115 rules exempt miscellaneous metal parts and products coating operations from the required coating VOC limits if located on a property where total uncontrolled VOC emissions from all applicable surface coating processes subject to Chapter 115, Subchapter E, Division 2 are less than 3.0 pounds per hour and 15 pounds per day. In the commission's existing rules, exemption from the required controls may be more stringent for properties conducting multiple coating processes specified in Division 2 because the exemption is not based on VOC emissions from a single coating category. To prevent potential backsliding for sources already subject to the Chapter 115 rules, the adopted rules would integrate the new 2008 CTG coating categories into the exemption in the commission's existing rules from the VOC control requirements. The adopted Chapter 115 rules retain the state's approach to maintain consistency with the current exemption criteria.

Despite the full demonstration of noninterference provided in the proposed rule preamble, the EPA commented that in order for the proposed rules to be approved as RACT, the state must also demonstrate that the existing Chapter 115 VOC content limits for miscellaneous metal part and product coatings, which were based on EPA's original 1978 CTG recommendations, were no longer technologically or economically feasible. The commission contends that by promulgating higher 2008 CTG-recommended RACT limits for miscellaneous metal part and product coatings, the EPA has established that the original 1978 CTG-recommended limits, and thus the existing Chapter 115 limits, are not technologically or economically feasible. However, the EPA's 2008 CTG did not specifically explain why the lower limits included in the original CTG recommendations were no longer technologically or economically feasible. In absence of any specific information indicating that the commission's existing miscellaneous metal part and product coating limits are no longer technologically or economically feasible, the adopted Chapter 115 rules in Subchapter E, Division 5 only include the 2008 CTG-recommended limits that are equivalent to or lower than the existing limits. For the coating categories in the 2008 CTG where the EPA recommended a less stringent limit than the general limit in the 1978 CTG, the adopted rules retain the original emission limit from the 1978 CTG.

In response to comments, the commission has revised §115.427 to limit the rule applicability to the re-coating of used miscellaneous metal parts and products at a designated on-site maintenance shop that was subject to §115.421(a)(9) prior to January 1, 2012, which is the approximate effective date of this rule revision. Additionally, in response to this same comment, the commission has revised §115.450(a) to exclude designated on-site maintenance shops from the miscellaneous metal parts and products coatings rule applicability in Division 5. The re-coating of used miscellaneous metal parts and products at a designated on-site maintenance shop that was exempt from §115.421(a)(9) prior to January 1, 2012, or that begins operation on or after January 1, 2012, is not subject to the miscellaneous metal parts and products coatings rules in either Division 2 or Division 5. The adopted revisions prevent any potential backsliding concerns by requiring sources that are currently complying with these rules in Division 2 to continue to meet these VOC limits. The adopted revisions are consistent with the intent of EPA's 1978 and 2008 CTG RACT recommendations for miscellaneous metal parts and products coatings and the commission maintains the rules continue to satisfy RACT requirements in FCAA, §172(c)(1) and §182(b)(2) and (f) for this CTG emission source category.

In response to comments, the commission added new §115.451(b)(4) to exempt all other coating categories regulated in Divisions 2 and 5 from the miscellaneous metal and plastic parts coatings rules. Incorporating this new exemption into §115.451 clarifies that the miscellaneous metal parts and products coatings rules do not apply to the coating operations characterized by another rule specified in Division 2 and Division 5.

Based on information provided during the public comment period, the commission determined that some of the pleasure craft coating VOC limits included in the EPA's CTG recommendations are not technologically feasible at this time and therefore do not represent RACT. In response to comments, the commission is increasing the VOC limit for *extreme high-gloss coatings* to 5.0 pounds of VOC per gallon of coating (lb VOC/gal coating) and revising the definition include any coating that achieves greater than 90% reflectance on a 60 degree meter. In response to comments, the commission is increasing the VOC limit for *finish primer/surfacer coatings* to 5.0 lb VOC/gal coating. In response to comments, the commission is increasing the VOC limit for *other substrate antifoulant coatings* to 3.34 lb VOC/gal coating. In response to comments, the commission is introducing a new specialty coating category for *antifoulant sealer/tie coatings,* which are coatings applied over an antifoulant coating to prevent

the release of biocides into the environment, or to promote adhesion between an antifoulant and a primer or other antifoulants, and is establishing a VOC limit of 3.5 lb VOC/gal coating for this new category. In response to comments, the commission is revising the definition of *pretreatment wash primer coatings* to include any coating that contains no more than 25% solids, by weight, and at least 0.10% acids, by weight; is used to provide surface etching; and is applied directly to fiberglass and metal surface to provide corrosion resistance and adhesion of subsequent coatings.

The EPA's 2008 CTG document recommends exempting the following types of miscellaneous metal part and product coatings and coating operations from the coating VOC limits and the coating application system requirements: stencil coatings; safety-indicating coatings; solid-film lubricants; electric-insulating and thermal-conducting coatings; magnetic data storage disk coatings; and plastic extruded onto metal parts to form a coating. The commission is not adopting this exemption because the listed coatings and coatings operations are not provided specific exemption from the coating VOC emission limits in the commission's existing rules; however, the adopted Chapter 115 rules do provide exemptions from the new coating application system requirements for these coatings and coating processes.

Additionally, the EPA's 2008 CTG document recommends structuring RACT rule requirements to provide properties that coat heavy-duty truck bodies or body parts with the option of meeting either the miscellaneous metal and plastic parts coatings regulations or automobile and light-duty truck assembly coatings regulations. The EPA's CTG recommendation is inconsistent with the general regulatory approach in Chapter 115 and is not being adopted.

At proposal, the commission requested comment on the appropriate applicability for the coating of other parts on coating lines separate from automobile and light-duty truck assembly surface coating processes, such as bumpers, aftermarket parts, and repair parts. However, no comments were received and therefore these parts and products will remain subject to the miscellaneous metal parts and products surface coating rules and will be subject to the miscellaneous plastic parts and products surface coating rules, depending on the substrate being coated.

The adopted rules implement the recommendations in the EPA's 2008 Miscellaneous Metal and Plastic Parts Coatings CTG that the commission has determined are RACT in the DFW and HGB areas, except as specifically discussed in this preamble.

Automobile and Light-Duty Truck Assembly Coatings CTG, Group IV Issued in 2008

The adopted Chapter 115 rules in Subchapter E, Division 5 reduce the VOC content limits of coatings applied to automobile and light-duty trucks during manufacturing and establish certain work practice procedures for cleaning operations associated with automobile and light-duty truck assembly coatings.

The adopted rules implement the recommendations in the EPA's 2008 Automobile and Light-Duty Truck Assembly Coatings CTG that the commission has determined are RACT in the DFW area, except as specifically discussed in this preamble.

Demonstrating Noninterference Under FCAA, Section 110(l)

The commission provides the following information to demonstrate that the inclusion of the Large Appliance Coatings, Metal Furniture Coatings, and Miscellaneous Metal and Plastic Parts Coatings CTG recommendations will not negatively impact the status of the state's attainment with the 1997 eight-hour ozone NAAQS, will not interfere with control measures or any other applicable requirement, and will not prevent reasonable further progress toward attainment of the ozone NAAQS.

By letter dated December 8, 2008, the commission requested clarification from the EPA regarding several issues related to the recommendations in the following three CTG documents: Control Techniques Guidelines for Large Appliance Coatings (EPA 453/R-07-004), issued in 2007; Control Techniques Guidelines for Metal Furniture Coatings (EPA 453/R-07-005), issued in 2007; and Control Techniques Guidelines for Miscellaneous Metal and Plastic Parts Coatings (EPA 453/R-08-003), issued in 2008. A number of the recommended VOC content limits for specific coatings categories in the 2007 and 2008 CTG documents are less stringent than the more general VOC content limits specified in the following EPA guideline series recommendations: Control of Volatile Organic Emissions from Existing Stationary Sources - Volume V: Surface Coating of Large Appliances (EPA-450/2-77-0.34), issued in 1977; Control of Volatile Organic Emissions from Existing Stationary Sources - Volume III: Surface Coating of Metal Furniture (EPA-450/2-77-032), issued in 1977; and Control of Volatile Organic Emissions from Existing Stationary Sources - Volume VI: Surface Coating of Miscellaneous Metal Parts and Products (EPA-450/2-78-015), issued in 1978. The commission requested clarification to assure that implementing the CTG recommendations would not be considered as backsliding and to be certain that the commission has the appropriate information to determine whether the new 2007 and 2008 CTG recommendations actually represent RACT for Texas. On March 17, 2011, the EPA issued a guidance memorandum regarding these three CTG categories entitled, *Approving SIP Revisions Addressing VOC RACT Requirements for Certain Coatings Categories.* The EPA stated in the memorandum: ". . . if a state believes the volume usage distribution among the general and specialty categories in the docket is representative of the distribution in the nonattainment area, we believe that if a state undertakes wholesale adoption of the new categorical limits in a specific CTG, the state may rely on the assessments in the docket to demonstrate that the range of new limits will result in an overall reduction in emissions from the collection of covered coatings."

Consistent with this EPA memorandum, on June 8, 2011, the commission proposed to implement the 2007 and 2008 CTG-recommended RACT limits for these three emission source categories. The proposed rulemaking provided discussion regarding the estimated percent reductions for these CTG categories that supported the EPA's position that applying the new 2007 and 2008 CTG-recommended limits as a whole will result in net VOC emissions reductions. Despite the demonstration that implementing the CTG-recommended approach would not interfere with attainment of, or reasonable progress towards, attainment of the ozone standard for the HGB and DFW areas, the EPA submitted comments on this rulemaking indicating that in order for the proposed rules to be approved as RACT, the state must also demonstrate that the existing Chapter 115 limits for these CTG categories, which were based on the EPA's original 1977 and 1978 recommendations, are no longer technologically or economically feasible.

As discussed elsewhere in this preamble, the commission contends that by promulgating higher CTG-recommended RACT limits for these source categories in 2007 and 2008, the EPA has established that the original 1977 and 1978 recommended limits, and thus the existing Chapter 115 limits, are no longer tech-

nologically or economically feasible. However, the EPA's CTG documents did not specifically explain why the lower limits included in the 1977 and 1978 CTG recommendations were no longer technologically or economically feasible. In absence of any specific information indicating that the existing Chapter 115 limits for these source categories are not technologically or economically feasible, and given the EPA's stated intention to disapprove the rules without such a demonstration, the commission is obligated under the FCAA, §172(c)(1) and §182(b)(2) to revise the proposed limits for these source categories to only include the 2007 and 2008 CTG-recommended limits that are equivalent to or lower than the existing limits. Where the EPA's 2007 and 2008 CTG-recommended limits are less stringent than the original CTG-recommended limits, the commission is retaining the original 1977 and 1978 emission limits in the current rule, except for high performance architectural coatings for the miscellaneous metal parts and products coatings rules.

The EPA only addressed the technological and economic feasibility issues associated with high performance architectural coatings in support of its presumptive RACT recommendations in the 2008 Miscellaneous Metal and Plastic Parts Coatings CTG. The commission agrees with the EPA that the 6.2 lb VOC/gal coating constitutes RACT for this coating type and that promulgating a VOC limit less than 6.2 lb VOC/gal coating may restrict the application of liquid high performance architectural coatings that are currently available and in use today. The cost of converting to powder coatings or installing and operating add-on controls to meet a lower limit is not a reasonable alternative compared to the emission reduction that would be achieved. In light of this information, as provided in the EPA's 2008 CTG, the commission has determined a VOC limit of 6.2 lb VOC/gal coating for high performance architectural coatings to be RACT. The commission contends that the adoption of this coating VOC limit for high performance architectural coatings, which is higher than in the existing Chapter 115 rules, does not interfere with attainment of, or reasonable progress towards, attainment of the ozone standard for the HGB and DFW areas. Therefore, the commission is adopting to retain the EPA's 2008 Miscellaneous Metal and Plastic Parts CTG-recommended VOC limit of 6.2 lb VOC/gal coating for high performance architectural coatings in the miscellaneous metal parts and products coatings rules.

The existing Chapter 115, Subchapter E, Division 2 rules were revised in July 2000 (25 TexReg 6754) to reflect a rule interpretation that determined the rules should be applied to original equipment manufacturers, off-site job shops that coat new or used parts or products, and designated on-site maintenance shops that re-coat used parts or products. However, the EPA's 1977 CTG recommendations for this source category, which were the basis for the Division 2 rules, were clearly not intended to apply to designated on-site maintenance shops that re-coat used parts or products (EPA-450/2-78-015). The EPA's 2008 Miscellaneous Metal and Plastic Parts Coatings CTG recommendations also do not apply to designated on-site maintenance shops (EPA-453/R-08-003).

Accordingly, the commission has determined that it is not necessary to apply these RACT requirements to designated on-site maintenance shops that re-coat used parts or products in order to meet the mandates of FCAA, §172(c)(1) and §182(b)(2). Therefore, in response to comments received on this rulemaking, the commission is revising the Division 2 rules for the DFW and HGB areas in §115.427 to exempt the coating of miscellaneous metal parts and products at a designated on-site maintenance shop that was exempt from VOC limits in §115.421(a)(9) prior to January 1, 2012, or that begins operation on or after January 1, 2012. The coating of miscellaneous metal parts and products at a designated on-site maintenance shop that was subject to the VOC limits in §115.421(a)(9) prior to January 1, 2012, remains subject to this division. For purposes of this exemption, a designated on-site maintenance shop is an area at a site where used miscellaneous metal parts or products are recoated on a routine basis. Additionally, in response to comments on this rulemaking, the commission is excluding designated on-site maintenance shops from the miscellaneous metal parts and products coatings rule applicability in Division 5, §115.450(a).

The adopted revisions will not interfere with the state's demonstration of attainment with the 1997 eight-hour ozone NAAQS, reasonable further progress towards attainment, or any other applicable requirement of the FCAA. The adopted revisions prevent any potential backsliding concerns by requiring sources that are currently complying with these rules in Division 2 to continue to meet these VOC limits. The adopted revisions are consistent with the intent of EPA's 1977 and 2008 CTG RACT recommendations for miscellaneous metal parts and products coatings and the commission maintains the rules continue to satisfy RACT requirements for this CTG emission source category. Regulating the coating of miscellaneous metal parts and products at a new designated on-site maintenance shop is not appropriate since VOC reductions do not advance attainment of the 1997 eight-hour ozone standard for the DFW and HGB areas, as demonstrated in the reasonably available control measures analyses in the DFW Attainment Demonstration SIP Revision for the 1997 Eight-Hour Ozone Standard scheduled for adoption on November 16, 2011, and in the HGB Attainment Demonstration SIP Revision for the 1997 Eight-Hour Ozone Standard adopted on March 10, 2010.

Based on this analysis, the commission has determined the adopted rules for Large Appliance Coatings, Metal Furniture Coatings, and Miscellaneous Metal and Plastic Parts Coatings will not interfere with the state's demonstration of attainment with the 1997 eight-hour ozone NAAQS, reasonable further progress towards attainment, or any other applicable requirement of the FCAA.

Section by Section Discussion

The commission adopts amendments to Division 2 in Chapter 115, Subchapter E, entitled *Surface Coating Processes,* to accommodate the changes made in the other divisions in Chapter 115 affected by this rulemaking as a result of the EPA's CTG recommendations.

The commission adopts amendments to Division 3 in Chapter 115, Subchapter E, entitled *Flexographic and Rotogravure Printing,* to implement the EPA's 2006 Flexible Package Printing CTG recommendations for this emission source category.

The commission adopts new Division 5 in Chapter 115, Subchapter E, entitled *Control Requirements for Surface Coating Processes,* to accommodate new coating categories and rule requirements being adopted in response to the Large Appliance Coatings; Metal Furniture Coatings; Automobile and Light-Duty Truck Assembly Coatings; Paper, Film, and Foil Coatings; and Miscellaneous Metal and Plastic Parts Coatings CTG documents. Adopted new Division 5 applies in the DFW and HGB areas and contains the Chapter 115 rules applicable to the surface coating categories that are currently located in Division 2 except where the commission has determined the controls in the commission's existing rules are not RACT for these areas.

Adopted new Division 5 improves readability of the Chapter 115 rules by separating the requirements for the surface coating processes in the DFW and HGB areas affected by the adopted rulemaking from the requirements applicable to locations not affected by the adopted rulemaking, except for the surface coating processes conducted at designated on-site maintenance shops in the DFW and HGB areas, which will remain subject to Division 2, as discussed elsewhere in this preamble.

The commission adopts new Division 6 in Chapter 115, Subchapter E, entitled *Industrial Cleaning Solvents,* to implement the EPA's 2007 Industrial Cleaning Solvents CTG recommendations for this new emission source category in the DFW and HGB areas.

The commission adopts new Division 7 in Chapter 115, Subchapter E, entitled *Miscellaneous Industrial Adhesives,* to implement the CTG recommendations for this new emission source category in the DFW and HGB areas.

In addition to the adopted amendments to implement RACT for the specified surface coating processes, flexible package printing processes, industrial cleaning solvents, and miscellaneous industrial adhesives, the commission adopts grammatical, stylistic, and various other non-substantive changes to update the rules in accordance with current *Texas Register* style and format requirements, improve readability, establish consistency in the rules, and conform to the standards in the *Texas Legislative Council Drafting Manual,* February 2011. Such changes include appropriate and consistent use of acronyms, punctuation, section references, and certain terminology like *that, which, shall,* and *must.* References to the *Dallas/Fort Worth area* and the *Houston/Galveston area* have been updated to the *Dallas-Fort Worth area* and the *Houston-Galveston-Brazoria area,* respectively to be consistent with current terminology for the region. These non-substantive changes are not intended to alter the existing rule requirements in any way and are not specifically discussed in this preamble.

SUBCHAPTER E, SOLVENT-USING PROCESSES

DIVISION 2, SURFACE COATING PROCESSES

Section 115.422, Control Requirements

The commission adopts minor non-substantive changes to the introductory paragraph of existing §115.422 and to §115.422(6). The changes update rule language necessary to comply with current rule formatting standards. These changes are not intended to alter the meaning of §115.422.

Since proposal, §115.422(1)(A) has been revised to ensure units are used consistently throughout this and other divisions in Chapter 115. The adopted change is non-substantive and is not intended to change the meaning of this requirement.

The commission adopts §115.422(7) to indicate that beginning March 1, 2013, the owner or operator of a paper surface coating line subject to this division and located in the DFW or HGB areas is required to implement the work practices specified in subparagraphs (A) - (E) to limit VOC emissions from storage, mixing, and handling of cleaning and cleaning-related waste materials. The adopted work practices in subparagraphs (A) - (E) include: storing all VOC-containing cleaning materials in closed containers; ensuring that mixing and storage containers used for VOC-containing cleaning materials are kept closed at all times except when depositing or removing these materials; minimizing spills of VOC-containing cleaning materials; conveying VOC-containing cleaning materials from one location to another in closed containers or pipes; and minimizing VOC emissions from cleaning of storage, mixing, and conveying equipment.

Section 115.427, Exemptions

The commission adopts a revision to §115.427(a)(3) to clarify that the emission calculations used in surface coating activities that are not addressed by the surface coating categories of adopted new §115.450(a) are excluded. The adopted revision is necessary to ensure the coatings and solvents used in the surface coating categories transitioning from applicability in this division to proposed new Division 5 continue to be included in the emissions calculations that determine exemption for the surface coating categories that are not transitioning to applicability in Division 5.

The commission adopts §115.427(a)(7) to indicate that beginning March 1, 2013, in the DFW and HGB areas, the surface coating categories listed in subparagraphs (A) - (E) will be exempt from the requirements in Division 2 if they are subject to the requirements in adopted new Division 5. Adopted subparagraphs (A) and (B) list large appliance coating and metal furniture coating, respectively. Adopted subparagraph (C) lists miscellaneous metal parts and products coating. Adopted subparagraph (D) lists each paper coating line with the potential to emit equal to or greater than 25 tpy of VOC emissions from all coatings applied. For reasons discussed elsewhere in this preamble, the commission is not adopting rules to implement the EPA's CTG recommendation to completely exempt individual paper coating lines from all coating VOC emission limits if the emissions generated are less than 25 tpy. Paper coating lines may already be required to comply with the existing requirements in this division and exempting them from the coating VOC emission limits could result in backsliding. The paper coating lines that remain subject to this division on or after the March 1, 2013, compliance date would not be subject to any portion of the Division 5 rules affecting paper, film, and foil coating processes. Adopted subparagraph (E) lists automobile and light-duty truck manufacturing coating.

Adopted §115.427(a)(7) is necessary to clarify that beginning March 1, 2013, the surface coating categories proposed for regulation in new Division 5 are no longer required to comply with any portion of the requirements in Division 2 and to minimize potential dual applicability between Divisions 2 and 5. The commission acknowledges that it is possible that some facilities may still be subject to both divisions if the facilities perform coatings operations for multiple categories currently subject to Division 2.

In response to comments received on the proposed rulemaking, the commission is adopting §115.427(a)(8) to exempt in the DFW and HGB areas the re-coating of used miscellaneous metal parts and products at a designated on-site maintenance shop that was exempt from VOC limits in §115.421(a)(9) prior to January 1, 2012, or that begins operation on or after January 1, 2012. The re-coating of used miscellaneous metal parts and products at a designated on-site maintenance shop that was subject to the VOC limits in §115.421(a)(9) prior to January 1, 2012, remains subject to this division. For purposes of this exemption, a designated on-site maintenance shop is an area at a site where used miscellaneous metal parts or products are re-coated on a routine basis. January 1, 2012, is the beginning of the calendar year shortly after the expected effective date of this rulemaking. The adopted revisions prevent any potential backsliding concerns by requiring sources that are currently complying with these rules in Division 2 to continue to meet the VOC emission limits. The adopted revisions are consistent with the intent of EPA's 1977

and 2008 CTG RACT recommendations for miscellaneous metal parts and products coatings and the commission maintains the rules continue to satisfy RACT requirements for this CTG emission source category.

Section 115.429, Counties and Compliance Schedules

Since proposal, §115.429(b) has been revised to remove language made obsolete by the passing of the compliance date. Adopted §115.429(b) states that in Ellis, Johnson, Kaufman, Parker, and Rockwall Counties the compliance date has already passed and the owner or operator of each surface coating operation shall continue to comply with this division. Prior to the adopted change, §115.429(b) required compliance no later than June 15, 2007.

Since proposal, §115.429(c) has been revised to remove language made obsolete by the passing of the compliance date. Adopted §115.429(c) states that in Hardin, Jefferson, and Orange Counties the compliance date has already passed and the owner or operator of each shipbuilding and ship repair operation that, when uncontrolled, emits a combined weight of volatile organic compounds from ship and offshore oil or gas drilling platform surface coating operations equal to or greater than 50 tpy and less than 100 tpy shall continue to comply with this division. Prior to the adopted change, §115.429(c) required compliance no later than December 31, 2006.

The commission adopts subsection (d) to indicate that the owner or operator of a paper surface coating process shall comply with the requirements in §115.422(7) no later than March 1, 2013. The March 1, 2013, compliance date provides affected owners and operators approximately a year and a half to make any necessary changes and ensures that any VOC emission reductions achieved by the adopted rule will occur prior to the ozone season in the DFW area.

SUBCHAPTER E, SOLVENT-USING PROCESSES

DIVISION 3, FLEXOGRAPHIC AND ROTOGRAVURE PRINTING

Section 115.430, Applicability and Definitions

The commission adopts a change to the title of §115.430 from *Flexographic and Rotogravure Printing Definitions* to *Applicability and Definitions* to reflect the addition of rule applicability in this section's content.

To accommodate adopted subsection (a), the flexographic and rotogravure printing definitions currently located in §115.430(1) - (4) are adopted as §115.430(b)(4) - (7), respectively. The existing introductory paragraph for §115.430 has been deleted and replaced with updated language for consistency with other Chapter 115 rules.

The commission adopts subsection (a) to indicate that the requirements in this division apply to the specified flexographic and rotogravure printing processes in paragraphs (1) - (4) that are located in the Beaumont-Port Arthur (BPA), DFW, El Paso, and HGB areas and in Gregg, Nueces, and Victoria Counties, unless exempted in adopted new §115.431. The BPA and El Paso areas and Gregg, Nueces, and Victoria Counties are included in adopted subsection (a) because these locations are affected by the existing flexographic and rotogravure printing rules; however, no new requirements are being adopted for printing processes in these locations. Adopted subsection (a) establishes consistency with other Chapter 115 rules and improves the readability of the rule by first describing the units affected by the subsequent requirements.

Adopted paragraph (1) lists packaging rotogravure printing lines. Adopted paragraph (2) lists publication rotogravure printing lines. Adopted paragraph (3) lists flexographic printing lines. Adopted paragraph (4) lists flexible package printing lines. The adopted new applicability format is not intended to alter the existing applicability for this division.

Adopted subsection (b) includes the new definitions related to flexible package printing in addition to the existing definitions in §115.430. Adopted subsection (b) also specifies that unless the context clearly indicates otherwise or unless specifically defined in the Texas Clean Air Act (Texas Health and Safety Code, Chapter 382), in 30 TAC §§3.2, 101.1, or 115.10, the terms used in this division have the meanings commonly used in the field of air pollution control.

Since proposal, the commission has revised adopted subsection (b) in order to define cleaning operations associated with flexible package printing. Adopted paragraph (1) defines *Cleaning operation* as the cleaning of a press, press parts, or removing dried ink from areas around a press. Cleaning operation does not include cleaning electronic components of a press, cleaning in pre-press (e.g., platemaking) or post-press (e.g., binding) operations, or use of janitorial supplies (e.g., detergents or floor cleaners) to clean areas around a press. Cleaning would also not include parts washers or cold cleaners. This definition is adopted directly from the EPA's 2006 CTG description of flexible package printing cleaning operations. Establishing this definition eliminates the potential for the cleaning operations intended to be regulated in this division from mistakenly being identified as general cleaning solvent operations that would require compliance with the industrial cleaning solvents rules in adopted new Division 6.

Adopted paragraph (2), proposed as paragraph (1), defines *Daily weighted average* as the total weight of VOC emissions from all inks and coatings subject to the same VOC content limit in §115.432, divided by the total volume or weight of those materials (minus water and exempt solvent), or divided by the total volume or weight of solids applied to each printing line per day. Since proposal, the definition has been revised to indicate that water and exempt solvent are only excluded from the daily weighted average calculation where the VOC limits in §115.432 exclude these materials. Since the VOC limits in §115.432(c) include water and exempt solvent, the daily weighted average calculations must reflect the concentration of water and exempt solvent. To accommodate the distinction between VOC emission limit and VOC content limit made in §115.432(c)(1)(A) and (B), the word *content* has been deleted from the adopted definition. Additionally, because this definition applies universally to all of the printing processes subject to Division 3, the phrase *inks and coatings* has been replaced with *materials* to more appropriately indicate that the types of materials for which the daily weighted average is calculated depends on the materials that are regulated under the control requirements in §115.432. For example, the printing processes subject to a control requirement in §115.432(a) is only required to control the VOC content of inks. The adopted definition is intended to clarify the term as used in the existing monitoring and recordkeeping requirements for the rotogravure and flexographic printing processes not affected by this adopted rulemaking and to facilitate compliance for flexible package printing processes affected by the adopted control requirements in §115.432(c).

Adopted paragraph (3), proposed as paragraph (2), defines *Flexible package printing* as flexographic or rotogravure printing on any package or part of a package the shape of which can be readily changed including, but not limited to, bags, pouches, liners, and wraps using paper, plastic, film, aluminum foil, metalized or coated paper or film, or any combination of these materials. Although flexible package printing is not specifically defined in the current rule, the process is represented under the existing definition of packaging rotogravure printing if the package materials are printed on a rotogravure press, or represented under the existing definition of flexographic printing if the package materials are printed on a flexographic press. The commission also adopts revising the term *Flexographic printing process* to remove the word *process* for consistency with the other defined terms in this subsection.

Section 115.431, Exemptions

The commission adopts new §115.431 to list the exemptions currently contained in §115.437 that apply to all flexographic and rotogravure printing processes subject to this division and to incorporate the proposed exemptions recommended in the EPA's 2006 Flexible Package Printing CTG. Adopted new §115.431 establishes consistency with other Chapter 115 rules and makes the rule easier to read by clearly identifying the flexographic and rotogravure printing lines that are exempt from all or portions of the subsequent rule requirements.

Adopted new subsection (a) lists the exemptions that apply for the BPA, DFW, El Paso, and HGB areas. Adopted new paragraph (1) is the existing exemption in §115.437(a)(1) with non-substantive changes necessary to comply with rule formatting standards. Adopted new paragraph (2) is the existing exemption in §115.437(2) with non-substantive changes necessary to comply with rule formatting standards.

Adopted new paragraph (3) provides an exemption from the requirements in adopted §115.432(c) and (d) beginning March 1, 2013, in the DFW and HGB areas for all flexible package printing lines located on a property that have a combined weight of total actual VOC emissions less than 3.0 tpy from all coatings and associated cleaning operations. Properties qualifying for this exemption will not be subject to the more stringent adopted VOC control requirements for flexible package printing in §115.432(c) but will remain applicable to the existing controls in §115.432(a), unless the property meets another exemption under this section. As discussed elsewhere in this preamble, the commission is not adopting the EPA's 2006 CTG recommendation to completely exempt these flexible package printing processes from the rule requirements. Flexible package printing processes co-located on a property with other flexographic and rotogravure printing processes may already be required to comply with the current Chapter 115 rules; therefore, providing the CTG-recommended exemption could result in backsliding.

Adopted new paragraph (4) provides an exemption from the coating VOC limits in adopted §115.432(c) for individual flexible package printing lines with the maximum potential to emit from all coatings less than 25 tpy in the DFW and HGB areas beginning March 1, 2013. As discussed elsewhere in this preamble, the commission is not adopting the EPA's 2006 CTG recommendation to exempt these printing lines from all coating VOC limits. Flexible package printing lines qualifying for this exemption will remain subject to the existing ink VOC control requirements, unless the printing line or printing process meets another exemption under this section, to prevent potential backsliding for units currently required to comply with the Chapter 115 regulations.

Adopted new subsection (b) is the existing exemption in §115.437(b), related to sources in Gregg, Nueces, and Victoria Counties, with only non-substantive edits necessary to comply with current rule formatting standards.

Section 115.432, Control Requirements

The commission adopts the amendment to subsection (a) to clarify that beginning March 1, 2013, this subsection no longer applies to flexible package printing lines in the DFW and HGB areas that are required to comply with the requirements in adopted subsection (c). The adopted amendment prevents flexible package printing lines from being subject to duplicative control requirements. Additionally, adopted subsection (a) incorporates other non-substantive edits necessary to comply with current rule formatting standards.

The commission replaces the current text in existing paragraph (1) with updated language to require the owner or operator to limit the VOC emissions from solvent-containing ink used on each packaging rotogravure, publication rotogravure, flexible package, and flexographic printing lines by using one of the options in subparagraphs (A), (B), or (C). Adopted paragraph (1) affects the same printing lines as existing paragraph (1) but adds flexible package printing lines to clarify that these printing lines remain subject to the control requirements in this paragraph if not subject to the new control requirements in adopted subsection (c).

The commission adopts non-substantive changes to subparagraphs (A) - (C) necessary to comply with current rule formatting standards. In addition, the commission adopts minor amendments to subparagraph (C) to replace the phrase *shall be required to provide for* with *must achieve,* and *reduction in VOC emissions* with *control efficiency.* The adopted changes update the existing language to establish consistency with terminology used in the adopted requirements for this division and other Chapter 115 rules. The adopted changes are not intended to alter the meaning of this requirement.

Adopted §115.432(a)(1)(C)(iv) specifies that flexible package printing processes using a vapor control system must continue to comply with the overall control efficiency requirement corresponding to the type of press used to conduct the printing. Adopted §115.432(a)(1)(C)(iv) is intended to provide clarification and is not intended to impose additional requirements on flexible package printing owners and operators.

The commission adopts the amendment to paragraph (2) to replace *Any graphic arts facility that becomes* with *All flexographic and rotogravure printing lines that become.* The commission also adopts revisions to this paragraph to indicate that the project must meet one of the requirements in subparagraphs (A) or (B). The adopted non-substantive changes to paragraph (2) and subparagraphs (A) and (B) are intended to clarify the existing provisions and are necessary to comply with current rule formatting standards. The commission has corrected a typographical error made in the proposed rule; the adopted change more appropriately refers to the processes affected by this provision.

The commission adopts replacing subsection (b) with updated language to indicate that in Gregg, Nueces, and Victoria Counties, the owner or operator shall limit the VOC emissions from solvent-containing ink used on each packaging rotogravure, publication rotogravure, flexible package, and flexographic

printing lines by using one of the options in this subsection. The acknowledgement of flexible package printing in the subsection is intended for clarification and is not intended to impose any additional requirements since this printing process is currently subject to the requirements corresponding to the type of press used to conduct the flexible package material printing.

The commission adopts non-substantive changes to paragraphs (1) - (3) necessary to comply with rule formatting standards. In addition, the commission adopts minor amendments to paragraph (3) to replace the phrase *shall be required to provide for* with *must achieve,* and *reduction in VOC emissions* with *control efficiency.* The adopted changes update the existing language with terminology used for consistency with other Chapter 115 rules. The adopted changes are not intended to alter the meaning of this requirement.

The commission adopts paragraph (3)(D) to indicate that a flexible package printing process must meet the overall control efficiency in subparagraph (B) or (C), depending on the type of press used. Flexible package printing processes are currently required to meet either the packaging rotogravure printing process overall control efficiency if the flexible package materials are printed on a rotogravure press, or the flexographic printing overall control efficiency if the flexible package materials are printed on a flexographic press.

Adopted subsection (c) establishes the control requirements that apply to each flexible package printing line in the DFW and HGB areas, unless specifically exempt in §115.431, beginning March 1, 2013. Except as specifically discussed elsewhere in this preamble, adopted subsection (c) implements the EPA's recommendations in the 2006 Flexible Package Printing CTG that the commission has determined are RACT. In order to clarify the materials the control requirements apply to and for consistency throughout this division, the commission has replaced the word *materials* with *coatings* where it appeared in the proposed rules. These changes are not specifically discussed in this Section by Section Discussion portion of the preamble.

Adopted paragraph (1) requires the owner or operator to limit the VOC emissions from coatings applied on each flexible package printing line by using one of the options in subparagraphs (A) - (C). Adopted paragraph (1) also indicates that these limitations are based on the daily weighted average. Determining the VOC content of coatings applied to flexible package materials on a daily weighted average is based on the suggested averaging period in the EPA's 2006 CTG. Although the EPA's 2006 CTG is not clear on which control requirement options are intended to be used in order to meet the VOC limits in subparagraphs (A) and (B), the commission presumes that owners and operators may elect to comply with either VOC limit using low-VOC coatings or using coatings in combination with the operation of a vapor control system.

Adopted subparagraph (A) limits the VOC emissions of the coatings to 0.80 pound of VOC per pound of solids applied. Adopted subparagraph (A) indicates that the VOC emission limit must be met through the use of coatings or a combination of coatings and the operation of a vapor control system. For consistency with the use of significant figures, a zero has been added to the proposed 0.80 pound of VOC per pound of solids VOC limit. In response to comments received on requirements similar to this subparagraph, subparagraph (A) has been revised to replace the term *low-VOC materials* with *coatings,* and not with *materials* for reasons discussed elsewhere in this Section by Section Discussion portion of the preamble, to clarify that under this option the VOC content of coatings used do not have to meet the VOC emission limit in this subparagraph; instead, the combination of the VOC from the coatings used and the vapor control system efficiency must reduce the VOC emissions generated to less than or equal to the VOC emission limit. Similarly, the rule has been revised since proposal to replace *content limit* with *emission limit* to more appropriately apply to both the options available, whether the owner or operator limits the content of the VOC in a coating or uses coatings in conjunction with the operation of a vapor control system, to demonstrate compliance with this subparagraph. This change indicates that the VOC content is not necessarily restricted when using the coating in combination with the operation of a vapor control system compliance option. These changes provide clarification without altering the meaning of this subparagraph. Lastly, non-substantive changes were made to the proposed language to ensure consistency with other similar requirements in this subchapter.

Adopted subparagraph (B) limits the VOC emissions from the coatings to 0.16 pound of VOC per pound of coating applied. Adopted subparagraph (B) indicates that the VOC emission limit must be met through the use of low-VOC coatings or a combination of coatings and the operation of a vapor control system. In response to comments received on requirements similar to this subparagraph, the content has been revised to replace the term *low-VOC materials* with *coatings,* and not with *materials* for reasons discussed elsewhere in this Section by Section Discussion portion of the preamble, to clarify that under this option the VOC content of coatings used do not have to meet the VOC content limit in this subparagraph; instead, the combination of the VOC from the coatings used and the vapor control system efficiency must reduce the VOC generated to less than or equal to the VOC content limit. Similarly, at proposal, this control option referred to 0.16 pound of VOC per pound of coating as a content limit. However, the rule has been revised to replace *content limit* with *emission limit* to more appropriately apply to both the options available, whether the owner or operator limits the content of the VOC in a coating or uses coatings in conjunction with the operation of a vapor control system, to demonstrate compliance with this subparagraph. This change indicates that the VOC content is not necessarily restricted when using the coating in combination with the operation of a vapor control system compliance option. These changes provide clarification without altering the meaning of this subparagraph. Lastly, non-substantive changes were made to the proposed language to ensure consistency with other similar requirements in this subchapter.

Adopted subparagraph (C) requires the operation of a vapor control system to achieve an overall control efficiency of at least 80% by weight. This option provides an alternative method for affected flexible package printers where low-VOC coatings are not sufficient to achieve the desired product quality or efficacy. As discussed elsewhere in this preamble, the commission is not adopting the EPA's CTG recommendation to correlate the overall control efficiency of add-on control equipment with the date the equipment was first installed. The most stringent CTG recommendation for the overall control efficiency of add-on controls in the CTG is 80%. The commission expects that affected flexible package printers choosing to comply with the control requirement in adopted subparagraph (C) are sources with control equipment capable of meeting at least an 80% overall control efficiency.

Adopted paragraph (2) specifies that a flexible package printing line that becomes subject to paragraph (1) by exceeding the exemption limits in §115.431(a) is subject to the provisions of this

subsection even if throughput or emissions later fall below exemption limits unless emissions are maintained at or below the controlled emissions level achieved while complying with paragraph (1) of this subsection and one of the conditions in subparagraphs (A) or (B) is met.

Adopted subparagraph (A) requires the project that caused throughput or the emission rate to fall below the exemption limits in §115.431(a) to be authorized by a permit, permit amendment, standard permit, or permit by rule required by 30 TAC Chapters 106 or 116. Proposed subparagraph (A) also specifies that if a permit by rule is available for the project, the owner or operator shall continue to comply with paragraph (1) of this subsection for 30 days after the filing of documentation of compliance with that permit by rule.

Adopted subparagraph (B) requires that if authorization by permit, permit amendment, standard permit, or permit by rule is not required for the project, the owner or operator shall provide the executive director 30 days notice of the project in writing. This is an existing requirement for printing lines subject to the requirements in subsection (a), and is incorporated into adopted subsection (c).

Adopted paragraph (3) requires an owner or operator applying coatings in combination with a vapor control system to meet the VOC emission limit in paragraph (1)(A) or (B) of this subsection using the equation provided. This adopted new control requirement is necessary to demonstrate that the overall control efficiency of the vapor control system, when used in conjunction with coatings, is sufficient to meet the VOC limits in paragraph (1)(A) or (B). Adopted paragraph (3) contains the equation to determine the overall control efficiency needed to meet the specified VOC limits. The adopted equation in paragraph (3) is the same as the equation in existing §115.423(3)(A) with revision to conform to the circumstances in this rule. The adopted paragraph also requires control device and capture efficiency testing to be performed in accordance with the testing requirements in §115.435(a). Since proposal, adopted paragraph (3) has been revised to update the variable descriptions. In the proposed rule, one of the descriptions for the equation variables incorrectly referenced a figure in a different Chapter 115 rule. Additionally, since proposal, the equation variables have been revised for clarification to ensure the variable units are consistent with one another and to direct the owner or operator to base the VOC content of the coatings on either the daily weighted average of VOC emissions or the maximum VOC emissions. Also, for reasons discussed elsewhere in this Section by Section Discussion portion of the preamble, the term *low-VOC* has been deleted from the instances where *low-VOC coatings* is used in reference to the combination of low-VOC coatings and the operation of a vapor control system option.

Adopted subsection (d) requires the owner or operator of a flexible package printing process to implement the work practices in paragraphs (1) and (2) for cleaning materials. Adopted paragraph (1) requires keeping all cleaning solvents and used shop towels in closed containers. Adopted paragraph (2) requires conveying cleaning solvents from one location to another in closed containers or pipes.

Section 115.433, Alternate Control Requirements

The commission adopts revisions to the existing provisions in §115.433 to consolidate redundant provisions currently located in subsections (a) and (b) under a single "implied (a)" under §115.433. Adopted "implied (a)" in §115.433 makes the provisions for alternate control requirements applicable to the owner or operator of a flexographic or rotogravure printing line subject to this division, regardless of the printing property location. The adopted amendment to §115.433 would apply to the locations currently listed in either existing subsection (a) or (b); the BPA, DFW, El Paso, and HGB areas and Gregg, Nueces, and Victoria Counties.

Section 115.435, Testing Requirements

The commission adopts non-substantive revisions to subsection (a) necessary to comply with rule formatting standards. The commission also adopts revisions to clarify that the purpose of the testing requirements in this section is to demonstrate compliance with the control requirements in §115.432. These changes are not intended to alter the meaning of this requirement.

The commission adopts non-substantive changes to paragraphs (1) - (5). The commission adopts paragraph (6) to include *as amended through October 18, 1983 (48 FR 48375).* The adopted revision reflects the most recent amendment of this test procedure in the Code of Federal Regulations (CFR).

The commission adopts the renumbering of current paragraph (7) as adopted paragraph (8), and existing paragraph (8), regarding minor modifications to the methods, is adopted as paragraph (7).

Non-substantive revisions are adopted in paragraph (8), regarding capture efficiency testing, that are necessary to comply with current rule formatting standards and are not intended to alter the meaning of this requirement. The commission adopts updates to paragraph (8) to include *as amended through October 21, 1996 (61 FR 54559).* In subparagraph (A), the commission also adopts updates to clause (ii) and subclause (I) to include *as amended through October 17, 2000 (65 FR 61761).* The adopted revision reflects the most recent amendment of this test method in the CFR.

Adopted subparagraph (B)(i) replaces the existing text equation prescribed to determine the overall control efficiency using the gas/gas method for temporary total enclosures (TTE) with an equation under §115.435(a)(8)(B)(i) to conform to current rule formatting requirements and improve readability of the rule. The adopted equation and variables are identical to the text equation and variables in current §115.435(a)(7)(B)(i).

Adopted subparagraph (B)(ii) replaces the existing text equation prescribed to determine the overall control efficiency using the liquid/gas method for TTE with the equation under §115.435(a)(8)(B)(ii) to conform to current rule formatting requirements and improve readability of the rule. The adopted equation and variables are identical to the text equation and variables in current §115.435(a)(7)(B)(ii).

Adopted subparagraph (B)(iii) replaces the existing text equation prescribed to determine the overall control efficiency using the gas/gas method for buildings or rooms used as an enclosure with an equation under §115.435(a)(8)(B)(iii) to conform to current rule formatting requirements and improve readability of the rule. The adopted equation and variables are identical to the text equation and variables in current §115.435(a)(7)(B)(iii).

Adopted subparagraph (B)(iv) replaces the existing text equation prescribed to determine the overall control efficiency using the liquid/gas method for buildings or rooms used as an enclosure with the equation under §115.435(a)(8)(B)(iv) to conform to current rule formatting requirements and improve readability of

the rule. The adopted equation and variables are identical to the text equation and variables in current §115.435(a)(7)(B)(iv).

The commission removes the language in existing subparagraph (C)(i) - (iii) and replaces it with adopted language that requires the operating parameters selected for monitoring of the capture system for compliance with the requirements in §115.436(a) be monitored and recorded during the initial capture efficiency testing and thereafter during facility operation. Adopted subparagraph (C) states that the executive director may require a new capture efficiency test if the operating parameter values change significantly from those recorded during the initial capture efficiency test. Adopted subparagraph (C) ensures the operational parameters tested in the initial performance test are representative of those during normal operation and consolidates the necessary provisions from subparagraph (C)(i) - (iii). Adopted subparagraph (C) does not substantively change the requirements for any facilities currently subject to the rule.

The commission deletes subparagraph (C)(i) regarding the prohibition on incorporating any error margin from the test into the results of the capture efficiency test. While the commission considers it inappropriate to include an error margin in the test results, it is not necessary to specifically include this prohibition in the rule.

The commission deletes existing subparagraph (C)(ii) because the requirement is no longer necessary since the date to accomplish the initial capture efficiency testing for the owner or operator of an affected rotogravure or flexographic printing line has already passed.

The commission deletes the language in existing subparagraph (C)(iii) regarding identification of the monitored parameters during the initial pretest meeting. As discussed elsewhere in this preamble, the monitoring parameters for the capture systems along with other control devices are addressed under the existing provisions in §115.436, and it is unnecessary to include the provisions in current subparagraph (C)(iii). Furthermore, a pretest meeting with the source owner or operator may not always occur.

The commission adopts non-substantive revisions to subsection (b)(1) - (5) necessary to comply with rule formatting requirements that are not intended to alter the meaning of this provision. Additionally, the commission adopts updates to paragraph (6) to reflect the most recent amendment of testing procedures in the CFR.

The commission adopts subsection (c) to allow methods other than those specified in subsections (a)(1) - (6) and (b)(1) - (6) to be used if the alternative methods have been approved by the executive director and validated according to Method 301. The adopted provision for alternative methods is similar to alternative method provisions in other Chapter 115 rules.

Section 115.436, Monitoring and Recordkeeping Requirements

The commission deletes the existing language in subsection (a) and replaces it with updated text to indicate that in the BPA, DFW, El Paso, and HGB areas, the owner or operator of a rotogravure or flexographic printing line subject to this division, shall comply with the monitoring and recordkeeping requirements in paragraphs (1) - (6). The adopted revision is not intended to alter the meaning of the existing language in subsection (a). The commission also adopts non-substantive revisions to paragraphs (1) - (6) to update language necessary to comply with rule formatting standards.

Additionally, the commission adopts revisions to paragraph (3) to remove the term *emission* from *emission control device* because control device is the term defined in §101.1. The adopted rule change provides clear and consistent use of terminology throughout the rule and is not intended to change the meaning of this requirement.

The commission adopts a non-substantive revision to paragraph (6) necessary to comply with rule formatting standards and to update the reference to §115.435 to reflect the adopted renumbering of exiting subsection (a)(7) to adopted subsection (a)(8).

The commission adopts non-substantive changes to subsection (b) and paragraphs (1) - (5) to update rule language for consistency with rule formatting standards and to update references. In subsection (b), the commission adopts replacing the term *facility* with *line* to provide clear and consistent use of terminology throughout the rule. These changes are not intended to alter the meaning of this requirement.

The commission adopts revisions to paragraph (3) to remove the term *emission* from *emission control device* because control device is the term defined in §101.1. The adopted rule change provides clear and consistent use of terminology throughout the rule and is not intended to change the meaning of this requirement.

Adopted subsection (c) requires the owner or operator of a flexible package printing line in the DFW and HGB areas to comply with the monitoring and recordkeeping requirements contained in adopted paragraphs (1) - (7), beginning March 1, 2013. At proposal, the monitoring and recordkeeping requirements in this subsection appeared applicable only to the flexible package printing lines subject to §115.432(c) due to inconsistencies in the types of material records that were required to be kept under this subsection. However, in order to clarify that all flexible package printing lines subject to the control requirements in §115.432(a) and (c) are required to comply with this subsection, the rule has been revised to align the monitoring and recordkeeping requirements for the flexible package printers demonstrating compliance with §115.432(a) with those demonstrating compliance with §115.432(c). These changes do not expand the rules to require keeping records for all of the materials comprising the definition of coatings, as defined in §101.1, for owners and operators of flexible package printing lines subject to §115.432(a). Owners or operators subject to §115.432(a) are only required to maintain records of inks, the same records that the existing rules require. Ensuring all monitoring and recordkeeping requirements applicable to the owners or operators of flexible package printing are located in the same subsection improves the clarity and readability of these rules.

Adopted paragraph (1) has not been modified since proposal because all flexible package printers are required to retain records of coatings used, including inks and adhesives, in order to demonstrate compliance with the control requirements in §115.432(c) or to demonstrate that a flexible package printing line does not meet the 25 tpy VOC emission threshold to become subject to the updated requirements in §115.432(c).

Adopted paragraph (2) has been modified to require the owner or operator of flexible package printing lines subject to the control requirements in §115.432(c), to maintain records of the quantity and type of each coating and solvent consumed if any of the coatings, as applied, exceed the applicable VOC content limits in §115.432(c). Adopted paragraph (2) also requires that records must be sufficient to demonstrate compliance with the applicable

VOC content limit on a daily weighted average. The rule citation has been added to clarify that this paragraph only applies to the flexible package printers subject to §115.432(c) and not those in §115.432(a).

Adopted paragraph (3) has been added since proposal to specify that for flexible package printing lines that are subject to the control requirements in §115.432(a), the owner or operator shall maintain daily records of the quantity of each ink and solvent used at a facility subject to the requirements of an alternate means of control approved by the executive director in accordance with §115.433 that allows the application of inks exceeding the applicable control limits. Adopted paragraph (3) requires that such records be sufficient to demonstrate compliance with the applicable emission limitation in §115.432(a) on a daily weighted average. Adopted paragraph (3) imposes the same requirements for a flexible package printing line that is subject to §115.432(a), as the requirements in existing §115.436(a)(2).

Adopted paragraph (4), proposed as paragraph (3), has been modified since proposal to require the owner or operator to install and maintain monitors to continuously measure and record operational parameters of any control device installed to meet applicable control requirements in §115.432(a) or (c). In addition, paragraph (4) requires that such records must be sufficient to demonstrate proper functioning of those devices to design specifications, including the parameters in adopted subparagraphs (A) - (D).

The remainder of the monitoring and recordkeeping requirements can be universally applied to the flexible package printers subject to §115.432(a) and (c) and have only been revised to renumber proposed paragraphs (4) - (6) as adopted paragraphs (5) - (7), respectively.

Section 115.437, Exemptions

The commission adopts the repeal of §115.437. As discussed elsewhere in the Section by Section Discussion portion of this preamble, the commission adopts the relocation of the exemptions currently listed in §115.437 to adopted new §115.431, to improve readability of the rule by listing the exemptions before the rule requirements.

Section 115.439, Counties and Compliance Schedules

The commission adopts revisions to subsection (a) to clarify that the existing language indicates the compliance date for flexographic and rotogravure printing lines in the specified locations has passed, except the compliance date for flexible package printing processes affected by subsections (c) and (d).

The commission adopts the amendment to subsection (b) to clarify that the owner or operator of a flexible package printing process affected by the adopted rule requirements is not required to be in compliance until the dates specified in subsections (c) and (d). Since proposal, adopted subsection (b) has been revised to state that in Ellis, Johnson, Kaufman, Parker, and Rockwall Counties the compliance date has already passed and the owner or operator of a flexographic or rotogravure printing line subject to this division shall continue to comply with this division. Prior to adoption, subsection (b) required compliance no later than March 1, 2009.

Adopted subsection (c) requires the owner or operator of a flexible package printing line in the DFW and HGB areas to comply with the requirements in §115.432(c) and (d) and §115.436(c), no later than March 1, 2013. The March 1, 2013, compliance date provides affected owners and operators approximately a year and a half to make any necessary changes and ensures that any VOC emission reductions achieved by the adopted rule will occur prior to the ozone season in the DFW area. Adopted subsection (c) also specifies that any testing required by §115.435 to demonstrate compliance with the requirements in adopted §115.432(c) must be completed and results submitted by no later than March 1, 2013.

Adopted subsection (d) requires the owner or operator of a flexible package printing line in the DFW and HGB areas that becomes subject to the requirements in this division after March 1, 2013, to comply with the requirements in this division no later than 60 days after becoming subject.

SUBCHAPTER E, SOLVENT-USING PROCESSES

DIVISION 5, CONTROL REQUIREMENTS FOR SURFACE COATING PROCESSES

Section 115.450, Applicability and Definitions

The commission adopts new §115.450, to clearly identify the surface coating processes affected by the requirements in this division and to define the terms relevant to those surface coating processes. Since proposal, the commission has replaced *coating process* or *coating operation* with *surface coating process* throughout this division to ensure the use of consistent terminology and because *surface coating process* is the term defined in §115.450(b). Additionally, where a requirement referred to *exempt solvents* or *exempt compounds,* the commission has revised to *exempt solvent* for consistency with the terminology used throughout this division and in other divisions in Subchapter E. To ensure consistent use of units used throughout this division, only the English units have been retained in the adopted rules in this division. The adopted changes are non-substantive and are not intended to change the meaning of a requirement. These changes are not specifically discussed where they occur in the adopted new Division 5 rules.

Adopted new subsection (a) specifies that the requirements in this division apply to the surface coating processes listed in paragraphs (1) - (5) in the DFW and HGB areas and to the surface coating process listed in paragraph (6) in the DFW area. Adopted new subsection (a) does not apply to automobile and light-duty truck assembly surface coating processes in the HGB area because there are no facilities in the HGB area that will be subject to this CTG category. The commission has previously submitted a negative declaration for the automobile and light-duty truck assembly coating process category for the HGB area.

Adopted new paragraphs (1) and (2) list large appliance surface coating processes and metal furniture surface coating processes, respectively. The adopted applicability for large appliance and metal furniture surface coating processes is not limited to the manufacturers of these parts and products; any process involving the coating of these substrates is subject to the adopted rule requirements. The adopted applicability in paragraphs (1) and (2) retains the existing applicability for these coating processes, as defined in existing §115.420(b)(6) and (7).

As a result of changes made in response to comments received on this rulemaking, the miscellaneous metal parts and products rule applicability has been limited to original equipment manufacturers and off-site job shops, and not designated on-site maintenance shops, as was proposed. The re-coating of used miscellaneous metal parts and products at designated on-site

maintenance shops that was subject to §115.421(a)(9) prior to January 1, 2012, will remain subject to the Division 2 miscellaneous metal parts and products coatings rules. The re-coating of miscellaneous metal parts and products at a designated on-site maintenance shop that was exempt from §115.421(a)(9) prior to January 1, 2012, or that begins operation on or after January 1, 2012, are not subject to the miscellaneous metal parts and products coatings rules in either this division or Division 2. For purposes of this exemption, a designated on-site maintenance shop is an area at a site where used miscellaneous metal parts or products are re-coated on a routine basis. January 1, 2012, is the beginning of the calendar year shortly after the expected effective date of this rulemaking. The adopted revisions prevent any potential backsliding concerns by requiring sources that are currently complying with these rules in Division 2 to continue to meet these VOC limits. The adopted revisions are consistent with the intent of EPA's 1977 and 2008 CTG RACT recommendations for miscellaneous metal parts and products coatings and the commission maintains the rules continue to satisfy RACT requirements for this CTG emission source category. For this reason, adopted paragraph (3) has been expanded to contain the applicability for the coating categories that were located in paragraph (4) at proposal. Adopted new paragraph (3) specifies that this division applies to miscellaneous metal part and product surface coating, miscellaneous plastic part and product surface coating, pleasure craft surface coating, and automotive/transportation and business machine plastic part surface coating at the original equipment manufacturer and off-site job shops that coat new and used parts and products or that re-coat used parts and products. Adopted new paragraph (3) mirrors the applicability recommended in the EPA's 2008 Miscellaneous Metal and Plastic Parts Coatings CTG.

Adopted new paragraph (4) specifies that this division applies to motor vehicle materials applied to metal and plastic parts described in paragraph (3) at the original equipment manufacturer and off-site job shops that coat new parts and products or that re-coat used parts and products. Since proposal, the indication that these materials do not apply to operations other than automobile and light-duty truck assembly coating processes has been deleted because this is already stated in the definitions pertaining to motor vehicle materials located in subsection (b). Additionally, adopted new paragraph (4) states that motor vehicle materials are only regulated when applied to the parts and products listed in adopted paragraph (3). The adopted rule applicability is the same as recommended in the EPA's 2008 Miscellaneous Metal and Plastic Parts Coatings CTG.

Adopted new paragraph (5) specifies that this division applies to paper, film, and foil surface coating lines with the potential to emit from all coatings of VOC greater than or equal to 25 tpy when uncontrolled. The adopted applicability threshold is the same as recommended in the EPA's 2007 Paper, Film, and Foil Coatings CTG.

Adopted new paragraph (6) specifies that this division applies to automobile and light-duty truck assembly surface coating processes conducted by the original equipment manufacturer in the DFW area. Automobile and light-duty truck manufacturing coating, as defined in existing §115.420(b)(8)(A), is currently subject to Chapter 115. Adopted new paragraph (6) also incorporates operators that conduct automobile and light-duty truck surface coating processes under contract with the original equipment manufacturer in the DFW area into the rule applicability. The contract coaters referred to are those that coat new automobile and light-duty truck bodies, body parts for new automobiles or new light-duty trucks, and other parts that are coated along with these bodies or body parts under contract with the original equipment manufacturer. The adopted applicability is recommended in the EPA's 2008 Automobile and Light-Duty Truck Assembly Coatings CTG.

Adopted new subsection (b) includes the general definitions that apply to adopted new Division 5 and also specifies that unless the context clearly indicates otherwise or unless specifically defined in the Texas Clean Air Act (Texas Health and Safety Code, Chapter 382), in §§3.2, 101.1, or 115.10, the terms used in this division have the meanings commonly used in the field of air pollution control. Unless specifically discussed, the definitions in this subsection are identical to those in existing §115.420(a).

Adopted new paragraph (1) defines *Aerosol coating (spray paint)* as a hand-held, pressurized, non-refillable container that expels an adhesive or a coating in a finely divided spray when a valve on the container is depressed.

Adopted new paragraph (2) defines *Air-dried coating* as a coating that is cured at a temperature below 194 degrees Fahrenheit (90 degrees Celsius); these coatings may also be referred to as low-bake coatings. Adopted new paragraph (2) is a definition recommended in the EPA's 2008 Miscellaneous Metal and Plastic Parts Coatings CTG; however, the commission adopts the term as a general definition because it is used in the control requirements section for other coating categories affected by this division.

Adopted new paragraph (3) defines *Baked coating* as a coating that is cured at a temperature at or above 194 degrees Fahrenheit (90 degrees Celsius); these coatings may also be referred to as high-bake coatings. Adopted new paragraph (3) is a definition recommended in the EPA's 2008 Miscellaneous Metal and Plastic Parts Coatings CTG; however, the commission adopts the term as a general definition because it is used in the control requirements section for other coating categories affected by this division. In the EPA's 2008 Miscellaneous Metal and Plastic Parts Coatings CTG a high-baked coating is defined as a coating that is cured at a temperature above 194 degrees Fahrenheit (90 degrees Celsius).

Adopted new paragraph (4) defines *Coating application system* as devices or equipment designed for the purpose of applying a coating material to a surface. The devices may include, but are not limited to, brushes, sprayers, flow coaters, dip tanks, rollers, knife coaters, and extrusion coaters.

Adopted new paragraph (5) defines *Coating line* as an operation consisting of a series of one or more coating application systems and associated flash-off area(s), drying area(s), and oven(s) wherein a surface coating is applied, dried, or cured. The coating line ends at the point the coating is dried or cured, or prior to any subsequent application of a different coating.

Adopted new paragraph (6) defines *Coating solids (or solids)* as the part of a coating that remains on the substrate after the coating is dried or cured.

Adopted new paragraph (7) defines *Daily weighted average* as the total weight of VOC emissions from all coatings subject to the same VOC limit, divided by the total volume or weight of those coatings, or divided by the total volume or weight of solids, delivered to the application system each day. Adopted new paragraph (7) indicates that coatings subject to different VOC content limits in §115.453 must not be combined for purposes of calculating the daily weighted average. Since proposal, the definition

has been revised to indicate that water and exempt solvent are only excluded from the daily weighted average calculation where applicable. Owners and operators subject to the VOC limits in §115.453 that exclude water and exempt solvent must also exclude these materials when calculating the daily weighted average. Accordingly, since the paper, film, and foil VOC limits in §115.453(a)(4) include water and exempt solvent, the daily weighted average calculations for this category must reflect the concentration of water and exempt solvent. Adopted new paragraph (7) retains the method for determining the daily weighted average consistent with the existing definition in §115.420(a)(6) with changes to accommodate the various units and components unique to the coating category VOC limits that are based on the daily weighted average.

Adopted new paragraph (8) defines *Multi-component coating* as a coating that requires the addition of a separate reactive resin, commonly known as a catalyst or hardener, before application to form an acceptable dry film. Adopted new paragraph (8) is a definition recommended in the EPA's 2008 Miscellaneous Metal and Plastic Parts Coatings CTG; however, the commission adopts the term as a general definition because it is used in the control requirements section for other coating categories affected by this division.

Adopted new paragraph (9) defines *Normally closed container* as a container that is closed unless an operator is actively engaged in activities such as adding or removing material.

Adopted new paragraph (10) defines *One-component coating* as a coating that is ready for application as it comes out of its container to form an acceptable dry film. A thinner, necessary to reduce the viscosity, is not considered a component. Adopted new paragraph (10) is a definition recommended in the EPA's 2008 Miscellaneous Metal and Plastic Parts Coatings CTG; however, the commission adopts the term as a general definition because it is used in the control requirements section for other coating categories affected by this division.

Adopted new paragraph (11) defines *Pounds of volatile organic compounds (VOC) per gallon of coating (minus water and exempt solvent)* as the basis for emission limits for surface coating processes. Adopted new paragraph (11) retains the definition of pounds of VOC per gallon of coating as defined in existing §115.420(a)(9) with non-substantive changes that are not intended to alter the meaning of this definition. The adopted definition in paragraph (11) includes the equation to calculate lb VOC/gal coating (minus water and exempt solvent) using values obtained from testing data or analytical data from the material safety data sheet (MSDS). Explanations of the variables follow the equation. Since proposal, the adopted new definition and equation have been revised in order to use terminology consistently throughout this division.

Adopted new paragraph (12) defines *Pounds of volatile organic compounds (VOC) per gallon of solids* as the basis for emission limits for surface coating processes. Adopted new paragraph (12) retains the definition of pounds of VOC per gallon of solids as defined in existing §115.420(a)(10) with non-substantive changes that are not intended to alter the meaning of this definition. The adopted definition in paragraph (12) includes the equation to calculate pounds of VOC per gallon of solids using values obtained from testing data or analytical data from the MSDS. Explanations of the variables follow the equation.

Adopted new paragraph (13) defines *Spray gun* as a device that atomizes a coating or other material and projects the particulates or other material onto a substrate.

Adopted new paragraph (14) defines *Surface coating processes* as operations that use a coating application system.

Adopted new subsection (c) provides specific surface coating definitions that are unique to each surface coating operation proposed for regulation in this division. Unless specifically discussed, the adopted definitions in this section are recommended in the EPA's CTG documents related to the surface coating categories subject to this division.

Adopted new paragraph (1) defines the terms that apply to automobile and light-duty truck manufacturing. The terms defined in adopted new subparagraphs (A) - (T) include: *Adhesive; Automobile and light-duty truck adhesive; Automobile and light-duty truck bedliner; Automobile and light-duty truck cavity wax; Automobile and light-duty truck deadener; Automobile and light-duty truck gasket/gasket sealing material; Automobile and light-duty truck glass-bonding primer; Automobile and light-duty truck lubricating wax/compound; Automobile and light-duty truck sealer; Automobile and light-duty truck trunk interior coating; Automobile and light-duty truck underbody coating; Automobile and light-duty truck weather strip adhesive; Automobile assembly surface coating process; Electrodeposition primer; Final repair; Inline repair; Light-duty truck assembly surface coating process; Primer-surfacer; Topcoat; and Solids turnover ratio (RT').* The definitions of these terms are provided in adopted new paragraph (1) and are not specifically discussed in this preamble, except for those specific definitions that are not taken directly from the EPA's 2008 Automobile and Light-Duty Truck Assembly Coatings CTG.

Adopted new subparagraph (M) defines *Automobile assembly surface coating process as the assembly-line coating of new passenger cars, or passenger car derivatives, capable of seating 12 or fewer passengers. This definition is derived from the existing definition of Automobile coating in §115.420(b)(12)(A)(i).*

Adopted new subparagraph (Q) defines *Light-duty truck assembly surface coating process* as the assembly-line coating of new motor vehicles rated at 8,500 pounds gross vehicle weight or less and designed primarily for the transportation of property, or derivatives such as pickups, vans, and window vans. This definition is derived from the existing definition of *Light-duty truck coating* in §115.420(b)(12)(A)(ii).

Adopted new paragraph (2) defines the terms that apply to automotive/transportation and business machine plastic parts. The terms defined in adopted new subparagraphs (A) - (O) include: *Adhesion prime; Black coating; Business machine; Clear coating; Coating of plastic parts of automobiles and trucks; Coating of business machine plastic parts; Electrostatic prep coat; Flexible coating; Fog coat; Gloss reducer; Red coating; Resist coat; Stencil coat; Texture coat; and Vacuum-metalizing coatings.* The definitions of these terms are provided in adopted new paragraph (2) and are not specifically discussed in this preamble. The definitions are taken directly from the EPA's 2008 Miscellaneous Metal and Plastic Parts Coatings CTG without substantive change. The *Coating of plastic parts of business machines* definition has been revised since proposal to *Coating of business machine plastic parts* for consistency with the naming convention of other definitions in this section.

Adopted new paragraph (3) defines *Large appliance coating* as the coating of doors, cases, lids, panels, and interior support

parts of residential and commercial washers, dryers, ranges, refrigerators, freezers, water heaters, dishwashers, trash compactors, air conditioners, and other large appliances. Adopted new paragraph (3) retains the definition for large appliance coating as defined in existing §115.420(b)(6) without revision. Although the 2007 Large Appliance Coatings CTG recommends VOC limits for specific coating types, the CTG document does not include definitions for these specific coating types. The definitions in adopted new subparagraphs (A) - (F) incorporate the definitions recommended in the EPA's 2008 Miscellaneous Metal and Plastic Parts Coatings CTG for this coating category due to the similarities in the substrates being coated, with minor non-substantive changes necessary to conform to current rule formatting standards. Since proposal, other non-substantive changes have also been made. In addition to these changes, a percent sign has been appended to the numerical value in the extreme high-gloss coating definition. The definitions in adopted new subparagraphs (A) - (F) are: *Extreme high-gloss coating; Extreme performance coating; Heat-resistant coating; Metallic coating; Pretreatment coating; and Solar-absorbent coating.*

In response to comments, the commission revised the definition of extreme performance coating for miscellaneous metal and plastic parts coating in §115.450(c)(5)(I) to include exposure to extreme environmental conditions, such as continuous outdoor exposure, as an extra stipulation that the metal or plastic parts may experience. The commission expects that some large appliances require the same type of protection as miscellaneous metal and plastic parts when exposed to extreme environmental conditions. Adopted new subparagraph (B) defines *Extreme performance coatings* as a coating used on a metal surface where the coated surface is, in its intended use, subject to: chronic exposure to corrosive, caustic or acidic agents, chemicals, chemical fumes, chemical mixtures, or solutions; repeated exposure to temperatures in excess of 250 degrees Fahrenheit (121 degrees Celsius); repeated heavy abrasion, including mechanical wear and repeated scrubbing with industrial grade solvents, cleansers, or scouring agents; or exposure to extreme environmental conditions, such as continuous outdoor exposure.

Adopted new paragraph (4) defines *Metal furniture coating* as the coating of metal furniture including, but not limited to, tables, chairs, wastebaskets, beds, desks, lockers, benches, shelves, file cabinets, lamps, and other metal furniture products or the coating of any metal part that will be a part of a nonmetal furniture product. Adopted new paragraph (4) retains the definition in existing §115.420(b)(7) without revision. Although the 2007 Metal Furniture Coatings CTG recommends VOC limits for specific coating types, the CTG document does not include definitions for these specific coating types. The definitions in adopted new subparagraphs (A) - (F) incorporate the definitions recommended in the EPA's 2008 Miscellaneous Metal and Plastic Parts Coatings CTG for similar coating categories with minor non-substantive changes necessary to conform to current rule formatting standards. The definitions in adopted new subparagraphs (A) - (F) are: *Extreme high-gloss coating; Extreme performance coating; Heat-resistant coating; Metallic coating; Pretreatment coating; and Solar-absorbent coating.*

In response to comments, the commission revised the definition of extreme performance coating for miscellaneous metal and plastic parts coating in §115.450(c)(5)(I) to include exposure to extreme environmental conditions, such as continuous outdoor exposure, as an extra stipulation that the metal or plastic parts may experience. The commission expects that some metal furniture requires the same type of protection as miscellaneous metal and plastic parts when exposed to extreme environmental conditions. Adopted subparagraph (B) defines *Extreme performance coating* as a coating used on a metal surface where the coated surface is, in its intended use, subject to: chronic exposure to corrosive, caustic or acidic agents, chemicals, chemical fumes, chemical mixtures, or solutions; repeated exposure to temperatures in excess of 250 degrees Fahrenheit (121 degrees Celsius); repeated heavy abrasion, including mechanical wear and repeated scrubbing with industrial grade solvents, cleansers, or scouring agents; or exposure to extreme environmental conditions, such as continuous outdoor exposure.

Adopted new paragraph (5) lists the defined terms that apply to miscellaneous metal and plastic parts. Unless specifically discussed, the definitions in adopted new paragraph (5) incorporate the definitions recommended in the EPA's 2008 Miscellaneous Metal and Plastic Parts Coatings CTG with minor non-substantive changes necessary to conform to current rule formatting standards. The terms defined in adopted new subparagraphs (A) - (HH) include: *Camouflage coating; Clear coat; Drum (metal); Electric-dissipating coating; Electric-insulting varnish; EMI/RFI shielding; Etching filler; Extreme high-gloss coating; Extreme performance coating; Heat-resistant coating; High performance architectural coating; High temperature coating; Mask coating; Metallic coating; Military specification coating; Mold-seal coating; Miscellaneous metal parts and products; Miscellaneous plastic parts and products; Multi-colored coating; Off-site job shop; Optical coating; Pail (metal); Pan-backing coating; Prefabricated architectural component coating; Pretreatment coating; Repair coating; Safety-indicating coating; Shock-free coating; Silicone-release coating; Solar-absorbent coating; Stencil coating; Touch-up coating; Translucent coating; and Vacuum-metalizing coating.* The adopted definitions of these terms are provided in adopted new paragraph (5) and are not specifically discussed in this preamble, except for those definitions that are not directly from the EPA's 2008 Miscellaneous Metal and Plastic Parts Coatings CTG or that the commission is adopting a modification to.

The definition of *Clear coat* in adopted new subparagraph (B) is a coating that lacks opacity or is transparent and may or may not have an undercoat that is used as a reflectant base or undertone color. This definition is identical to the existing definition in §115.420(b)(9)(A). The EPA's 2008 CTG provides a recommended definition for clear coat; however, revising it to reflect the CTG-recommended definition is unnecessary since the definition for the term in Chapter 115 and the CTG are synonymous.

The definition of *Drum (metal)* in adopted new subparagraph (C) is any cylindrical metal shipping container with a nominal capacity equal to or greater than 12 gallons but equal to or less than 110 gallons. The EPA's 2008 CTG provides a recommended definition for a drum; however, revising it to reflect the CTG-recommended definition is unnecessary since the definition for the term in Chapter 115 and the CTG are synonymous.

The definition of *Miscellaneous metal parts and products* in adopted new subparagraph (Q) is those specific parts and products listed in clauses (i) - (vii). Adopted new subparagraph (Q) retains the definition in existing §115.420(b)(9) with revision to delete the locations that are affected by the miscellaneous metal parts and products coating rule requirements. The affected locations are more appropriately described in adopted new subsection (a). Adopted new clause (i) identifies large farm machinery (harvesting, fertilizing, and planting machines; tractors, combines, etc.). Adopted new clause (ii) identifies small farm

machinery (lawn and garden tractors, lawn mowers, rototillers, etc.). Adopted new clause (iii) identifies small appliances (fans, mixers, blenders, crock pots, dehumidifiers, vacuum cleaners, etc.). Adopted new clause (iv) identifies commercial machinery (computers and auxiliary equipment, typewriters, calculators, vending machines, etc.). Adopted new clause (v) identifies industrial machinery (pumps, compressors, conveyor components, fans, blowers, transformers, etc.). Adopted new clause (vi) identifies fabricated metal products (metal-covered doors, frames, etc.). Adopted new clause (vii) identifies any other category of coated metal products, including, but not limited to, those that are included in the Standard Industrial Classification Code major group 33 (primary metal industries), major group 34 (fabricated metal products), major group 35 (nonelectrical machinery), major group 36 (electrical machinery), major group 37 (transportation equipment), major group 38 (miscellaneous instruments), and major group 39 (miscellaneous manufacturing industries). Excluded are those surface coating processes specified in §115.420(b)(1) - (8) and (10) - (14) and in paragraphs (1) - (4) and (6) - (8) of this subsection. At proposal, the exclusion of those surface coating processes other than miscellaneous metal parts and products specified in §115.420(b)(1) - (8) and (10) - (14) of Division 2 was inadvertently left out. However, the adopted rule has been revised to incorporate the exclusion in order to clarify that the parts and products characterized by these coating categories were not and are not included in the miscellaneous metal parts and products coating category.

In response to comments received on this rulemaking, the commission has adopted new subparagraph (R) to define *Miscellaneous plastic parts and products* as parts and products including, but not limited to the parts and products in adopted new clauses (i) - (xiii). Adopted new clause (i) lists molded plastic parts. Adopted new clause (ii) lists small and large farm machinery. Adopted new clause (iii) lists commercial and industrial machinery and equipment. Adopted new clause (iv) lists interior or exterior automotive parts. Adopted new clause (v) lists construction equipment. Adopted new clause (vi) lists motor vehicle accessories. Adopted new clause (vii) lists bicycles and sporting goods. Adopted new clause (viii) lists toys. Adopted new clause (ix) lists recreational vehicles. Adopted new clause (x) lists lawn and garden equipment. Adopted new clause (xi) lists laboratory and medical equipment. Adopted new clause (xii) lists electronic equipment. Adopted new clause (xiii) lists other industrial and household products. Excluded are those surface coating processes specified in §115.420(b)(1) - (8) and (10) - (14) and paragraphs (1) - (4) and (6) - (8) of this subsection. The coating categories excluded from this adopted definition clarifies that the parts and products characterized by other coating categories in the Division 2 or Division 5 rules are not included in the miscellaneous plastic parts and products coating category. The EPA's 2008 CTG did not recommend a definition for this coating category; however, this adopted definition includes the description of the plastic parts and products addressed in the EPA's 2008 CTG.

The definition of *Off-site job shop* in adopted new subparagraph (T) is a non-manufacturer of metal or plastic parts and products that applies coatings to such products at a site exclusively under contract with one or more parties that operate under separate ownership and control. This definition is not an existing definition and is not recommended in the EPA's Miscellaneous Metal and Plastic Parts CTG. The commission adopts this definition to describe the intended meaning of an off-site job shop as described in the Rule Interpretation Team document Number R5-421.005, concerning the applicability of the miscellaneous metal parts and products surface coating rules. The proposed definition may imply that a site, subject to §115.421(a)(9) prior to January 1, 2012, that is considered to be an off-site job shop but also has a designated on-site maintenance shop, would not meet the applicability for the miscellaneous metal parts and products coating rules because the site coats its own products in addition to coating metal parts and products exclusively under contract. This interpretation is not the intent of the rule applicability and in order to avoid confusion in the future, the commission has deleted the word *exclusively* from the adopted definition.

Adopted new subparagraph (V) defines *Pail (metal)* as any cylindrical metal shipping container with a capacity equal to or greater than 1.0 gallon but less than 12 gallons and constructed of 29 gauge or heavier material. The adopted definition is not recommended in the Miscellaneous Metal and Plastic Parts Coating CTG. Adopted new subparagraph (V) retains the definition of pail in existing §115.420(b)(9)(G) without revision because the coating of pails is still considered a miscellaneous metal part coating operation.

Although there were no comments received directly relating to the addition of a definition for safety-indicating coatings, one commenter requested clarification concerning the types of coatings considered to be safety-indicating coatings. For clarification, the commission adopts new subparagraph (AA), which defines *Safety-indicating coating* as a coating which changes physical characteristics, such as color, to indicate unsafe conditions. This adopted definition is identical to the definition provided in the South Coast Air Quality Management District (SCAQMD) Rule 1107, Coating of Metal Parts and Products, one of the rules the EPA used to develop the 2008 CTG recommendations.

Adopted new paragraph (6) defines the terms that apply to motor vehicle materials. The terms defined in adopted new subparagraphs (A) - (H) include: *Motor vehicle bedliner; Motor vehicle cavity wax; Motor vehicle deadener; Motor vehicle gasket/sealing material; Motor vehicle lubricating wax/compound; Motor vehicle sealer; Motor vehicle trunk interior coating; and Motor vehicle underbody coating*. The adopted definitions of these terms are provided in adopted new paragraph (6) and are not specifically discussed in this preamble. The definitions are taken directly from the EPA's 2008 Miscellaneous Metal and Plastic Parts Coatings CTG with changes to replace the term *facility* with *process.* The adopted changes more appropriately reflect that motor vehicle materials applied to substrates other than automobiles or light-duty trucks during assembly line-coating are subject to the requirements corresponding to motor vehicle materials regardless of the process location. Since proposal, the definition for *Motor vehicle sealer* has been revised to correct the reference to *automobile and light-duty truck sealer* that was erroneously included in the EPA's 2008 CTG-recommended definition.

Adopted new paragraph (7) defines *Paper, film, and foil coating* as the coating of paper and pressure-sensitive tapes (regardless of substrate and including paper, fabric, and plastic film), related web coating processes on plastic film (including typewriter ribbons, photographic film, and magnetic tape), metal foil (including decorative, gift wrap, and packaging), industrial and decorative laminates, abrasive products (including fabric coated for use in abrasive products), and flexible packaging. Paper, film, and foil coating includes the application of a continuous layer of a coating material across the entire width or any portion of the width of a paper, film, or foil web substrate to: provide a cover-

ing, finish, or functional or protective layer to the substrate; saturate the substrate for lamination; or provide adhesion between two substrates for lamination. Paper, film, and foil coating does not include coating performed on or in-line with any offset lithographic, screen, letterpress, flexographic, rotogravure, or digital printing press. In addition, size presses and on-machine coaters that function as part of an in-line papermaking system are not included.

Adopted new paragraph (7) incorporates the EPA's 2007 Paper, Film, and Foil CTG process description to supplement the existing definition of paper coating in §115.420(b)(10). The added language is intended to clearly distinguish between processes that constitute paper, film, and foil coating and processes that include coating on paper, film, and foil but that would not constitute a coating process and, therefore, would not be subject to the requirements referring to paper, film, and foil coating. To provide further clarification, paragraph (7) has been reformatted since proposal to separate the processes considered paper, film, and foil coating from those that are not. However, the substance of this definition has not been altered. Additionally, the EPA's 2007 CTG considers fabric coating and vinyl coating a paper, film, and foil coating process; however, the commission interprets the applicability of fabric and vinyl coating under paper, film, and foil coating to be limited to certain fabric and vinyl coating operations. Under this interpretation, some facilities may be subject to paper, film, and foil under Division 5 while others may remain subject to the Division 2 fabric and vinyl coating requirements in Division 2, depending on the particular coating operation.

Adopted new paragraph (8) defines the terms that apply to pleasure craft. Adopted new paragraph (8) defines *Pleasure craft* as any marine or fresh-water vessel used by individuals for noncommercial, nonmilitary, and recreational purposes that is less than 65.6 feet in length. Adopted new paragraph (8) clarifies that a vessel rented exclusively to, or chartered for, individuals for such purposes is considered a pleasure craft. Adopted new paragraph (8) retains the existing definition of pleasure craft in existing §115.420(b)(11)(U) except for the metric system measurement which has been deleted since proposal to ensure units are used consistently throughout the division. This change is not intended to change the meaning of the adopted new *Pleasure craft* definition. In response to comments received on the proposed rule, the commission has revised the definitions for extreme high-gloss coating, pretreatment wash primer, and antifoulant sealer/tie coating to reflect the commenter's suggestions. The definitions adopted in paragraph (8) are taken directly from the EPA's 2008 Miscellaneous Metal and Plastic Parts Coatings CTG without substantive change, except where specifically discussed.

The terms defined in adopted new subparagraphs (A) - (K) include: *Antifoulant coating; Antifoulant sealer/tie coating; Extreme high-gloss coating; Finish primer-surfacer; High build primer-surfacer; High-gloss coating; Pleasure craft coating; Pretreatment wash primer; Repair Coating; Topcoat; and Touch-up coating.*

Adopted new subparagraph (B) defines *Antifoulant sealer/tie coating* as a coating applied over an antifoulant coating to prevent the release of biocides into the environment or to promote adhesion between an antifouling and a primer or other antifoulants. As discussed elsewhere in the Section by Section Discussion portion of this preamble, this definition has been established to accommodate the adopted new VOC limit for antifoulant sealer/tie coating in §115.453(a)(1)(F) in response to comments received on the proposed rulemaking.

Adopted new subparagraph (C) defines *Extreme high-gloss coating* as any coating that achieves at least 90% reflectance on a 60 degree meter when tested by American Society for Testing and Materials Method D523-89. Coatings that achieve at least 90% reflectance, instead of 95% reflectance as proposed, constitute extreme high-gloss coatings. This definition has been modified since proposal in response to comments received on this rulemaking.

Adopted new subparagraph (H) defines *Pretreatment wash primer* as a coating that contains no more than 25% solids by weight and at least 0.01% acids by weight; used to provide surface etching; and applied directly to fiberglass and metal surfaces to provide corrosion resistance and adhesion of subsequent coatings. As discussed elsewhere, this definition has been revised in response to comments received. Coatings that, contain no more than 25% solids by weight and at least 0.10% acids by weight instead of 12% solids by weight and at least 0.50% acids by weight as proposed, constitute pretreatment wash primers.

To accommodate the exemption for pleasure craft repair and touch-up coatings provided in response to comments received on this rulemaking, the rule has been revised to include definitions for repair and touch-up coatings. Adopted new subparagraph (I) defines *Repair coating* as a coating used to re-coat portions of a previously coated product that has sustained mechanical damage to the coating following normal surface coating processes. Adopted new subparagraph (K) defines *Touch-up coating* as a coating used to cover minor coating imperfections appearing after the main coating process. These definitions are consistent with the definitions for repair coatings and touch-up coatings recommended in the EPA's 2008 CTG, and subsequently, the adopted rules for the miscellaneous metal and plastic parts coating categories in §115.450(c)(5)(Z) for repair coating and in §115.450(c)(5)(FF) for touch-up coating. Applying these definitions to the pleasure craft coating category facilitates understanding of the intended exemption in adopted new §115.451(n).

Section 115.451, Exemptions

The commission adopts new §115.451, to list the exemptions that apply to the owner or operator of a surface coating process subject to this division. Adopted new §115.451 provides the same exemptions for the surface coating processes that are currently located in existing §115.427(a) and incorporates the exemptions recommended in the CTG documents associated with the surface coating processes affected by this division. Adopted new §115.451 has been reformatted from proposal as discussed in this portion of the Section by Section Discussion.

Adopted new subsection (a), proposed as paragraph (1), excludes from the VOC emission calculations for purposes of paragraphs (1) - (3) the coatings and solvents used in coating activities and associated cleaning operations not addressed by the surface coating categories in §115.421(a)(3), (5) - (7), and (10) - (15) or §115.453. Adopted new §115.451(a) includes, as an example, that architectural coatings applied in the field to stationary structures and their appurtenances, to portable buildings, to pavements, or to curbs at a property would not be included in the calculations. The adopted exemption retains the criteria in existing §115.427(a)(3) with non-substantive revision to ensure materials that are currently required to be considered in the calcu-

lation continue to be included regardless of whether the coating process is regulated under Division 2 or relocated to Division 5. This is an existing Chapter 115 exemption and not recommended in the EPA's CTG documents. The commission has revised the proposed rule to clarify this subsection applies to paragraphs (1) - (3). Additionally, the commission has corrected the citations referring to the applicable coating categories in §115.421 that are considered when determining the VOC emissions at a property. At proposal, this exemption included the coatings and solvents associated with §115.421(a)(8)(A), which regulates the automobile and light-duty truck manufacturing coating category that has transitioned to this division and should not be included; and excluded the coatings and solvents associated with §115.421(a)(7), which regulated the can coating category and should be included.

Adopted new paragraph (1), proposed as subparagraph (A), exempts all surface coating processes on a property that, when uncontrolled, will emit a combined weight of VOC of less than 3.0 pounds per hour and 15 pounds per day in any consecutive 24-hour period from the control requirements in §115.453. As discussed elsewhere in this preamble, the CTG documents recommend an exemption threshold of 15 pounds per day for each product coating category. The commission is not adopting the CTG recommendation because the existing exemption criteria in §115.427(a)(3) requires the VOC emissions generated from the coatings and solvents used in all of the surface coating processes in Division 2, unless specifically excluded, be combined to determine exemption from the applicable rule requirements in §115.421(a). Adopted new paragraph (1) maintains the existing approach implemented in §115.427(a)(3)(A), with revisions to indicate this exemption continues to apply to the processes transitioning from applicability in Division 2 to Division 5.

Adopted new paragraph (2), proposed as subparagraph (B), exempts surface coating processes on a property that, when uncontrolled, will emit a combined weight of VOC of less than 100 pounds in any consecutive 24-hour period from §115.453(a), if documentation is provided to, and approved by, both the executive director and the EPA to demonstrate that necessary coating performance criteria cannot be achieved with coatings that satisfy applicable VOC limits and that control equipment is not technically or economically feasible. Adopted new §115.451(a)(2) is the same as the existing Chapter 115 exemption in §115.427(a)(3)(B) and not an EPA CTG recommendation.

Adopted new paragraph (3), proposed as subparagraph (C), exempts surface coating processes on a property where total coating and solvent usage does not exceed 150 gallons in any consecutive 12-month period from the VOC limits in §115.453(a). The adopted exemption is identical to the current exemption in §115.427(a)(3)(C).

Adopted new subsection (b), proposed as paragraph (2), exempts the surface coating processes in paragraphs (1) - (4), proposed as subparagraphs (A) - (C), from the coating VOC limits for miscellaneous metal and plastic part coating in §115.453(a)(1)(C) - (D) and motor vehicle materials in §115.453(a)(2). Adopted new paragraph (1) exempts large appliance coating. Adopted new paragraph (2) exempts metal furniture coating. Adopted new paragraph (3) exempts automobile and light-duty truck assembly coating. The exemption for the surface coating processes listed in adopted paragraphs (1) - (3) clarifies that any such part or assembled product is not considered a miscellaneous metal or plastic part and would not be required to comply with the rule requirements related to this category. Since proposal, the coating category specified in paragraph (2) has been incorporated into adopted new §115.451(b) for clarification. In response to comments received, adopted new paragraph (4) has been included to exempt from the miscellaneous metal and plastic parts those surface coating processes specified in §115.420(b)(1) - (8) and (10) - (14). Adopted new paragraph (4) clarifies that the surface coating processes listed remain subject to Division 2 and ensure that they are not affected by the adopted new rules in Division 5. This exemption was inadvertently left out at proposal, but is consistent with the EPA's 2008 Miscellaneous Metal and Plastic Parts CTG recommendations and the existing Division 2 miscellaneous metal parts and products coatings rule intent. Additionally, at proposal, this subsection did not exempt the surface coating processes in paragraphs (1) - (4) from the motor vehicle material requirements. However, the exemption revision is necessary because the motor vehicle material requirements only apply to the substrates under the surface coating processes in §115.453(a)(1)(C) - (F).

Adopted new subsection (c), proposed as paragraph (3), exempts paper, film, and foil surface coating processes from the coating application system requirements in §115.453(c) and the coating use work practice requirements in §115.453(d)(1). The EPA's 2007 Paper, Film, and Foil Coating CTG document does not recommend coating application methods and does not provide recommendations for work practices associated with coatings and coating-related waste.

Adopted new subsection (d), proposed as paragraph (4), exempts automobile and light-duty truck assembly surface coating processes from the coating application system requirements in §115.453(c) and the cleaning-related work practice requirements specified in §115.453(d)(2). The 2008 Automobile and Light-Duty Truck Assembly Coatings CTG document recommends that the owners and operators of automobile and light-duty truck assembly coating processes develop and implement a work plan for cleaning activities beyond the more general work practice procedures listed in §115.453(d)(2). The 2008 CTG document also does not provide the recommendation to require coatings be applied using specific application systems.

Adopted new subsection (e), proposed as paragraph (5), exempts automobile and light-duty truck assembly surface coating materials supplied in containers with a net volume of 16 ounces or less, or a net weight of 1.0 pound or less, from the VOC limits in Table 2 under §115.453(a)(3).

Adopted new subsection (f), proposed as paragraph (6), provides an exemption for specific miscellaneous metal part and product surface coatings and surface coating processes from using the coating application systems required in §115.453(c). The operations exempted under adopted paragraphs (1) - (7), proposed as subparagraphs (A) - (G), include: touch-up coatings, repair coatings, and textured finishes; stencil coatings; safety-indicating coatings; solid-film lubricants; electric-insulating and thermal-conducting coatings; magnetic data storage disk coatings; and plastic extruded onto metal parts to form a coating. The commission is not adopting the EPA's 2008 Miscellaneous Metal Parts and Products Coatings CTG recommendation to exempt these coatings and coating operations from the coating VOC limits for reasons discussed in the Background and Summary section of this preamble.

Adopted new subsections (g) and (h), proposed as paragraphs (7) and (8), also exempt specific surface coatings and operations

from the coating application system requirements in §115.453(c). Adopted new subsection (g), proposed as paragraph (7), exempts all miscellaneous plastic part airbrush coatings and coating operations where total coating usage is less than 5.0 gallons per year. Adopted new subsection (h), proposed as paragraph (8), provides an exemption for pleasure craft surface coating operations applying extreme high-gloss coatings. The adopted exemptions are recommended in the EPA's 2008 Miscellaneous Metal and Plastic Part Coatings CTG document.

Adopted new subsection (i), proposed as paragraph (9), exempts various miscellaneous plastic parts surface coatings and surface coating operations from the coating VOC limits in §115.453(a)(1)(D). The coatings and coating operations exempted under adopted new paragraphs (1) - (8), proposed as subparagraphs (A) - (H), include: touch-up and repair coatings; stencil coatings applied on clear or transparent substrates; clear or translucent coatings; any individual coating type used in volumes less than 50 gallons in any one year, if substitute compliant coatings are not available, provided that the total usage of all such coatings does not exceed 200 gallons per year, per property; reflective coating applied to highway cones; mask coatings that are less than 0.5 mil thick dried and the area coated is less than 25 square inches; electromagnetic interference/radio frequency interference shielding coatings; and heparin-benzalkonium chloride-containing coatings applied to medical devices, if the total usage of all such coatings does not exceed 100 gallons per year, per property. Since proposal, the name of the surface coating category exempt in adopted new paragraph (7) has been updated to reference the category using the term as it is defined in §115.450. The adopted exemptions are recommended in the EPA's 2008 Miscellaneous Metal and Plastic Part Coatings CTG document. Since proposal, the term *facility* as used in adopted new paragraphs (4) and (8), proposed as subparagraphs (D) and (H), have been replaced with *property* to clarify the requirement and ensure consistent use of terminology.

Adopted new subsection (j), proposed as paragraph (10), exempts certain automotive/transportation and business machine plastic part surface coatings and surface coating operations from the coating VOC limits in §115.453(a). The exemptions in adopted paragraphs (1) - (8), proposed as subparagraphs (A) - (H), include: texture coatings; vacuum-metalizing coatings; gloss reducers; texture topcoats; adhesion prime; electrostatic preparation coatings; resist coatings; and stencil coatings. These exemptions are adopted as recommended in the Miscellaneous Metal and Plastic Parts Coatings CTG.

Adopted subsection (k), proposed as paragraph (11), provides an exemption for powder coatings applied to metal and plastic parts surface coating processes from the requirements in this division, except as specified in §115.458(b)(5). Powder coatings produce minimal VOC emissions and would likely not exceed the VOC control limits designated for each coating type specified in the metal and plastic parts requirements in §115.453(a)(1)(C) - (F) and (2).

Adopted new subsection (l), proposed as paragraph (12), exempts aerosol coatings (spray paint) from this division. The adopted exemption is identical to existing §115.427(a)(6).

Adopted new subsection (m), proposed as paragraph (13), exempts coatings applied to test panels and coupons as part of research and development, quality control, or performance-testing activities at paint research or manufacturing properties from the requirements in this division. The adopted exemption is a recommendation provided in the EPA's 2008 Miscellaneous Metal and Plastic Parts Coatings CTG.

In response to comments received on the pleasure craft surface coating rules, adopted new subsection (n) is added to exempt from the VOC limits in §115.453(a)(1)(F) pleasure craft touch-up and repair coatings supplied in containers less than or equal to 1.0 quart, provided that the total usage of all such coatings does not exceed 50 gallons per calendar year per property. Exempting no more than 50 gallons per calendar year equivalent to the volume of coatings exempted under adopted new subsection (i) for miscellaneous plastic parts and products. Although the commenter requested the exemption in metric units, the adopted exemption has been converted to English units consistent with the units used throughout this division. Providing an exemption for touch-up and repair coatings used in small quantities eliminates the need to completely re-coat a pleasure craft and, as a result, reduces overall VOC emissions from pleasure craft surface coating. This exemption for coatings used in small quantities is also consistent with the EPA's recommended exemptions for other coating categories in the EPA's Miscellaneous Metal and Plastic Parts Coating CTG.

Since proposal, the commission has revised the rule to adopt new subsection (o) to exempt pleasure craft surface coating processes from the VOC limits in §115.453(a)(1)(C) and (D). This new exemption clarifies that pleasure craft coating processes are not considered miscellaneous metal or plastic parts and that owners and operators are not required to comply with the corresponding VOC limits of such parts. Adopted subsection (o) does not alter the intent of the proposed rules.

Section 115.453, Control Requirements

The commission adopts new §115.453, to implement EPA's CTG recommendations related to the surface coating categories adopted for regulation in this division, unless specifically discussed.

Adopted new subsection (a) states that the control requirements in this subsection apply to the surface coating processes subject to this division. Except as specified in paragraph (3), the VOC limits are based on the daily weighted average of all coatings, as delivered to the application system. Adopted new §115.453(a) excludes paragraph (3) to clarify that determination of compliance with the certain VOC limits pertaining to automobile and light-duty truck assembly coatings are based on averaging approaches unique to that industrial coating category. The daily weighted average approach is consistent with both the existing method of determining compliance with the VOC emission limits and the averaging period suggested in the CTG documents for the coating categories subject to this division. Adopted new subsection (a) has been revised since proposal to clarify that the daily weighted average is based on the VOC content in the coatings delivered to the application system, and not on the individual coating VOC content of each coating applied.

Adopted new paragraph (1) requires that the coating VOC limits for each of the categories listed in subparagraphs (A) - (F) must be met by applying low-VOC coatings to meet the specified VOC content limits on a lb VOC/gal coating basis, (minus water and exempt solvent), or by applying coatings and operating a vapor control system to meet the specified VOC emission limits on a pound of VOC per gallon of solids basis. The requirement that applying low-VOC coatings to meet the VOC content limits as delivered to the application system has been deleted to remove redundant language since it is already stated in subsec-

tion (a). In response to comments received, the commission has replaced the term *low-VOC coatings* with *coatings* to clarify that the VOC content of coatings used do not have to meet the VOC emission limits in subparagraphs (A) - (F); instead the combination of the VOC from the coatings used and the vapor control system efficiency must reduce the VOC emissions generated to less than or equal to the VOC emission limits in subparagraphs (A) - (F). Additionally, the proposed provision that required owners and operators to not apply coatings in excess of the VOC content limits in this paragraph may seem conflicting with the requirement to determine the VOC content of coatings based on the daily weighted average. For this reason, paragraph (1) has been revised to state that the VOC limits are based on the daily weighted average. This change clarifies that an affected owner or operator is not required to limit the VOC content of every coating applied; rather, the daily weighted average of the VOC content of the coatings applied must meet the appropriate VOC content limits in this paragraph. These changes are intended to clarify and are not intended to alter the meaning of this paragraph. Adopted paragraph (1) has also been changed to indicate that if a coating meets more than one coating type definition, then the coating with the least stringent VOC limit applies. Although this provision was not incorporated directly in response to comments, the commission received certain comments that suggest these instances are likely to occur and may cause confusion as to which VOC limit applies. This issue was not addressed in the EPA's CTG documents; however, the existing miscellaneous metal parts and products coatings rules provide this option, which is necessary to facilitate compliance with these rules. Lastly, non-substantive changes were made to the proposed language to ensure consistency with other similar requirements in this subchapter.

The commission adopts new subparagraph (A) to establish the VOC limits that apply to large appliance coatings. As discussed elsewhere in this preamble, the EPA submitted comments on the proposed rulemaking stating that in order for the proposed VOC limits to be approved as RACT for the large appliance coating emission source category, the commission must demonstrate that the existing state limits for the large appliance category, which were based on the EPA's original 1977 CTG recommendations, are no longer technologically or economically feasible. In the proposed rule preamble, the commission provided a demonstration that implementing the 2007 CTG-recommended VOC limits would not interfere with attainment of, or reasonable progress towards attainment of, the ozone standard for the HGB and DFW areas. Although the EPA's 2007 CTG did not specifically explain why the lower limits included in the original 1977 *Control of Volatile Organic Emissions from Existing Stationary Sources - Volume V: Surface Coating of Large Appliances* CTG recommendations were no longer technologically or economically feasible, in the absence of any specific information indicating that the state's existing limits for these source categories are not technologically or economically feasible, the commission is obligated under the FCAA to revise the proposed limits for large appliance coating to only include the 2007 CTG-recommended limits that are at least as stringent as the existing limits. Therefore, the proposed VOC limits that were less stringent than 2.8 lb VOC/gal coating (minus water and exempt solvent), the existing Chapter 115 VOC limit, have been replaced with the EPA's 2007 CTG-recommended VOC limits, where appropriate. Subparagraph (A) contains two tables with the VOC limits for various types of large appliance coatings. Table 1 presents the VOC content limits on a lb VOC/gal coating basis, and Table 2 presents the equivalent VOC emission limits on a pound of VOC per gallon of solids basis. Although not recommended in the 2007 Large Appliance Coatings CTG, adopted subparagraph (A) requires that if a coating does not meet a specific coating type definition, then it can be assumed to be a general-use coating and the VOC limit for general coating applies.

The commission adopts new subparagraph (B) to establish the VOC limits that apply to metal furniture coatings. As discussed elsewhere in this preamble, the EPA submitted comments on the proposed rulemaking stating that in order for the proposed VOC limits to be approved as RACT for the metal furniture coating emission source category, the commission must demonstrate that the existing state limits for the metal furniture category, which were based on the EPA's original 1977 CTG recommendations, are no longer technologically or economically feasible, in addition to the commission's demonstration in the proposed rule that implementing the 2007 CTG-recommended VOC limits would not interfere with attainment of, or reasonable progress towards attainment of, the ozone standard for the HGB and DFW areas. Although the EPA's 2007 CTG did not specifically explain why the lower limits included in the original 1977 *Control of Volatile Organic Emissions from Existing Stationary Sources - Volume III: Surface Coating of Metal Furniture* CTG recommendations were no longer technologically or economically feasible, in the absence of any specific information indicating that the state's existing limits for these source categories are not technologically or economically feasible, the commission is obligated under the FCAA to revise the proposed limits for metal furniture coating to only include the 2007 CTG-recommended limits that are at least as stringent as the existing limits. Therefore, the proposed VOC limits that were less stringent than 3.0 lb VOC/gal coating (minus water and exempt solvent), the existing Chapter 115 VOC limit, have been replaced with the EPA's 2007 CTG-recommended VOC limits, where appropriate. Subparagraph (B) contains two tables with the VOC limits for various types of metal furniture coatings. Table 1 in §115.453(a)(1)(B), presents the VOC content limits on a lb VOC/gal coating basis, and Table 2 in §115.453(a)(1)(B), presents the equivalent VOC emission limits on a pound of VOC per gallon of solids basis. Although not recommended in the 2007 CTG, adopted subparagraph (B) requires that if a coating does not meet a specific coating type definition, then it can be assumed to be a general-use coating and the VOC limit for general coating applies.

The commission adopted new subparagraph (C) to establish the VOC limits that apply to miscellaneous metal parts and products coatings. As discussed elsewhere in this preamble, the EPA submitted comments on the proposed rulemaking stating that in order for the proposed VOC limits to be approved as RACT for the miscellaneous metal parts and products coating emission source category, the commission must demonstrate that the existing state limits for the miscellaneous metal parts and products category, which were based on the EPA's original 1978 CTG recommendations, are no longer technologically or economically feasible, in addition to the commission's demonstration in the proposed rule that implementing the 2008 CTG-recommended VOC limits would not interfere with attainment of, or reasonable progress towards attainment of, the ozone standard for the HGB and DFW areas. Although the EPA's 2008 CTG did not specifically explain why the lower limits included in the original 1978 *Control of Volatile Organic Emissions from Existing Stationary Sources - Volume VI: Surface Coating of Miscellaneous Metal Parts and Products* CTG recommendations were no longer technologically or economically feasible, in the ab-

sence of any specific information indicating that the state's existing limits for these source categories are not technologically or economically feasible, the commission is obligated under the FCAA to revise the proposed limits for miscellaneous metal parts and products to only include the 2008 CTG-recommended limits that are at least as stringent as the existing limits. Therefore, the proposed VOC limits that were less stringent than the existing Chapter 115 VOC limits, have been replaced with the EPA's 2008 CTG-recommended VOC limits, where appropriate. Subparagraph (C) contains two tables with the VOC limits for various types of miscellaneous metal parts and products coatings. Table 1 in §115.453(a)(1)(C), presents the VOC content limits on a lb VOC/gal coating basis; and Table 2, also located in §115.453(a)(1)(C), presents the equivalent VOC emission limits on a pound of VOC per gallon of solids basis. The EPA's 2008 CTG inadvertently left out the pounds of VOC per gallon of solids limit for repair and touch-up coatings, thus the proposed rule did as well. However, adopted Table 2 has been revised since proposal to include the pounds of VOC per gallon of solids limit. Adopted subparagraph (C) requires that if a coating does not meet a specific coating category definition, then it can be assumed to be a general-use coating and the VOC limit for general coating applies. This adopted requirement is recommended in the EPA's 2008 CTG.

The commission adopted new subparagraph (D) to establish the VOC limits that apply to miscellaneous plastic parts and products coatings. Adopted new subparagraph (D) requires that if a coating does not meet a specific coating category definition, then it can be assumed to be a general-use coating, and the VOC limit for general coating applies. This adopted requirement is recommended in the EPA's 2008 Miscellaneous Metal and Plastic Parts Coatings CTG. Subparagraph (D) contains two tables with coating VOC limits for various miscellaneous plastic parts and products. Table 1 in §115.453(a)(1)(D), presents the VOC content limits on a lb VOC/gal coating basis. At proposal, the word *Coating* was inadvertently excluded from the list of coating categories and has been added where appropriate in the table. Table 2, also located in §115.453(a)(1)(D), presents the equivalent VOC emission limits on a pound of VOC per gallon of solids basis.

The commission adopts new subparagraph (E) to establish the VOC limits that apply to automotive/transportation and business machine plastic parts coatings. Adopted subparagraph (E) requires that the VOC limit for red, yellow, and black automotive/transportation coatings, except touch-up and repair coatings, be determined by multiplying the appropriate limit in Table 1 of this subparagraph by 1.15. The EPA's Miscellaneous Metal and Plastic Parts Coatings CTG recommends that for all miscellaneous metal and plastic part coating categories, if a coating does not meet a specific coating category definition, then it can be assumed to be a general-use coating and the VOC limit for general coating applies. However, the automotive/transportation and business machine plastic parts coatings category does not have a general or other coating category; the requirement therefore does not apply to this particular coating category. Subparagraph (E) contains two tables with coating VOC limits for various automotive/transportation and business machine plastic parts coatings types. Table 1 in §115.453(a)(1)(E), presents the VOC content limits for automotive/transportation plastic parts coatings on a lb VOC/gal coating basis and a pound of VOC per gallon of solids basis. Table 2, also located in §115.453(a)(1)(E), presents the VOC content limits for business machine plastic parts coatings on a lb VOC/gal coating basis and a pound of VOC per gallon of solids basis.

The commission adopts new subparagraph (F) to establish the VOC limits that apply to pleasure craft coatings. Adopted new subparagraph (F) requires that if a coating does not meet a specific coating category definition, then it can be assumed to be a general-use coating and the VOC limit for other pleasure coatings applies. Such a coating would be classified under *all other pleasure craft surface coatings for metal or plastic.* Similarly, if a coating classified as an antifoulant does not meet one of the antifoulant coating category definitions, the *other substrate antifoulant coating* VOC limit would apply. Subparagraph (F) contains two tables with coating VOC limits for various pleasure craft coatings types. Table 1 in §115.453(a)(1)(F) presents the VOC content limits on a lb VOC/gal coating basis, and Table 2, also located in §115.453(a)(1)(F), presents the equivalent VOC emission limits on a pound of VOC per gallon of solids basis. In response to comments received on the proposed rules, the commission has revised the VOC limits for extreme high-gloss coating, finish primer-surfacer coating, other substrate antifoulant coating, and antifoulant sealer/tie coating in §115.453(a)(1)(F) to reflect the commenter's suggestions. Based on the information presented by the commenter, and in accordance with EPA's guidance on this issue, the commission agrees that some of the pleasure craft coating VOC limits included in the EPA's 2008 CTG recommendations are not technologically feasible at this time, and that the coating VOC limits requested by the commenter are reasonably available considering technological and economic feasibility and therefore constitute RACT for the pleasure craft industry in Texas.

Adopted new paragraph (2) requires that the coating VOC limits applied to the metal and plastic parts in paragraph (1)(C) - (F) of this subsection, as delivered to the application system, must be met using low-VOC coatings. The proposed provision in the rule that required owners and operators to not apply coatings in excess of the VOC content limits in this paragraph may seem conflicting with the direction to determine the VOC content of coatings based on the daily weighted average. For this reason, proposed paragraph (2) has been revised to remove this statement to clarify that an affected owner or operator is not required to limit the VOC content of every coating applied; rather, the daily weighted average of the VOC content of the coatings applied must meet the appropriate VOC content limits in this paragraph. These changes are intended to clarify and are not intended to alter the meaning of this paragraph. The adopted VOC limits for motor vehicle materials are provided only on a lb VOC/gal coating basis because the 2008 Miscellaneous Metal and Plastic Parts Coatings CTG document expects that these are low-use materials and are often used in areas of operation that would be expensive to control with add-on controls, and therefore would not be controlled with any type of vapor control system, eliminating the need to convert the VOC content limits in lb VOC/gal coating to pounds of VOC per gallon of solids.

Adopted new paragraph (3) requires that the coating VOC limits for automobile and light-duty truck assembly surface coating processes must be met by applying low-VOC coatings, as delivered to the application system. The proposed provision in the rule that required owners and operators to not apply coatings in excess of the VOC limits in this paragraph may seem conflicting with the direction to determine the VOC content of coatings based on the daily weighted average. For this reason, proposed paragraph (2) has been revised to remove this statement to clarify that an affected owner or operator is not required to limit the

VOC content of every coating applied; rather, the daily weighted average of the VOC content of the coatings applied must meet the appropriate VOC limits in this paragraph. These changes are intended to clarify and are not intended to alter the meaning of this paragraph. Table 1 in §115.453(a)(3) presents the VOC limits for each automobile and light-duty truck surface coating process. The limits vary depending on the process. The commission adopts to implement the EPA's 2008 Automobile and Light-Duty Truck Assembly Coatings CTG recommendation to base the VOC limits for electrodeposition primer coatings on a monthly weighted average instead of the daily weighted average required in the existing Chapter 115 rules. Compliance with the VOC limits on a monthly weighted average basis must be determined in accordance with the procedure in §115.455(a)(2)(D). The term *VOC emission limit* has generally been used in reference to the VOC limits provided on a pound of VOC per gallon of solids basis, and the term *VOC content limit* has been used in reference to the VOC limits provided on a lb VOC/gal coating basis. Because the VOC limits associated with automobile and light-duty truck assembly surface coating processes are provided on both gallon of coating and gallon of solids basis, the commission has revised the terminology to *VOC limit* in this adopted new paragraph, where appropriate, for consistency to avoid potential confusion. This change does not alter the meaning of the requirements in this paragraph in any way.

Additionally, the commission adopts as an alternative to the VOC limit of 4.8 lb VOC/gal coating applied for final repair, if a source owner or operator does not compile records sufficient to enable determination of a daily weighted average VOC content, compliance with the final repair VOC limit may be demonstrated each day by meeting a standard of 4.8 lb VOC/gal coating (minus water and exempt solvent) on an occurrence-weighted average basis. Compliance with the VOC limits on an occurrence-weighted average basis must be determined in accordance with the procedure specified in §115.455(a)(2). Table 2 in §115.453(a)(3) presents the VOC limits for miscellaneous materials used during automobile and light-duty truck assembly coating. Compliance with the VOC content limits must be determined in accordance with §115.455(a)(1) or (2)(C), as appropriate.

Adopted new paragraph (4) requires that the coating VOC limits for each paper, film, and foil coating process in §115.453(a)(4) must be met by applying low-VOC coatings to meet the specified VOC content limits on a pound of VOC per pound of coating basis as delivered to the application system or by applying coatings in combination with the operation of a vapor control system to meet the specified VOC emission limits on a pound of VOC per pound of solids basis. Since proposal, the contents of this paragraph have been amended. The non-substantive changes made to the proposed language ensure consistency with other similar requirements in this subchapter. In response to comments received on requirements similar to this paragraph, the content has been revised to replace the term *low-VOC coatings* with *coatings.* The adopted change clarifies that the VOC content of coatings used do not have to meet the VOC emission limits in this paragraph; instead, the combination of the coating VOC content and the vapor control system efficiency must meet the VOC emission limits in this paragraph. In addition, the proposed provision in the rule that required owners and operators to not apply coatings in excess of the VOC content limits in this paragraph may seem conflicting with the direction to determine the VOC content of coatings based on the daily weighted average. For this reason, proposed paragraph (4) has been revised to remove this statement to clarify that an affected owner or operator is not required to limit the VOC content of every coating applied; rather, the daily weighted average of the VOC content of the coatings applied must meet the appropriate VOC content limits in this paragraph. These changes are intended to clarify and are not intended to alter the meaning of this paragraph. Lastly, *as delivered to the application system* has been incorporated into adopted paragraph (4) because it was inadvertently left out in the proposed rule.

The table in §115.453(a)(4) provides separate VOC limits for pressure sensitive tape and label surface coating and paper, film, and foil surface coating. The table has been revised since proposal to list the pounds of VOC per pound of coating limits first, followed by the pounds of VOC per pound of solids limits.

The commission adopts new paragraph (5) to require an affected owner or operator choosing to comply with the option to apply coatings in combination with the operation of a vapor control system to meet the VOC emission limits in subsection (a)(1) or (4), to use the equation provided. This adopted new control requirement is necessary to demonstrate that the overall control efficiency of the vapor control system, when used in conjunction with coatings, is sufficient to meet the VOC emission limits in §115.453(a)(1) and (4). Adopted new paragraph (5) contains the equation to determine the overall control efficiency of a vapor control system needed in order to meet the appropriate VOC emission limits in §115.453. The equation adopted in new paragraph (5) is the same as the equation in existing §115.423(3)(A). For owners and operators affected by paragraph (1) of this subsection, the variable units should be in pounds of VOC per gallon of solids, and for owners and operators affected by paragraph (4) of this subsection, the variable units should be in pounds of VOC per pound of solids. Since proposal, adopted new paragraph (5) has been revised to establish consistency in terminology used throughout this section and with other requirements in this subchapter, as well as to update the variable descriptions. Adopted new paragraph (5) also requires control device and capture efficiency testing to be performed in accordance with the testing requirements in §115.455(a)(3) and (4).

Adopted new subsection (b) provides that except for the surface coating process in subsection (a)(2), the owner or operator of a surface coating process may operate a vapor control system capable of achieving a 90% overall control efficiency, as an alternative to subsection (a). This alternative provides owners and operators the operational flexibility to use means of controlling the VOC generated from coatings other than by reducing the VOC content of the coatings applied, especially when the use of high-VOC coatings is necessary or desirable for product quality. The Automobile and Light-Duty Truck Assembly Coatings CTG did not recommend using a vapor control system as an alternative compliance option. However, to maintain the same flexibility provided in Division 2, adopted new subsection (b) provides the owner or operator of an automobile or light-duty truck assembly coating process the option to comply with the 90% overall control efficiency compliance option recommended in the EPA's CTG documents regarding the other coating processes affected by this rulemaking. Adopted new subsection (b) requires control device and capture efficiency testing be performed in accordance with the testing requirements in §115.455(a)(3) and (4). Additionally, adopted new subsection (b) indicates that if the owner or operator complies with the overall control efficiency option under this subsection, then the owner or operator is exempt from the application system requirements of subsection (c). An owner or operator choosing the control option in this paragraph would not have to limit the VOC content of coating materials and would not

need to use any particular coating application system to demonstrate compliance with the control requirements. The language in adopted new subsection (b) also does not include the provision in §115.423(3)(B) that requires the owner or operator to submit design data for each capture system and control device to the executive director for approval. Sites that elect the use of this option and install additional control equipment would be required to meet permitting requirements for the installation and including a separate provision for executive director approval is unnecessary.

The commission adopts new subsection (c) to ensure that the owner or operator of any surface coating process subject to this division does not apply coatings unless one of the listed coating application systems is used. Except for the automobile and light-duty truck assembly surface coating category and the paper, film, and foil surface coating category, the adopted application systems are intended for use in surface coating processes choosing to comply with the control options requiring low-VOC coatings in subsection (a). If an operation qualifies for exemption from the VOC content limits, the coating application system requirements are still applicable to that operation unless specifically exempt from this subsection or if operating a vapor control system. The application systems are listed in adopted new paragraphs (1) - (7) and include: electrostatic application; high-volume, low-pressure spray (HVLP); flow coat; roller coat; dip coat; brush coating or hand-held paint rollers; and other coating application system capable of achieving a transfer efficiency equivalent to or better than that achieved by HVLP spray. Adopted new paragraph (7) states that for the purpose of this requirement, the transfer efficiency of HVLP spray is assumed to be 65%. In response to comments received on this rulemaking, the commission has incorporated hand-held paint rollers into paragraph (6) to clarify that this is an acceptable application system. The commission expects that hand-held paint rollers are synonymous with brush coating listed in §115.453(b)(6).

Adopted new subsection (d) requires the owner or operator of a surface coating process subject to the division to implement work practice procedures listed in paragraphs (1) and (2). The adopted new work practices are recommendations provided in the CTG documents addressing the coating categories affected by this division.

Adopted new paragraph (1) requires that for all coating-related activities, including but not limited to, solvent storage, mixing operations, and handling operations for coatings and coating-related waste materials, the owner or operators of all surface coating processes listed in §115.450(a), except where specifically exempt, must implement the work practices in subparagraphs (A) - (E). Adopted new paragraph (1) also requires additional work practices for automobile and light-duty truck assembly coating. Adopted new subparagraph (A) requires storage of all VOC-containing coatings and coating-related waste in closed containers. Adopted new subparagraph (B) requires minimization of spills of VOC-containing coatings. Adopted new subparagraph (C) requires conveying all coatings in closed containers or pipes. Adopted new subparagraph (D) requires closing mixing vessels that contain VOC-containing coatings and other materials except when specifically in use. Adopted new subparagraph (E) requires cleaning up spills immediately. Although the Large Appliance Coatings CTG is the only document that recommends the work practice specified in subparagraph (E), the commission adopts to extend the requirement to the other surface coating processes subject to this division because the commission expects that most sites are voluntarily following this work practice for safety reasons. Adopted new subparagraph (F) requires that in addition, the owner or operator of an automobile and light-duty truck assembly coating process minimize VOC emissions from the cleaning of storage, mixing, and conveying equipment. Adopted new subparagraph (F) only applies to automobile and light-duty truck assembly coating processes because this work practice is unique to the recommendations in the corresponding CTG document.

Adopted new paragraph (2) requires that for all cleaning-related activities including, but not limited to, waste, storage, mixing, and handling operations for cleaning materials, the owner or operator must implement the work practice procedures in subparagraphs (A) - (E). Adopted new paragraph (2) requires that in addition, the owner or operator of metal parts and products coating processes listed in §115.450(a)(3) - (5), implement the work practice in subparagraph (F). Adopted subparagraph (A) requires storage of all cleaning materials and shop towels in closed containers. Adopted new subparagraph (B) requires that storage containers used for VOC-containing cleaning materials are kept closed at all times except when depositing or removing these materials. Adopted new subparagraph (C) requires minimization of spills of VOC-containing cleaning materials. Adopted new subparagraph (D) requires conveying VOC-containing cleaning materials from one location to another in closed containers or pipes. Adopted new subparagraph (E) requires minimization of VOC emissions from cleaning of storage, mixing, and conveying equipment. Adopted new subparagraph (F) requires cleaning up spills immediately. In addition, adopted new subparagraph (G) requires the owner or operator to minimize VOC emissions from the cleaning of application, storage, mixing, and conveying equipment by ensuring that equipment cleaning is performed without atomizing the cleaning solvent, and all spent solvent is captured in closed containers. Adopted new subparagraph (G) only applies to metal and plastic parts surface coating processes listed in §115.453(a)(1)(C) - (F) and (2), because this work practice is unique to the recommendations in the 2008 Miscellaneous Metal and Plastic Parts Coatings CTG document. The adopted work practice procedures in this paragraph apply to any cleaning material involved in operations such as the surface preparation of a substrate and post-operation cleaning of equipment and work areas.

Adopted new paragraph (3) directs the owner or operator of an automobile and light-duty truck assembly surface coating process to implement a work practice plan containing procedures to minimize VOC emissions from cleaning activities and purging of coating application equipment. Adopted new paragraph (3) allows properties with a work practice plan already in place to comply with National Emission Standards for Hazardous Air Pollutants (NESHAP) requirements specified in 40 CFR §63.3094 (as amended through April 20, 2006 (71 FR 20464)), to incorporate procedures for minimizing non-hazardous air pollutant VOC emissions to comply with the work practice plan required by this paragraph.

Adopted new subsection (e) specifies that a coating operation that becomes subject to the provisions of §115.453(a) by exceeding the provisions of §115.451 is subject to the provisions in §115.453(a) even if throughput or emissions later fall below exemption limits unless emissions are maintained at or below the controlled emissions level achieved while complying with §115.453(a) and one of the conditions in paragraphs (1) or (2) is met. This is an existing requirement in §115.422 and the commission adopts to include the same requirement in Division 5. Adopted new paragraph (1) specifies that the project that caused

throughput or emission rate to fall below the exemption limits in §115.451 must be authorized by any permit, permit amendment, standard permit, or permit by rule required by Chapters 106 or 116. Adopted new paragraph (1) also requires that if a permit by rule is available for the project, compliance with §115.451 must be maintained for 30 days after the filing of documentation of compliance with that permit by rule. Adopted new paragraph (2) specifies that if authorization by permit, permit amendment, standard permit, or permit by rule is not required for the project, the owner or operator shall provide the executive director 30 days notice of the project in writing.

Section 115.454, Alternate Control Requirements

Adopted new §115.454, provides the owner or operator of a surface coating process subject to this division, alternate methods of demonstrating and documenting continuous compliance with the applicable control requirements or exemption criteria in this division may be approved by the executive director in accordance with §115.910 if emission reductions are demonstrated to be substantially equivalent. This option is not a recommendation in any of the CTG documents applicable to this division but is adopted for consistency with other Chapter 115 rules.

Adopted new subsection (b) specifies that for any surface coating process or processes at a specific property, the executive director may approve requirements different from those in §115.453(a)(1)(C) based upon the executive director's determination that such requirements will result in the lowest emission rate that is technologically and economically reasonable. The adopted new subsection specifies that when making such a determination, the executive director shall specify the date or dates by which such different requirements shall be met and shall specify any requirements to be met in the interim. The adopted new subsection also specifies that if the emissions resulting from such different requirements equal or exceed 25 tpy for a property, the determinations for that property shall be reviewed every five years. Additionally, the adopted new subsection states that executive director approval does not necessarily constitute satisfaction of all federal requirements nor eliminate the need for approval by the EPA in cases where specified criteria for determining equivalency have not been clearly identified in applicable sections of this chapter. Adopted new subsection (b) incorporates the alternate control requirement in existing §115.423(4), with non-substantive changes to update the section referenced in order to maintain the same flexibility afforded in the existing Chapter 115 rules. Since proposal, this paragraph has been modified to correctly cite §115.453(a)(1)(C), which contains miscellaneous metal parts and products because this subsection only applies to this coating category. In addition, the phrase *or processes* has been removed to clarify that the only coating process affected by this subsection is the miscellaneous metal parts and products coating category.

Section 115.455, Approved Test Methods and Testing Requirements

Adopted new §115.455, specifies the test methods approved to determine compliance with the coating VOC limits and specifies the capture efficiency testing requirements for owners and operators choosing to operate a vapor control system to comply with the adopted rule requirements.

Adopted new subsection (a) specifies the approved test methods and testing requirements and requires that compliance with the requirements in this division must be determined by applying the test methods, as appropriate. Additionally, adopted new subsection (a) provides as an alternative to the test methods in paragraph (1), the VOC content of coatings may be determined by using analytical data from the MSDS, and if necessary the dilution solvent. The Miscellaneous Metal and Plastic Parts Coatings and Automobile and Light-Duty Truck Assembly Coatings CTG documents recommend accepting data from the MSDS as a compliance alternative to testing. However, the commission expects that relying on the MSDS is sufficient to ensure continuous compliance with the control requirements in §115.453 and adopts to extend this option to owners and operators of all surface coating categories. Unless specifically discussed, the adopted test methods in this subsection are identical to the testing procedures required in existing §115.425.

Adopted new paragraph (1) specifies that the owner or operator shall demonstrate compliance with the VOC limits in §115.453 by applying the test methods in paragraphs (1) and (2), as appropriate. The EPA's Miscellaneous Metal and Plastic Parts Coatings and Automobile and Light-Duty Truck Assembly Coatings CTG documents provide specific testing recommendations that are adopted for inclusion in this section. The commission adopts to allow owners and operators of these surface coating processes to employ other test methods to avoid inadvertently eliminating a testing procedure in §115.425 that may currently be used to comply with the existing requirements in §115.421(a). Adopted new paragraph (1) also allows the owner or operator to exclude exempt solvents from determining compliance with the applicable control requirements when a test method inadvertently measures compounds that are exempt solvent. This provision is currently in §115.425 and is retained in the adopted rules, with revision, because compliance with the VOC content limits is based on the VOC concentration of a coating considering only the VOC and solids content.

The specific methods and procedures required are listed in subparagraphs (A) - (D) and include: Method 24 (40 CFR Part 60, Appendix A); American Society for Testing and Materials (ASTM) Test Methods D1186-06.01, D1200-06.01, D3794-06.01, D1644-75, and D 3960-81; EPA guidelines series document "Procedures for Certifying Quantity of Volatile Organic Compounds (VOC) Emitted by Paint, Ink, and Other Coatings," EPA-450/3-84-019, as in effect December, 1984; and the additional test procedures described in 40 CFR §60.446 (as amended through October 17, 2000 (65 FR 61761)).

The commission also adopts new subparagraph (E) to allow minor modifications to the test methods specified in subparagraphs (A) - (D) if approved by the executive director.

The commission adopts new paragraph (2) to indicate that in addition to the test methods listed in subsection (a)(1), the owner or operator shall determine compliance with the VOC limits in §115.453(a)(3) by applying the test methods in paragraphs (2)(A) - (C), as appropriate.

Adopted new subparagraph (A) specifies the Protocol for Determining the Daily VOC Emission Rate of Automobile and Light-Duty Truck Topcoat Operations (EPA-453/R-08-002).

Adopted new subparagraph (B) specifies the procedure contained in this paragraph for determining daily compliance with the alternative emission limitation in §115.453(a)(3) for final repair. Calculation of occurrence weighted average for each combination of repair coatings (primer, specific basecoat, clearcoat) must be determined by the procedure list in subparagraph (B)(i) - (iii).

Adopted new clause (i) provides that the relative occurrence weighted average usage is calculated using the equations in clause (i) for each repair material. Adopted new clause (i) is the combination of the requirements in existing §115.425(3)(B)(i) and (ii). The equations in §115.453(a)(2)(B)(i) are used to determine the occurrence weighted average of the primer, basecoat, and clearcoat used in repair operations. A description of each equation variable is provided with the equations. The EPA's 2008 Automobile and Light-Duty Truck Assembly Coatings CTG recommends giving clearcoat coatings a weighting factor of two and the other coatings a weighting factor of one. However, the commission adopts to retain the existing approach for determining the occurrence weighted average in §115.425(3)(B) because it adequately accounts for the varying usage between the different types of coatings used in repair operations.

Adopted new clause (ii) specifies that the occurrence weighted average (Q) in lb VOC/gal coating (minus water and exempt solvents) as applied, for each potential combination of repair coatings is calculated according to subparagraph (B). Included in adopted new clause (ii) is the equation to determine the occurrence weighted average and descriptions of each equation variable, except for those that are defined in clause (i).

Adopted new subparagraph (C) lists the procedure contained in 40 CFR Part 63, Subpart PPPP, Appendix A (as amended through April 24, 2007 (72 FR 20237)), for reactive adhesives. Adopted new subparagraph (C) is a recommendation provided in the EPA's 2008 Automobile and Light-Duty Truck Assembly Coatings CTG document.

Adopted new subparagraph (D) lists the procedure contained in 40 CFR Part 60, Subpart MM (as amended October 17, 2000 (65 FR 61760)) for determining the monthly weighted average for electrodeposition primer.

Adopted new paragraph (3) lists the required methods used to determine compliance with the overall control efficiency option in adopted new §115.453(b). The methods listed in adopted new subparagraph (3) are used to determine the destruction or removal efficiency of control devices, such as a thermal oxidizer, that are used to comply with §115.453(b). The methods listed in subparagraphs (A) - (D) include: Methods 1 - 4 (40 CFR Part 60, Appendix A) for determining flow rate; Method 25 (40 CFR Part 60, Appendix A) for determining total gaseous nonmethane organic emissions as carbon; Methods 25A or 25B (40 CFR Part 60, Appendix A) for determining total gaseous organic concentrations using flame ionization or nondispersive infrared analysis; and the additional performance test procedures in 40 CFR §60.444 (as amended through October 17, 2000 (65 FR 61761)). Adopted new subparagraph (E) allows the executive director to approve minor modifications to the methods in subparagraphs (A) - (D).

Adopted new paragraph (4) requires that the owner or operator of a surface coating process subject to §115.453(a)(5) and (b) shall measure the capture efficiency using applicable procedures outlined in 40 CFR §52.741, Subpart O, Appendix B (as amended through October 21, 1996 (61 FR 54559)). These procedures are: Procedure T - Criteria for and Verification of a Permanent or Temporary Total Enclosure; Procedure L - VOC Input; Procedure G.2 - Captured VOC Emissions (Dilution Technique); Procedure F.1 - Fugitive VOC Emissions from Temporary Enclosures; and Procedure F.2 - Fugitive VOC Emissions from Building Enclosures. Since proposal, the rule citation that incorrectly referred to the surface coating processes subject to this requirement, has been updated to correctly cite §115.453(a)(5) and (b).

Adopted new subparagraph (A) includes exemptions that apply to capture efficiency testing requirements if the source meets the provisions in either clause (i) or (ii). The exemptions from capture efficiency testing provided in clauses (i) and (ii) are identical to the capture efficiency testing exemptions currently provided in existing §115.425(a)(7)(A). Adopted new clause (i) provides an exemption for sources with a permanent total enclosure that meets the specifications of Procedure T, and all VOC is directed to a control device. Adopted new clause (ii) provides an exemption if the source uses a control device designed to collect and recover VOC, and the conditions in subclauses (I) and (II) are met.

Adopted new subparagraph (B) requires that the capture efficiency must be calculated using one of the following four protocols referenced. The adopted subparagraph requires, in addition, that any affected source must use one of these protocols, unless a suitable alternative protocol is approved by the executive director and the EPA. The capture efficiency testing protocols included in adopted new subparagraph (B) are the same as those currently required in §115.425(a)(7)(B) except for non-substantive revisions and equation formatting necessary to conform to current rule formatting standards.

Adopted new clause (i) lists the protocol for the gas/gas method using a TTE. Additionally, the adopted clause states that the EPA specifications to determine whether a temporary enclosure is considered a TTE are given in Procedure T. The equation required for the gas/gas method using a TTE is also provided in clause (i) along with the description of the equation variables.

Adopted new clause (ii) lists the protocol for the liquid/gas method using a TTE. Additionally, the adopted clause states that the EPA specifications to determine whether a temporary enclosure is considered a TTE are given in Procedure T. The equation required for the liquid/gas method using a TTE is also provided in clause (ii) along with the description of the equation variables.

Adopted new clause (iii) lists the protocol for the gas/gas method using the building or room enclosure in which the affected source is located and in which the mass of VOC captured and delivered to a control device and the mass of fugitive VOC that escapes from the enclosure are measured while operating only the affected facility. The adopted clause requires that all fans and blowers in the building or room enclosure in which the affected source is located must be operating as they would under normal production. The equation required for the gas/gas method for using a building or room enclosure in which the affected source is located is also provided in clause (iii) along with the description of the equation variables.

Adopted new clause (iv) lists the protocol for the liquid/gas method using a building or room enclosure where the affected source is located in which the mass of liquid VOC input to process and the mass of fugitive VOC that escapes from the enclosure are measured while operating only the affected facility. The adopted clause requires that all fans and blowers in the building or room enclosure where the affected source is located must be operated as they would under normal production. The equation required for the liquid/gas method for using a building or room enclosure where the affected source is located is also provided in clause (iv) along with the description of the equation variables.

Adopted new subparagraph (C) requires the operating parameters selected for monitoring of the capture system for compliance

with the requirements in §115.458(a) must be monitored and recorded during the initial capture efficiency testing and thereafter during facility operation. Adopted new subparagraph (C) indicates the executive director may require a new capture efficiency test if the operating parameter values change significantly from those recorded during the initial capture efficiency test. Adopted new subparagraph (C) ensures the operational parameters tested in the initial performance test are representative of those during normal operation.

Adopted new paragraph (5) allows the owner or operator to use test methods other than those specified in paragraphs (1) - (4) if approved by the executive director and validated by 40 CFR Part 63, Appendix A, Method 301. Adopted new paragraph (5) also specifies that for purposes of this paragraph, substitute "executive director" each place that Method 301 references "administrator."

Adopted new subsection (b) specifies the inspection requirements. Adopted new subsection (b) requires that the owner or operator of each surface coating process subject to the control requirements in §115.453 shall provide samples, without charge, upon request by authorized representatives of the executive director, the EPA, or any local air pollution agency with jurisdiction. Adopted new subsection (b) specifies the representative or inspector requesting the sample will determine the amount of coating needed to test the sample to determine compliance. These inspection requirements are identical to those in existing §115.424 with reformatting changes.

Section 115.458, Monitoring and Recordkeeping Requirements

The commission adopts new §115.458, which specifies the monitoring and recordkeeping sufficient to demonstrate compliance with this division.

Adopted new subsection (a) specifies that the monitoring requirements in this subsection apply to the owner or operator of a surface coating process subject to this division that uses a vapor control system in accordance with §115.453. Adopted new subsection (a) requires that the owner or operator install and maintain monitors to accurately measure and record operational parameters of all required control devices, as necessary, to ensure the proper functioning of those devices in accordance with design specifications, including the requirements in subsection (a)(1) - (4). The adopted monitoring requirements in subsection (a) are identical to the existing requirements imposed in §115.426(2) with revisions to update language for consistency with language used throughout this division and other Chapter 115 rules.

Adopted new paragraph (1) requires continuous monitoring of the exhaust gas temperature immediately downstream of direct-flame incinerators or the gas temperature immediately upstream and downstream of any catalyst bed. Adopted new paragraph (2) requires the total amount of VOC recovered by carbon adsorption or other solvent recovery systems during a calendar month. Adopted new paragraph (3) requires continuous monitoring of carbon adsorption bed exhaust. Adopted new paragraph (4) requires appropriate operating parameters for capture systems and control devices other than those specified in subsection (a)(1) - (3).

Adopted new subsection (b) specifies that the recordkeeping requirements in this subsection apply to the owner or operator of a surface coating process subject to this division. Adopted new paragraph (1) requires the owner or operator to maintain records of the testing data or the MSDS, in accordance with the requirements in §115.455(a)(1). Adopted new paragraph (1) also requires that the MSDS must contain relevant information regarding each coating and solvent available for use in the affected surface coating processes including the VOC content, composition, solids content, and solvent density. Additionally, the adopted new paragraph requires that all records must be sufficient to demonstrate continuous compliance with the VOC limits in §115.453(a).

Adopted new paragraph (2) requires that records be maintained of the quantity and type of each coating and solvent consumed during the specified averaging period if any of the coatings, as delivered to the coating application system, exceed the applicable control limits. Such records must be sufficient to calculate the applicable weighted average of VOC content for all coatings. Adopted new paragraph (2) is the same as the existing requirement in §115.426(1)(B).

Adopted new paragraph (3) provides as an alternative to the recordkeeping requirements of paragraph (2), the owner or operator that qualifies for exemption under §115.451(a)(3) may maintain records of the total gallons of coating and solvent used in each month and total gallons of coating and solvent used in the previous 12 months. Adopted new paragraph (3) imposes the same requirement as in existing §115.426(1)(B)(3).

Adopted new paragraph (4) requires the owner or operator to maintain, on file, the capture efficiency protocol submitted under §115.455(a)(4). All results of the test methods and capture efficiency protocols must be submitted to the executive director within 60 days of the actual test date. The owner or operator is also required to maintain records of the capture efficiency operating parameter values on-site for a minimum of one year. If any changes are made to capture or control equipment, the owner or operator is required to notify the executive director in writing within 30 days of these changes and a new capture efficiency or control device destruction or removal efficiency test may be required.

Adopted new paragraph (5) requires that the owner or operator claiming an exemption in §115.451 maintain records sufficient to demonstrate continuous compliance with the applicable exemption criteria. For example, maintaining records of all coating and solvent usage may be sufficient to demonstrate continuous compliance with the exemption in §115.451. Adopted new paragraph (6) indicates that except for specialty coatings, compliance with the recordkeeping requirements of 40 CFR §63.752, (as amended through September 1, 1998 (63 FR 46534)), is considered to represent compliance with the requirements of this section.

The commission is not adopting proposed paragraph (6) indicating that except for specialty coatings, compliance with the recordkeeping requirements of 40 CFR §63.752, (as amended through September 1, 1998 (63 FR 46534)), is considered to represent compliance with the requirements of this section. Proposed paragraph (6) was inadvertently included at proposal because this provision is included in the corresponding Chapter 115, Subchapter E, Division 2 rules. The commission is not adopting this provision because it is intended to apply to aerospace coating operations that are not specifically addressed in this rule.

Adopted new paragraph (6), proposed as paragraph (7), requires that records must be maintained of any testing conducted in accordance with the provisions specified in §115.455(a). Adopted new paragraph (7), proposed as paragraph (8), re-

quires that records must be maintained a minimum of two years and be made available upon request to authorized representatives of the executive director, the EPA, or any local air pollution agency with jurisdiction.

Section 115.459, Compliance Schedules

The commission adopts new §115.459, to list the compliance schedule for affected surface coating processes in the DFW and HGB areas subject to Division 5. Adopted new subsection (a) requires that the owner or operator of a surface coating process subject to this division comply with the requirements of this division no later than March 1, 2013. The March 1, 2013, compliance date provides affected owners and operators approximately a year and a half to make any necessary changes and ensures that any VOC reductions achieved by the adopted rule will occur prior to the ozone season in the DFW area.

Adopted new subsection (b) requires that the owner or operator of a surface coating process that becomes subject to this division on or after March 1, 2013, comply with the requirements in this division no later than 60 days after becoming subject. Since proposal, minor changes have been made to explicitly state the compliance date and to replace *each surface coating process* with *a surface coating process* for clarification.

SUBCHAPTER E, SOLVENT-USING PROCESSES

DIVISION 6, INDUSTRIAL CLEANING SOLVENTS

Section 115.460, Applicability and Definitions

The commission adopts new §115.460, to identify the operations affected by the adopted rule requirements and to define the terms relevant to those affected operations.

The commission adopts new subsection (a) to indicate the requirements in this division apply to the owner or operator of solvent cleaning operations in the DFW and HGB areas beginning March 1, 2013. Adopted new subsection (a) states that residential and janitorial cleaning are not considered solvent cleaning operations. The adopted rules exclude residential and janitorial cleaning because these operations are outside the scope of sources intended to be affected by the EPA's 2006 CTG. In response to comments, subsection (a) has been revised to clarify that janitorial cleaning operations, like residential cleaning, are not subject to any requirement in this division. The exclusion of janitorial cleaning was inadvertently omitted at proposal. Unless specifically exempt in §115.461, the adopted cleaning rule requirements in this division are intended to apply to sites where cleaning requirements in the Chapter 115 rules specific to a regulated process or operation are absent, and to industrial processes or operations that are not specifically regulated in Chapter 115.

Adopted new subsection (b) indicates that unless the context clearly indicates otherwise or unless specifically defined in the Texas Clean Air Act (Texas Health and Safety Code, Chapter 382) or in §§3.2, 101.1, or 115.10, the terms used in this division have the meanings commonly used in the field of air pollution control. Adopted new subsection (b) also lists the specific definitions that apply in adopted new Division 6. Unless specifically discussed, the terms defined in this subsection are based on those in the Bay Area Air Quality Management District (BAAQMD) Regulation 8 Rules and SCAQMD Regulation XI, Rule 1171. The EPA's 2006 Industrial Cleaning Solvents CTG did not recommend any definitions but relied on both Management District's rules for the development of its exemption and control recommendations.

The terms defined in adopted new paragraphs (1) - (11) include: *Aerosol can; Electrical and electronic components; Janitorial cleaning; Magnet wire; Magnet wire coating operation; Medical device; Medical device and pharmaceutical preparation operations; Polyester resin operation; Precision optics; Solvent cleaning operation; and Volatile organic compound (VOC) composite partial pressure.*

Adopted new paragraph (3) defines *Janitorial cleaning* as the cleaning of building or building components including, but not limited to, floors, ceilings, walls, windows, doors, stairs, bathrooms, furnishings, and exterior surfaces of office equipment, and excludes the cleaning of work areas where manufacturing or repair activity is performed. The adopted definition is derived from the SCAQMD Regulation XI, Rule 1171 janitorial cleaning definition with revision to replace the term *facility* with *building* for clarification. The EPA's 2006 Industrial Cleaning Solvents CTG recommends excluding janitorial cleaning from the applicability for the adopted rule requirements.

The definition of *Solvent cleaning operation* in adopted new paragraph (10) is the removal of uncured adhesives, inks, and coatings; and contaminants such as dirt, soil, oil, and grease from parts, products, tools, machinery, equipment, vessels, floors, walls, and other work production related work areas. The adopted definition is based on the EPA's 2006 CTG description of cleaning operations.

At proposal, the commission inadvertently omitted the definition and equation for VOC composite partial vapor pressure. Adopted new paragraph (11) defines *VOC composite partial pressure* as the sum of the partial pressures of the compounds that meet the definition of VOC in §101.1. Adopted new paragraph (11) establishes the formula, and includes descriptions of each equation variable necessary to calculate the VOC composite partial pressure based on the individual vapor pressures of each VOC component in a cleaning solution. Both the definition and equation in adopted new paragraph (11) are derived from the definition in Chapter 115, Subchapter E, Division 4.

Section 115.461, Exemptions

The commission adopts new §115.461, to list the exemptions recommended in the EPA's 2006 Industrial Cleaning Solvents CTG. Adopted new §115.461 establishes consistency with other Chapter 115 rules and makes the rule easier to read by clearly identifying the cleaning activities that are exempt from all or portions of the subsequent rule requirements.

Adopted new subsection (a) exempts the owner or operator of solvent cleaning operations located on a property that emits less than 3.0 tons per calendar year of VOC from all cleaning solvents, when uncontrolled, from the requirements in this division, except as specified in §115.468(b)(2). The commission agrees with the EPA's determination that requiring these small sources to comply with the control requirements in §115.463 is not economically feasible and does not constitute RACT. When determining if a source qualifies for this exemption or any other exemption that refers to uncontrolled VOC emissions, the combined VOC emissions would be calculated without considering the emission reductions achieved through the use of any add-on controls or other operational changes.

In order to facilitate compliance with these rules, additional language has been incorporated into adopted new subsection (a) to exclude from the VOC emissions calculation, solvents used for cleaning operations that are exempt from all or portions of the rule requirements. At proposal, there was no description of the

VOC emissions required to be included in the calculation to determine whether the 3.0 tpy threshold is met or exceeded. Therefore, adopted new subsection (a) clarifies that the solvents used in the cleaning activities qualifying for exemption under subsections (b) - (e) are not included in this calculation because complying with the rule requirements are either technologically infeasible for these activities or the activities are already controlled under another division in Chapter 115.

Adopted new subsection (b) exempts any process or operation subject to Chapter 115 where the division specifies solvent cleaning requirements related to that process or operation. Adopted new subsection (b) ensures that owners and operators of affected processes or operations regulated in Chapter 115 are only subject to one set of cleaning requirements. Examples of operations exempt under adopted new subsection (b) from all requirements in this division because other divisions in Chapter 115 regulate the cleaning activities associated with the operations include degreasing, offset lithographic printing, and miscellaneous metal and plastic parts surface coating processes. Owners and operators qualifying for this exemption should maintain documentation that cleaning related to the process or operation is regulated by a separate rule in Chapter 115. For example, a copy of the rule the process or operation is regulated under would be sufficient to demonstrate compliance with this exemption.

In response to comments on the proposed Division 6 industrial cleaning solvents rules, the commission is adopting new subsection (c) to exempt from this division a solvent cleaning operation if the conditions in adopted new paragraphs (1) and (2) are satisfied. Adopted new paragraph (1) requires the process that the solvent cleaning operation is associated with be subject to another division in this chapter. Adopted new paragraph (2) requires the VOC emissions from the solvent cleaning operation are controlled in accordance with an emission specification or control requirement of the division that the process is subject to. The commission acknowledges that not all Chapter 115 rules contain cleaning solvent requirements, but that owners and operators of some processes may consider the cleaning operations an integral step of the production process or may find it to be more efficient to control emissions from cleaning activities in accordance with the process control requirements or emissions specifications in other Chapter 115-process specific rules. Adopted new subsection (c) is intended to promote flexibility and reduce the compliance burden for affected sources. The commission expects that complying with requirements in other Chapter 115 rules is at least as effective as meeting the industrial cleaning solvents rule requirements. This exemption is consistent with the EPA's 2006 CTG recommendation to ensure that a particular cleaning activity is not subject to duplicative requirements.

Adopted new subsection (d) exempts the products and operations listed in paragraphs (1) - (17) from the VOC limits in §115.463(a). The EPA's 2006 Industrial Cleaning Solvents CTG relies on the BAAQMD Regulation 8, Rule 4, Sections 8-4-116 and 8-4-117 for its recommended exemptions. The products and operations exempt under these sections would not be subject to the 0.42 pound VOC per gallon of solution (lb VOC/gal solution) VOC content limit even if subject to BAAQMD Rule 4 through an exemption in another BAAQMD rule under Regulation 8. Under the commission's interpretation of the exemptions provided in the BAAQMD Regulation 8, Rule 4, it is presumed that there are technological feasibility issues with meeting the 0.42 lb VOC/gal solution limit or equivalent cleaning standards and therefore the content limit should not be applied to the products and operations specified in BAAQMD Regulation 8, Rule 4, Sections 8-4-116 and 8-4-117.

The products and operations exempted under adopted new paragraphs (1) - (17) include: electrical and electronic components; precision optics; numisimatic dies; resin mixing, molding, and application equipment; coating, ink, and adhesive mixing, molding, and application equipment; stripping of cured inks, cured adhesives, and cured coatings; research and development laboratories; medical device or pharmaceutical preparation operations; performance or quality assurance testing of coatings, inks, or adhesives; architectural coating manufacturing and application operations; magnet wire coating operations; semiconductor wafer fabrication; coating, ink, resin, and adhesive manufacturing; polyester resin operations; flexographic and rotogravure printing processes; screen printing operations; and digital printing operations.

As a result of comments received on the proposed rules, adopted new paragraph (13) has been modified to exempt resin manufacturing in addition to ink, coating, and adhesive manufacturing, from the VOC limits due to the technological feasibility issues associated with those limits. The proposed rules exempted ink, adhesive, and coating manufacturing and the commission expects that the same cleaning challenges associated with manufacturing these materials also exist for resin manufacturing. The commission presumes the EPA recommended excluding ink, adhesive, and coating manufacturing from the industrial cleaning solvents rule applicability because the general VOC limits for cleaning solutions prevents adequate cleaning, potentially leading to cross contamination of manufactured products and poor product quality resulting in an off-specification product that would need to be disposed of. Exempting resin manufacturing maintains consistency with the EPA's 2006 CTG guidance that the general recommendations may not apply to a particular situation based upon the circumstances of a specific source.

The commission adopts new subsection (e) to exempt cleaning solvents supplied in aerosol cans from the VOC limits in §115.463(c) if total use for the property is less than 160 fluid ounces per day. Adopted new subsection (e) incorporates the exemption in the SCAQMD Regulation XI, Rule 1171, Section (g)(4). The exemption will allow sites to use higher VOC content cleaning solvents in aerosol cans in limited quantities if necessary for situations where low-VOC cleaning solvents may not be as effective.

Section 115.463, Control Requirements

The commission adopts new §115.463, to implement the EPA's 2006 Industrial Cleaning Solvents recommendations for affected cleaning solvent operations in the DFW and HGB areas that the commission has determined to be RACT, unless specifically discussed in this preamble. Adopted new §115.463 has been reformatted from proposal as discussed in this portion of the Section by Section Discussion.

Adopted new subsection (a), proposed as paragraph (1), requires that the owner or operator shall limit the VOC content of cleaning solutions to either the limit in paragraph (1) or (2). Various compliance options are provided to give affected owners or operators the flexibility to choose the appropriate option for the solvent cleaning operations performed at the site. Adopted new paragraph (1), proposed as subparagraph (A), limits the VOC content to 0.42 lb VOC/gal solution, as applied. Adopted new paragraph (2), proposed as subparagraph (B), limits the com-

posite partial vapor pressure of the cleaning solution to 8.0 millimeters of mercury at 20 degrees Celsius (68 degrees Fahrenheit). Since proposal, the units in adopted new paragraph (2) have been revised to ensure units are used consistently throughout the Chapter 115 rules. The adopted change in non-substantive and is not intended to change the meaning of this requirement.

Adopted new subsection (b), proposed as paragraph (2), provides an alternative to subsection (a) by allowing the owner or operator to operate a vapor control system capable of achieving an overall control efficiency of at least 85% by mass. Adopted new subsection (b) requires that capture efficiency testing must be performed in accordance with the testing requirements in §115.465. The 85% overall control efficiency is the control level recommended by the CTG as an alternative to meeting the VOC content limits.

Adopted new subsection (c), proposed as paragraph (3), specifies the work practice procedures the owner or operator shall implement during the handling, storage, and disposal of cleaning solvents and shop towels. Adopted new paragraph (1), proposed as subparagraph (A), requires covering open containers and used applicators. Adopted new paragraph (2), proposed as subparagraph (B), requires minimizing air circulation around solvent cleaning operations. Adopted new paragraph (3), proposed as subparagraph (C), requires properly disposing of used solvent and shop towels. Adopted new paragraph (4), proposed as subparagraph (D), requires implementing equipment practices that minimize VOC emissions (e.g., maintaining cleaning equipment to repair solvent leaks).

Adopted new subsection (d), proposed as paragraph (4), specifies that a solvent cleaning operation that becomes subject to the provisions of subsection (a) by exceeding the exemption limits in §115.461 is subject to the provisions in subsection (a) even if throughput or emissions later fall below exemption limits unless emissions are maintained at or below the controlled emissions level achieved while complying with subsection (a) and one of the conditions in paragraphs (1) or (2) is met. The provision in adopted new subsection (d) is similar to the existing provision in §115.422(6), and the commission is adopting this requirement in the control requirements of the adopted new rule for industrial cleaning solvents. Adopted new paragraph (1), proposed as subparagraph (A), requires the project that caused throughput or emission rate to fall below the exemption limits in §115.461 to be authorized by any permit, permit amendment, standard permit, or permit by rule required by Chapters 106 or 116. If a permit by rule is available for the project, compliance with subsection (a) must be maintained for 30 days after the filing of documentation of compliance with that permit by rule. Adopted new paragraph (2), proposed as subparagraph (B), requires that if authorization by permit, permit amendment, standard permit, or permit by rule is not required for the project, the owner or operator shall provide the executive director 30 days notice of the project in writing.

Section 115.464, Alternate Control Requirements

Adopted new §115.464, indicates that for the owner or operator of a solvent cleaning operation subject to this division, alternate methods of demonstrating and documenting continuous compliance with the applicable control requirements or exemption criteria in this division that may be approved by the executive director in accordance with §115.910 if emission reductions are demonstrated to be substantially equivalent. This option is not a recommendation in the EPA's 2006 Industrial Cleaning Solvents CTG but is consistent with the flexibility afforded to owners and operators regulated under other Chapter 115 rules.

Section 115.465, Approved Test Methods and Testing Requirements

Adopted new §115.465, specifies the methods and testing requirements that the owner or operator shall use to demonstrate compliance with the control requirements in §115.463. The proposed rule allowed the owner or operator to exclude exempt solvents when determining compliance with the VOC content limit, when a test method inadvertently measured compounds that are exempt. However, this option was erroneously included in the proposed rule and has been removed in the adopted rule because the control requirements include all components of the cleaning solution when determining the VOC content.

Since proposal, adopted new paragraph (1) has been reformatted to accommodate additional test methods to demonstrate compliance with the VOC limits in §115.463(a). Adopted paragraph (1) requires compliance to be determined using one of the methods listed in adopted new subparagraphs (A) - (D). Adopted new subparagraph (A) lists Method 24 (40 CFR Part 60, Appendix A). Adopted new subparagraph (B) lists American Society for Testing and Materials Method D2879, Standard Test Method for Vapor Pressure-Temperature Relationship and Initial Decomposition Temperature of Liquids by Isoteniscope to demonstrate compliance with §115.463(a)(2). Adopted new subparagraph (C) lists using standard reference texts for the true vapor pressure of each VOC component to demonstrate compliance with §115.463(a)(2). Adopted new subparagraph (D) lists using analytical data from the cleaning solvent supplier or manufacturer's MSDS. Adopted new subparagraph (D) can be used as an alternative to the methods listed in adopted new subparagraphs (A) and (B), and in lieu of adopted subparagraph (C). Although the EPA's 2006 CTG does not recommend specific test methods to determine the VOC content or vapor pressure of cleaning solutions, the commission adopts to include the various procedures to provide owners and operators the opportunity to choose the most appropriate means to demonstrate compliance with the control requirements in §115.463(a), as an alternative to relying on the MSDS or in the cases where the MSDS information is not available. This same flexibility is afforded to sites affected by other Chapter 115 rules.

Adopted new paragraph (2) requires that the owner or operator subject to §115.463(b) measure the capture efficiency using applicable procedures outlined in 40 CFR §52.741, Subpart O, Appendix B (as amended through October 21, 1996 (61 FR 54559)). These procedures are: Procedure T - Criteria for and Verification of a Permanent or Temporary Total Enclosure; Procedure L - VOC Input; Procedure G.2 - Captured VOC Emissions (Dilution Technique); Procedure F.1 - Fugitive VOC Emissions from Temporary Enclosures; and Procedure F.2 - Fugitive VOC Emissions from Building Enclosures. These testing requirements are the same as those imposed specified in existing §115.425(4).

Adopted new subparagraph (A) provides two exemptions in clauses (i) and (ii) that may apply to capture efficiency testing requirements. The exemptions from capture efficiency testing provided in clauses (i) and (ii) are identical to the capture efficiency testing exemptions currently provided in the existing §115.425(a)(7)(A) and adopted to be included in adopted new §115.455. Adopted new clause (i) provides an exemption for sources with permanent total enclosure that meets the specifications of Procedure T, and all VOC is directed to a control

device. Adopted new clause (ii) provides an exemption if the source uses a control device designed to collect and recover VOC and the conditions in subclauses (I) and (II) are met.

Adopted new subparagraph (B) requires that the capture efficiency must be calculated using one of the four protocols referenced in clauses (i) - (iv). The adopted subparagraph additionally requires that any affected source must use one of these protocols, unless a suitable alternative protocol is approved by the executive director and the EPA. The capture efficiency testing protocols included in adopted new subparagraph (B) are the same as those currently required in §115.425(4)(B) in the current Chapter 115 rules for surface coating process, except for non-substantive revisions and formatting to the equations to conform to current rule formatting standards.

Adopted new clause (i) lists the protocol for the gas/gas method using a TTE. Additionally, the adopted clause states that the EPA specifications to determine whether a temporary enclosure is considered a TTE are given in Procedure T. The equation required for the gas/gas method using a TTE is also provided in clause (i) along with the description of the equation variables.

Adopted new clause (ii) lists the protocol for the liquid/gas method using TTE. Additionally, the adopted clause states that the EPA specifications to determine whether a temporary enclosure is considered a TTE are given in Procedure T. The equation required for the liquid/gas method using a TTE is also provided in clause (ii) along with the description of the equation variables.

Adopted new clause (iii) lists the protocol for the gas/gas method using the building or room enclosure where the affected source is located and in which the mass of VOC captured and delivered to a control device and the mass of fugitive VOC that escapes from the enclosure are measured while operating only the affected facility. The adopted clause requires that all fans and blowers in the building or room enclosure where the affected source is located must be operating as they would under normal production. The equation required for the gas/gas method using a building or room enclosure where the affected source is located is also provided in clause (iii) along with the description of the equation variables.

Adopted new clause (iv) lists the protocol for the liquid/gas method using a building or room enclosure where the affected source is located in which the mass of liquid VOC input to process and the mass of fugitive VOC that escapes from the enclosure are measured while operating only the affected facility. The adopted clause requires that all fans and blowers in the building or room enclosure where the affected source is located must be operated as they would under normal production. The equation required for the liquid/gas method using a building or room enclosure where the affected source is located is also provided in clause (iv) along with the description of the equation variables.

Adopted new subparagraph (C) requires the operating parameters selected for monitoring of the capture system for compliance with the requirements in §115.468(a) must be monitored and recorded during the initial capture efficiency testing and thereafter during facility operation. Adopted new subparagraph (C) indicates the executive director may require a new capture efficiency test if the operating parameter values change significantly from those recorded during the initial capture efficiency test. Adopted new subparagraph (C) ensures the operational parameters tested in the initial performance test are representative of those during normal operation.

Adopted new paragraph (3) lists the required methods used to determine compliance with the overall control efficiency option in adopted new §115.463(b). The methods listed in adopted new paragraph (3) are used to determine the destruction or removal efficiency of control devices, such as a thermal oxidizer, that are used to comply with §115.463(b). The methods listed in subparagraphs (A) - (D) include: Method 1 - 4 (40 CFR Part 60, Appendix A) for determining flow rate; Method 25 (40 CFR Part 60 Appendix A) for determining total gaseous nonmethane organic emissions as carbon; Methods 25A or 25B (40 CFR Part 60, Appendix A) for determining total gaseous organic concentrations using flame ionization or nondispersive infrared analysis; and the additional performance test procedures in 40 CFR §60.444 (as amended through October 17, 2000 (65 FR 61761)). To accommodate the changes made to adopted paragraph (4), this paragraph has been reformatted.

Proposed subparagraph (3)(E) has been re-located in adopted new paragraph (4) to clarify that minor modifications to all of the test methods in this section may be approved by the executive director. Adopted new paragraph (4) allows minor modifications to the test methods in paragraphs (1) - (3) to be approved by the executive director. This paragraph also allows the use of test methods other than those specified in paragraphs (1) - (3) if approved by the executive director and validated by 40 CFR Part 63, Appendix A, Method 301. Adopted new paragraph (4) also specifies that for purposes of this paragraph, substitute "executive director" each place that Method 301 references "administrator."

Section 115.468, Monitoring and Recordkeeping Requirements

The commission adopts new §115.468, to identify the monitoring and recordkeeping sufficient to demonstrate compliance with the requirements in this division.

Adopted new subsection (a) specifies that the monitoring requirements in this subsection apply to the owner or operator of solvent cleaning operations subject to this division that uses a vapor control system in accordance with §115.463(b). New subsection (a) requires that the owner or operator permanently install and maintain monitors to accurately measure and record operational parameters of all required control devices, as necessary, to ensure the proper functioning of those devices in accordance with design specifications, including the requirements in paragraphs (1) - (4). The monitoring requirements are not recommendations contained in the EPA's 2006 CTG document; these requirements are consistent with other Chapter 115 rules for control device monitoring.

Adopted new paragraph (1) requires continuous monitoring of the exhaust gas temperature immediately downstream of direct-flame incinerators or the gas temperature immediately upstream and downstream of any catalyst bed. Adopted new paragraph (2) requires monitoring of the total amount of VOC recovered by carbon adsorption or other solvent recovery systems during a calendar month. Adopted new paragraph (3) requires continuous monitoring of carbon adsorption bed exhaust. Adopted new paragraph (4) requires monitoring of appropriate operating parameters for vapor control systems other than those specified in subsection (a)(1) - (3).

Adopted new subsection (b) specifies that the recordkeeping requirements in this subsection apply to the owner or operator of solvent cleaning operations subject to this division. As a result

of revisions made to the recordkeeping requirements, proposed paragraphs (3) and (4) have been re-numbered to adopted paragraphs (4) and (5), respectively.

Adopted new paragraph (1) requires that the owner or operator maintain records of the testing data or MSDS, or documentation of the standard reference texts used to determine the true vapor pressure of each VOC component, in accordance with the requirements in §115.465(1). Adopted new paragraph (1) requires records of the concentration of all VOC used to prepare the cleaning solution and, if diluted prior to use, the proportions that each of these materials is used must be recorded. Adopted new paragraph (1) also requires records must be sufficient to demonstrate continuous compliance with the cleaning solution VOC content or composite partial vapor pressure limits in §115.463(a). Since proposal, this paragraph has been revised to ensure the recordkeeping requirements correspond to the revised testing requirements in §115.465(1). Sufficient documentation of the standard reference text must be kept so that a commission investigator is able to verify the vapor pressure in the source referenced. However, the commission does not intend for an affected owner or operator to photocopy any portion of the standard reference text, as the commission recognizes that this may be violation of copyright laws.

Adopted new paragraph (2) requires that the owner or operator of a solvent cleaning operation claiming an exemption in §115.461 maintain records sufficient to demonstrate continuous compliance with the applicable exemption criteria. For example, maintaining records of solvent usage may be sufficient to demonstrate continuous compliance with the exemption in §115.461(a).

Adopted new paragraph (3) requires the owner or operator claiming exemption from this division in accordance with §115.461(c) to maintain records indicating the applicable division the process or operation is subject to as specified in §115.461(c)(1) and the control requirements or emission specifications used to control the VOC emissions from the solvent cleaning operation as specified in §115.461(c)(2). In addition, adopted paragraph (3) requires the owner or operator to also comply with the applicable recordkeeping requirements from the division the process is subject to sufficient to demonstrate that the VOC emissions from the solvent cleaning operation are controlled in accordance with the control requirements or emission specifications of that division. The adopted recordkeeping requirement accommodates the new exemption in §115.461(c) incorporated in response to comments. These requirements ensure owners and operators have adequate documentation for commission investigators to verify exemption.

Adopted new paragraph (4) requires that the owner or operator maintain records of any testing conducted at an affected site in accordance with the provisions specified in §115.465(2) - (4). At proposal, adopted new paragraph (4) inadvertently limited recordkeeping of testing conducted at an affected site in accordance with §115.465(2) and (3); however, records must be kept in accordance with §115.465(4) as well. Therefore, adopted new paragraph (4) has been revised to reflect the requirement for records to be maintained in accordance with testing in §115.465(2) - (4).

Adopted new paragraph (5) requires that records must be maintained a minimum of two years and be made available upon request to authorized representatives of the executive director, the EPA, or any local air pollution agency with jurisdiction. The adopted record retention period is consistent with other Chapter 115 rules.

Section 115.469, Compliance Schedules

The commission adopts new §115.469, to list the compliance schedule for affected solvent cleaning operations in the DFW and HGB nonattainment areas subject to this division.

The commission adopts new subsection (a) requiring the owner or operator of a solvent cleaning operation subject to this division to comply with the requirements in this division no later than March 1, 2013. The March 1, 2013, compliance date provides affected owners and operators approximately a year and a half to make any necessary changes and ensures that any VOC reductions achieved by the adopted rule will occur prior to the ozone season in the DFW area.

The commission also adopts new subsection (b) to require the owner or operator of a solvent cleaning operation that becomes subject to the division on or after March 1, 2013, to comply with the requirements in the division no later than 60 days after becoming subject.

SUBCHAPTER E, SOLVENT-USING PROCESSES

DIVISION 7, MISCELLANEOUS INDUSTRIAL ADHESIVES

Section 115.470, Applicability and Definitions

The commission adopts new §115.470 to clearly identify the sites affected by the adopted rule requirements and to define the terms relevant to the materials used by and processes conducted at those affected sites. Since proposal, revisions have been made to the rule language to ensure the terminology referring to the materials addressed in this division is used consistently and accurately throughout the division and to improve readability of the rule requirements. Specifically, where the rule requirements reference adhesives as the only type of material subject to this division has been updated to refer to adhesives and adhesive primers. Accordingly, where the rule requirements refer to adhesive or adhesive primer application processes has been updated to application process, except when the application process is specific to only one of the materials, because this is the term defined in §115.470. Additionally, where a requirement referred to *exempt solvents* or *exempt compounds,* the commission has revised to *exempt solvent* for consistency with the terminology used throughout this division and in other divisions in Subchapter E. These changes are not specifically discussed where they occur in the adopted new Division 7 rules.

The commission adopts new subsection (a) to specify the requirements in the division apply to the owner or operator of a manufacturing operation using adhesives or adhesive primers for any application process in the DFW and HGB areas beginning March 1, 2013. As discussed elsewhere in this preamble, in response to comments on this rulemaking, the commission revised subsection (a) from proposal to clarify the rule applicability. In the final rule for the 2008 Miscellaneous Industrial Adhesives CTG (73 FR 58489), the EPA clearly states that the CTG recommendations are intended to only apply to the FCAA, §183(e) miscellaneous industrial adhesives product category, which only includes adhesives used at industrial manufacturing operations. In the final rule, the EPA also clearly states that the 2008 Miscellaneous Industrial Adhesives CTG recommendations do not include field applied adhesives (e.g., plastic solvent welding cements used by plumbers to join plumbing pipes on construction jobs in the field). Adopted subsection (a) clarifies the rules in Division 7 apply to manufacturing operations in the DFW and HGB areas that use adhesives for any of the adhesive application processes specified in the control requirements in §115.473(a); ad-

hesives applied in the field (e.g., adhesives applied at construction jobs in the field) are not subject to this division. For purposes of this rule, a manufacturing operation refers to a manufacturer that uses adhesives to join surfaces in the assembly or construction of a product involving the application processes listed in §115.473(a). The rule applicability in subsection (a) more accurately reflects the sources affected by the EPA's 2008 Miscellaneous Industrial Adhesives CTG.

Adopted new subsection (b) indicates that unless the context clearly indicates otherwise or unless specifically defined in the Texas Clean Air Act (Texas Health and Safety Code, Chapter 382) or in §§3.2, 101.1, or 115.10, the terms used in this division have the meanings commonly used in the field of air pollution control. Adopted new subsection (b) also lists the specific definitions that apply in adopted new Division 7. Unless specifically discussed, the definitions incorporate the EPA's 2008 CTG definition recommendations.

As a result of new definitions incorporated into adopted new subsection (b), the proposed definitions have been renumbered. The definitions included in adopted new paragraphs (1) - (48) are: *Acrylonitrile-butadiene-styrene or ABS welding; Adhesive; Adhesive primer; Aerosol adhesive or adhesive primer; Aerospace component; Application process; Application system; Ceramic tile installation adhesive; Chlorinated polyvinyl chloride plastic or CPVC plastic welding; Chlorinated polyvinyl chloride welding or CPVC welding; Contact adhesive; Cove base; Cove base installation adhesive; Cyanoacrylate adhesive; Daily weighted average; Ethylene Propylenediene Monomer (EPDM) roof membrane; Flexible vinyl; Indoor floor covering installation adhesive; Laminate; Metal to urethane/rubber molding or casting adhesive; Motor vehicle adhesive; Motor vehicle glass-bonding primer; Motor vehicle weatherstrip adhesive; Multipurpose construction adhesive; Outdoor floor covering installation adhesive; Panel installation; Perimeter bonded sheet flooring installation; Plastic solvent welding adhesive; Plastic solvent welding adhesive primer; Plastic foam; Plastics; Polyvinyl chloride plastic or PVC plastic; Polyvinyl chloride welding adhesive or PVC welding adhesive; Porous material; Pounds of Volatile Organic Compounds (VOC) per gallon of adhesive (minus water and exempt solvent); Pounds of Volatile Organic Compounds (VOC) per gallon of solids; Reinforced plastic composite; Rubber; Sheet rubber lining installation; Single-ply roof membrane; Single-ply roof membrane installation and repair adhesive; Single-ply roof membrane adhesive primer; Structural glazing; Subfloor installation; Thin metal laminating adhesive; Tire repair; Undersea-based weapon system components; and Waterproof resorcinol glue.*

The definition of *Aerospace component* in adopted new paragraph (5) is any fabricated part, processed part, assembly of parts, or completed unit of any aircraft including but not limited to airplanes, helicopters, missiles, rockets, and space vehicles. Adopted new paragraph (5) indicates that this definition includes electronic components to acknowledge the differences between this definition and the definition of *Aerospace component* in Division 2. The inclusion of electronic components is necessary to accurately reflect the sources affected by the EPA's 2008 Miscellaneous Industrial Adhesives CTG.

The definition of *Application process* was inadvertently left out at proposal. The commission has added adopted new paragraph (6) to define *Application process* as a series of one or more application systems and any associated drying area or oven where an adhesive or adhesive primer is applied, dried, or cured. An application process ends at the point where the adhesive or adhesive primer is dried or cured, or prior to any subsequent application of a different adhesive. Adopted new paragraph (6) indicates that it is not necessary for an application process to have an oven or flash-off area. This definition is adopted directly from the EPA's 2008 CTG description of an application process.

The definition of *Application system* in adopted new paragraph (7) is devices or equipment designed for the purpose of applying an adhesive or adhesive primer to a surface and is based on the existing definition of *Coating application system* in §115.420(a)(3). Adopted new paragraph (7) indicates the devices may include, but are not be limited to, brushes, sprayers, flow coaters, dip tanks, rollers, hand application, and extrusion coaters. Adopted new paragraph (7) retains the definition in §115.420(a)(3) with changes to specify only those application systems that would be used to apply adhesives.

The definition of *Daily weighted average* in adopted new paragraph (15) is the total weight of VOC emissions from all adhesives or adhesive primers subject to the same VOC content limit in §115.473(a), divided by the total volume of those adhesives or adhesive primers (minus water and exempt solvent) delivered to the application system each day. Adopted new paragraph (15) indicates that adhesives or adhesive primers subject to different VOC limits in §115.473(a) must not be combined for purposes of calculating the daily weighted average. In addition, determination of compliance is based on each application process. The adopted definition is consistent with the use of daily weighted average in other Chapter 115 rules and is the averaging period suggested in the EPA's 2008 CTG.

The definition of *Porous material* in adopted new paragraph (34) is a substance that has tiny openings, often microscopic, in which fluids may be absorbed or discharged, including, but not limited to, paper and corrugated paperboard. This definition is adopted as recommended by the CTG and includes the clarification in the CTG that wood is not considered a porous material for the purposes of the definition.

Adopted new paragraph (35) defines *Pounds of volatile organic compounds (VOC) per gallon of adhesive (minus water and exempt solvent)* as the basis for content limits for application processes. This definition was not included in the proposed rule; however, the commission adopts this definition as new paragraph (35) to provide a method for affected owners and operators to determine the amount of VOC in the adhesive or adhesive primer mixture. The definition and equation in adopted new paragraph (35) are the same as existing §115.420(a)(9) with non-substantive changes, including substituting the word *adhesive* with *coating* and *emission* with *content.* The adopted definition in paragraph (35) includes the equation to calculate pounds of VOC per gallon of adhesive or adhesive primer (minus water and exempt solvent) using values obtained from testing data or analytical data from the MSDS. Explanations of the variables follow the equation.

Adopted new paragraph (36) defines *Pounds of volatile organic compounds (VOC) per gallon of solids* as the basis for content limits for application processes. This definition was not included in the proposed rule; however, the commission adopts this definition as new paragraph (36) to provide a method for affected owners and operators to determine the amount of VOC per adhesive or adhesive primer solids. The definition and equation in adopted new paragraph (36) are the same as existing §115.420(a)(10) with non-substantive changes, including substituting the word *adhesive* with *coating* and *emission* with *content.* The adopted

definition in paragraph (36) includes the equation to calculate pounds of VOC per gallon of solids using values obtained from testing data or analytical data from the MSDS. Explanations of the variables follow the equation.

Since proposal, the commission has added a definition in adopted new paragraph (47) for undersea-based weapons system components to clearly identify the substrates that are intended to be exempt under the corresponding exemption provided under §115.471(b)(2). Adopted new paragraph (47) defines *Undersea-based weapons system components* as the fabrication of parts, assembly of parts or completed units of any portion of a missile launching system used on undersea ships. This definition is adopted directly from the Ozone Transport Commission's model rule for Adhesives and Sealants, the basis for the EPA's 2008 CTG development.

Section 115.471, Exemptions

Adopted new §115.471, lists the exemptions recommended in the EPA's 2007 Miscellaneous Industrial Adhesives CTG. Adopted new §115.471 establishes consistency with other Chapter 115 rules and makes the rules easier to read by clearly identifying the adhesive and adhesive primer application processes that are exempt from all or portions of the subsequent rule requirements.

Adopted new subsection (a) exempts the owner or operator of adhesive application processes located on a property with actual combined emissions of VOC less than 3.0 tons per calendar year, when uncontrolled, from all adhesives, adhesive primers, and solvents used during related cleaning operations, from the requirements of this division, except as specified in §115.478(b)(2). The commission agrees with the EPA's determination that requiring these small sources to comply with the control requirements in §115.473 is not economically feasible and does not constitute RACT.

In order to facilitate compliance with these rules, additional language has been incorporated into adopted new subsection (a) to exclude from the VOC emissions calculation, adhesives that are exempt from this division. At proposal, there was no description of the VOC emissions required to be included in the calculation to determine whether the 3.0 tpy threshold is met or exceeded. Therefore, adopted new subsection (a) clarifies that the adhesives qualifying for exemption under subsections (b) and (c) are not included in this calculation because complying with the rule requirements are either technologically infeasible for these activities or the activities are already controlled under another division in Chapter 115.

Adopted new subsection (b) exempts the application processes in paragraphs (1) - (7) from the VOC limit requirements in §115.473(a) and the application system requirements in §115.473(b). The processes in paragraphs (1) - (7) are exempt from the adopted VOC content limits, application system requirements, and vapor control system requirements but remain affected by the adhesive-related and cleaning material work practices standards. At proposal, the exemption from the application system requirements in §115.473(b) was inadvertently left out. The adopted inclusion of this exemption clarifies the original intent of adopted new subsection (b) and maintains consistency with the recommendations in the EPA's 2008 CTG. Adopted paragraph (1) exempts adhesives or adhesive primers being tested or evaluated in any research and development, quality assurance, or analytical laboratory. Adopted paragraph (2) exempts adhesives or adhesive primers used in the assembly, repair, or manufacture of aerospace or undersea-based weapon system components. A minor non-substantive revision to proposed paragraph (2) has been made for consistency with the terminology used in the adopted new definition in §115.470(b)(48). Adopted paragraph (3) exempts adhesives or adhesive primers used in medical equipment manufacturing operations. Adopted paragraph (4) exempts cyanoacrylate adhesive application processes. Adopted paragraph (5) exempts aerosol adhesive and aerosol adhesive primer application processes. Adopted paragraph (6) exempts processes using polyester-bonding putties to assemble fiberglass parts as fiberglass boat manufacturing properties. Adopted paragraph (7) exempts processes using adhesives and adhesive primers that are supplied to the manufacturer in containers with a net volume of 16 ounces or less, or a net weight of 1.0 pound or less.

Adopted new subsection (c) exempts the owner or operator of any process or operation subject to another division in Chapter 115 that specifies adhesives or adhesive primer VOC content limits used during the application processes listed in the tables in adopted new §115.473(a) from the requirements in this division. The commission adopts this exemption to ensure adhesive or adhesive primer use specified in §115.473(a) that is associated with processes and operations in another division in Chapter 115 are not subject to duplicative control requirements.

Section 115.473, Control Requirements

Adopted new §115.473, incorporates the EPA's 2008 Miscellaneous Industrial Adhesives CTG recommendations for affected application processes in the DFW and HGB areas that the commission has determined to be RACT, except as specifically discussed.

Adopted new subsection (a) requires the owner or operator to limit VOC emissions from all adhesives and adhesive primers used during the specified application processes to the VOC content limits (minus water and exempt solvent) in the tables in adopted new subsection (a), as delivered to the application system. Adopted new subsection (a) indicates that these limits are based on the daily weighted average of all adhesives or adhesive primers delivered to the application system each day.

The tables in adopted subsection (a) contain the adhesive VOC content limits on a pound of VOC per gallon of adhesive basis (water and exempt solvent) for all of the application processes regulated by this division. If an adhesive or adhesive primer is used to bond dissimilar substrates together, then the applicable substrate category with the least stringent VOC content limit applies. Table 1 in §115.473(a) contains the adhesive VOC content limits for general adhesive application processes. Table 2 in §115.473(a) contains the adhesive VOC content limits for specialty adhesive application processes. Table 3 in §115.473(a) contains the adhesive VOC content limits for adhesive primer application processes.

Adopted new paragraph (1) requires the VOC content limits in subsection (a) to be met using one of the options provided in subparagraph (A) or (B). Adopted new subparagraph (A) allows the application of low-VOC adhesives to comply with the VOC content limits in new §115.473(a). Adopted new subparagraph (B) allows the application of adhesives in combination with the operation of a vapor control system to comply with the VOC content limits in adopted new §115.473(a). Various compliance options are provided to give affected owners or operators the flexibility to choose the appropriate option for the adhesive application processes performed at the site. In response to comments received

on requirements similar to this paragraph, subparagraph (B) has been revised to replace the term *low-VOC adhesives* with *adhesives or adhesive primers.* This change clarifies that the VOC content of the adhesives or adhesive primers used do not have to meet the VOC limits in subsection (a); instead, the combination of the VOC from the adhesives or adhesive primers used and the vapor control system efficiency must reduce the VOC emissions generated to less than or equal to the VOC emission limits in subsection (a). This change is intended to clarify the control option in subparagraph (B) and is not intended to alter the meaning of the requirement. Non-substantive changes have been made to the proposed language to ensure consistency with other similar requirements in this subchapter.

Adopted new paragraph (2) requires the owner or operator to operate a vapor control system capable of achieving an overall control efficiency of 85% of the VOC emissions from adhesives and adhesive primers if the testing requirements in §115.475(3) and (4) are satisfied, as an alternative to demonstrating compliance with the VOC content limits in adopted new subsection (a) through the options provided in paragraph (1). This alternative provides owners and operators the operational flexibility to use means of controlling the VOC generated from adhesives and adhesive primers other than by reducing the VOC content of the materials applied, especially when the use of high-VOC adhesives and adhesive primers is necessary or desirable for product quality. Additionally, compliance with this option does not require the use of the specified application systems listed in subsection (b).

The commission adopts new paragraph (3) to require an affected owner or operator choosing to comply with the option to apply adhesives in combination with a vapor control system to meet the VOC content limits in subsection (a), to use the equations provided. This adopted new control requirement is necessary to demonstrate that the overall control efficiency of the vapor control system, when used in conjunction with adhesives, is sufficient to meet the VOC content limits in subsection (a). Adopted new paragraph (3) contains two equations; one to determine the pounds VOC per gallon of solids and one to determine the overall control efficiency needed to meet the VOC content limits in subsection (a). Since proposal, adopted new paragraph (3) has been revised to update references and the variable descriptions and to establish consistency with the terminology used throughout this section. Specifically, as discussed elsewhere in the Section by Section Discussion portion of this preamble, paragraph (3) has been revised to replace the term *low-VOC coatings* with *adhesives or adhesive primers.* The instances where proposed paragraph (3) and the equations referenced *coatings,* the commission has replaced with *adhesives.* One of the variable descriptions for the first equation incorrectly referenced §115.471 and has been corrected to reference §115.473(a). One of the equation variables referenced *on the coating line* and has been corrected to *for each application process.* Additionally, one of the equation variables has been revised for clarification to direct the owner or operator to base the calculation on either the daily weighted average of VOC emissions or the maximum VOC emissions. These adopted changes are not intended to affect the usability of the equations. Adopted new paragraph (3) also requires control device and capture efficiency testing to be performed in accordance with the testing requirements in §115.475(3) and (4).

Adopted new subsection (b) requires the owner or operator of any application process subject to this division shall not apply adhesives or adhesive primers unless one of the application systems in paragraphs (1) - (8) is used. The application systems are required for use in combination with the compliance options specified in subsection (a)(1). Adopted new paragraph (1) lists electrostatic spray. Adopted new paragraph (2) lists spray. Adopted new paragraph (3) lists flow coat. Adopted new paragraph (4) lists roll coat or hand application, including non-spray application methods similar to hand or mechanically powered caulking gun, brush, or direct hand application. Adopted new paragraph (5) lists dip coat. Adopted new paragraph (6) lists airless spray. Adopted new paragraph (7) lists air-assisted airless spray. Adopted new paragraph (8) lists the acceptable use of other adhesive application systems capable of achieving a transfer efficiency equivalent to or better than that achieved by HVLP spray. Adopted new paragraph (8) states that for the purpose of this requirement, the transfer efficiency of HVLP spray is assumed to be 65%.

Adopted new subsection (c) requires the owner or operator of each application process subject to this division to implement the work practice procedures contained in paragraphs (1) and (2). The work practices aid in reducing VOC emissions generated from application processes and materials consumed during associated cleaning activities.

Adopted new paragraph (1) specifies the work practices the owner or operator shall implement for the storage, mixing, and handling of adhesives, adhesive primers, thinners, and adhesive-related waste materials. Adopted new subparagraph (A) requires storage of all VOC-containing adhesives, adhesive primers, and process-related waste materials in closed containers. Adopted new subparagraph (B) ensures that mixing and storage containers used for VOC-containing adhesives, adhesive primers, and process-related waste materials are kept closed at all times. Adopted new subparagraph (C) requires minimization of spills of VOC-containing adhesives, adhesive primers, and process-related waste materials. Adopted subparagraph (D) requires that VOC-containing adhesives, adhesive primers, and process-related waste materials be conveyed from one location to another in closed containers or pipes.

Adopted new paragraph (2) specifies the work practices the owner or operator shall implement for the storage, mixing, and handling of all cleaning materials containing VOC. Any cleaning activity conducted during an adhesive application process, including surface preparation, constitutes cleaning materials and is subject to these work practices. Adopted new subparagraph (A) requires storage of all VOC-containing cleaning materials and used shop towels in closed containers. Adopted new subparagraph (B) ensures that storage containers used for VOC-containing cleaning materials are kept closed at all times except when depositing or removing these materials. Adopted new subparagraph (C) requires minimization of spills of VOC-containing cleaning materials. Adopted new subparagraph (D) requires that VOC-containing cleaning materials be conveyed from one location to another in closed containers or pipes. Adopted new subparagraph (E) requires minimization of VOC emissions from the cleaning of application, storage, mixing, and conveying equipment by ensuring that equipment cleaning is performed without atomizing the cleaning solvent and all spent solvent is captured in closed containers.

Adopted new subsection (d) specifies that an application process that becomes subject to the provisions of §115.473(a) by exceeding the exemption limits in §115.471 is subject to the provisions in §115.473(a) even if throughput or emissions later fall below exemption limits unless emissions are maintained at or be-

low the controlled emissions level achieved while complying with §115.473(a) and one of the conditions in paragraph (1) or (2) is met. This requirement is not a CTG recommendation. Adopted new subsection (d) is consistent with other Chapter 115 rules.

Adopted new paragraph (1) requires the project that caused a throughput or emission rate to fall below the exemption limits in §115.471 to be authorized by a permit, permit amendment, standard permit, or permit by rule required by Chapters 106 or 116. Adopted new paragraph (1) requires if a permit by rule is available for the project, compliance with §115.473(a) must be maintained for 30 days after the filing of documentation of compliance with that permit by rule. Adopted new paragraph (2) requires if authorization by permit, permit amendment, standard permit, or permit by rule is not required for the project, the owner or operator shall provide the executive director 30 days notice of the project in writing.

Section 115.474, Alternate Control Requirements

The commission adopts new §115.474, to provide for the owner or operator of an application process subject to this division, alternate methods of demonstrating and documenting continuous compliance with the applicable control requirements or exemption criteria in this division may be approved by the executive director in accordance with §115.910 if emission reductions are demonstrated to be substantially equivalent. This option is not a recommendation in the 2008 Miscellaneous Industrial Adhesive CTG but is consistent with the flexibility afforded to owners and operators regulated under other Chapter 115 rules.

Section 115.475, Approved Test Methods and Testing Requirements

The commission adopts new §115.475, to identify the test methods approved to determine compliance with the control requirements in this division. Adopted new §115.475 requires that the owner or operator demonstrate compliance with the VOC content limits in §115.473(a) by applying the test methods in adopted new §115.475. Adopted new §115.475 allows the owner or operator to exclude exempt solvent when determining compliance with a VOC content limit where a test method inadvertently measures compounds that are exempt solvent. The commission adopts this provision because compliance with the VOC content limits is based on the VOC concentration of an adhesive considering the contents other than water and exempt solvent. Adopted §115.475 provides, as an alternative to the test methods in this section, the VOC content of an adhesive may be determined by using analytical data from the MSDS.

Adopted new paragraph (1) requires that except for reactive adhesives, compliance with the VOC content limits in §115.473(a) must be determined using Method 24 (40 CFR Part 60, Appendix A). Adopted new paragraph (2) requires that compliance with the VOC content limits for reactive adhesives in §115.473(a) must be determined using 40 CFR Part 63, Subpart PPPP, Appendix A (as amended through April 24, 2007 (72 FR 20237)).

Adopted new paragraph (3) requires that the owner or operator of an adhesive application process subject to §115.473(a)(2) shall measure the capture efficiency using applicable procedures outlined in 40 CFR §52.741, Subpart O, Appendix B (as amended through October 21, 1996 (61 FR 54559)). These procedures are: Procedure T - Criteria for and Verification of a Permanent or Temporary Total Enclosure; Procedure L - VOC Input; Procedure G.2 - Captured VOC Emissions (Dilution Technique); Procedure F.1 - Fugitive VOC Emissions from Temporary Enclosures; and Procedure F.2 - Fugitive VOC Emissions from Building Enclosures.

Adopted new subparagraph (A) provides two exemptions in clauses (i) and (ii) that may apply to capture efficiency testing requirements. The exemptions from capture efficiency testing provided in clauses (i) and (ii) are identical to the capture efficiency testing exemptions currently provided in the existing §115.425(a)(7)(A) and adopted to be included in adopted new §115.475. Adopted new clause (i) provides an exemption for sources with permanent total enclosure that meets the specifications of Procedure T and all VOC is directed to a control device. Adopted new clause (ii) provides an exemption if the source uses a control device designed to collect and recover VOC and the conditions in subclauses (I) and (II) are met.

Adopted new subparagraph (B) requires that the capture efficiency must be calculated using one of the protocols referenced. The adopted subparagraph additionally requires that any affected source must use one of these protocols, unless a suitable alternative protocol is approved by the executive director and the EPA. The capture efficiency testing protocols included in adopted new subparagraph (B) are the same as those currently required in §115.425(a)(7)(B) except for non-substantive revisions and formatting to the equations to conform to current rule formatting standards.

Adopted new clause (i) lists the protocol for the gas/gas method using TTE. Additionally, the adopted clause requires the EPA specifications to determine whether a temporary enclosure is considered a TTE are given in Procedure T. The equation required for the gas/gas method using a TTE is also provided in clause (i) with the definitions for the equation variables.

Adopted new clause (ii) lists the protocol for the liquid/gas method using TTE. Additionally, the adopted clause requires the EPA specifications to determine whether a temporary enclosure is considered a TTE are given in Procedure T. The equation required for the liquid/gas method using a TTE is also provided in clause (ii) with the definitions for the equation variables.

Adopted new clause (iii) lists the protocol for the gas/gas method using the building or room enclosure in which the affected source is located and in which the mass of VOC captured and delivered to a control device and the mass of fugitive VOC that escapes from the enclosure are measured while operating only the affected facility. The adopted clause requires that all fans and blowers in the building or room enclosure in which the affected source is located must be operating as they would under normal production. The equation required for the gas/gas method using a building or room enclosure in which the affected source is located is also provided in clause (iii) with the definitions for the equation variables.

Adopted new clause (iv) lists the protocol for the liquid/gas method using a building or room enclosure in which the affected source is located in which the mass of liquid VOC input to process and the mass of fugitive VOC that escapes from the enclosure are measured while operating only the affected facility. The adopted clause requires that all fans and blowers in the building or room enclosure in which the affected source is located must be operated as they would under normal production. The equation required for the liquid/gas method using a building or room enclosure in which the affected source is located is also provided in clause (iv) with the definitions for the equation variables.

Adopted new subparagraph (C) requires the operating parameters selected for monitoring of the capture system for compliance with the requirements in §115.478(a) must be monitored and recorded during the initial capture efficiency testing and thereafter during facility operation. Adopted new subparagraph (C) indicates the executive director may require a new capture efficiency test if the operating parameter values change significantly from those recorded during the initial capture efficiency test. Adopted new subparagraph (C) ensures the operational parameters tested in the initial performance test are representative of those during normal operation.

Adopted new paragraph (4) lists the required methods used to determine compliance with the overall control efficiency option in new §115.473(a)(2). The methods listed in adopted new paragraph (4) are used to determine the destruction or removal efficiency of control devices, such as a thermal oxidizer, that are used to comply with §115.473(a)(2). The methods listed in subparagraphs (A) - (D) include: Methods 1 - 4 (40 CFR Part 60, Appendix A) for determining flow rate; Method 25 (40 CFR Part 60 Appendix A) for determining total gaseous nonmethane organic emissions as carbon; Methods 25A or 25B (40 CFR Part 60, Appendix A) for determining total gaseous organic concentrations using flame ionization or nondispersive infrared analysis; and the additional performance test procedures in 40 CFR §60.444 (as amended through October 17, 2000 (65 FR 61761)).

Proposed subparagraph (4)(E) has been re-located in adopted new paragraph (5) to clarify that minor modifications to all of the test methods in this section may be approved by the executive director. Adopted new paragraph (5) allows test methods other than those specified in paragraphs (1) - (4) if approved by the executive director and validated by 40 CFR Part 63, Appendix A, Method 301. Adopted new paragraph (5) also specifies that for purposes of this paragraph, substitute "executive director" each place that Method 301 references "administrator."

Section 115.478, Monitoring and Recordkeeping Requirements

The commission adopts new §115.478, which specifies the monitoring and recordkeeping requirements sufficient to demonstrate compliance with this division.

Adopted new subsection (a) specifies that the monitoring requirements in subsection (a) apply to the owner or operator of an application process subject to this division that uses a vapor control system in accordance with §115.473(a)(2). Adopted new subsection (a) specifies that the owner or operator shall install and maintain monitors to accurately measure and record operational parameters of all required control devices, as necessary, to ensure the proper functioning of those devices in accordance with design specifications, including the requirements in paragraphs (1) - (4). The adopted control device monitoring requirements are consistent with those in other Chapter 115 rules, and the commission expects that these requirements are sufficient to ensure proper functioning of the equipment.

Adopted new paragraph (1) requires continuous monitoring of the exhaust gas temperature immediately downstream of direct-flame incinerators or the gas temperature immediately upstream and downstream of any catalyst bed. Adopted new paragraph (2) requires the total amount of VOC recovered by carbon adsorption or other solvent recovery systems during a calendar month. Adopted new paragraph (3) requires continuous monitoring of carbon adsorption bed exhaust. Adopted new paragraph (4) requires appropriate operating parameters for capture systems and control devices other than those specified in paragraphs (1) - (3).

Adopted new subsection (b) specifies that the recordkeeping requirements in paragraphs (1) - (4) apply to the owner or operator of an application process subject to this division. Adopted new paragraph (1) requires that the owner or operator shall maintain records of the testing data or the MSDS, in accordance with the requirements in §115.475(1). Adopted new paragraph (1) also requires that records must be sufficient to demonstrate continuous compliance with the VOC limits in §115.473(a). Adopted new paragraph (2) requires that the owner or operator of an application process claiming an exemption in §115.473 shall maintain records sufficient to demonstrate continuous compliance with the applicable exemption criteria. For example, maintaining records of adhesive and solvent usage may be sufficient to demonstrate continuous compliance with the exemption in §115.471(a). Adopted new paragraph (3) requires that the owner or operator shall maintain records of any testing conducted at an affected site in accordance with the provisions specified in §115.475(3). Adopted new paragraph (4) requires that records must be maintained a minimum of two years and be made available upon request to authorized representatives of the executive director, the EPA, or any local air pollution agency with jurisdiction. The adopted record retention period is consistent with other Chapter 115 rules.

Section 115.479, Compliance Schedules

The commission adopts new §115.479, to list the compliance schedule for affected application processes in the DFW and HGB nonattainment areas subject to this division.

The commission adopts new subsection (a) requiring the owner or operator of an application process subject to this division to comply with the requirements in this division no later than March 1, 2013. The March 1, 2013, compliance date provides affected owners and operators approximately a year and a half to make any necessary changes and ensures that any VOC reductions achieved by the adopted rule will occur prior to the ozone season in the DFW area.

The commission also adopts new subsection (b) to require the owner or operator of an application process that becomes subject to this division on or after March 1, 2013, to comply with the requirements in this division no later than 60 days after becoming subject.

Final Draft Regulatory Impact Analysis

The commission reviewed the adopted rulemaking in light of the regulatory impact analysis requirements of the Texas Government Code, §2001.0225, and determined that the adopted rulemaking meets the definition of a "major environmental rule" as defined in that statute. A "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 rulemaking does not, however, meet any of the four applicability criteria for requiring a regulatory impact analysis for a major environmental rule, which are listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225, applies only to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically

required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

The adopted rules implement the EPA's RACT recommendations for sources of VOC emissions for sources of VOC emissions in the DFW eight-hour ozone nonattainment area and the HGB eight-hour ozone nonattainment area as required by the FCAA, §172(c)(1), except for EPA recommendations that would be less stringent than the current requirements of Chapter 115 for these source categories. FCAA, §172(c)(1) requires the SIP for nonattainment areas to include reasonably available control measures, including RACT, for sources of pollutants identified by the EPA as required by FCAA, §183(e). FCAA, §182(b)(2) provides that for certain nonattainment areas, states must revise their SIP to include RACT for sources of VOC emissions covered by a CTG document issued after November 15, 1990, and prior to the area's date of attainment. The EPA published CTG documents in 2006 for Industrial Cleaning Solvents (EPA 453/R-06-001) and Flexible Package Printing (EPA 453/R-06-003); in 2007 for Paper, Film, and Foil Coatings (EPA 453/R-07-003), Large Appliance Coatings (EPA 453/R-07-004), and Metal Furniture Coatings (EPA 453/R-07-005); and in 2008 for Miscellaneous Metal and Plastic Parts (EPA-453/R-08-003), Miscellaneous Industrial Adhesives (EPA-453/R-08-005), and Automobile and Light-Duty Truck Assembly Coatings (EPA-453/R-08-006). Specifically, the adopted rules will limit the VOC content of coatings and solvents used by affected industrial sites in the DFW and HGB eight-hour ozone nonattainment areas for the following seven CTG emission source categories: flexible package printing; industrial cleaning solvents; large appliance coatings; metal furniture coatings; paper, film, and foil coatings; miscellaneous industrial adhesives; and miscellaneous metal and plastic parts coatings. The adopted rules will also limit the VOC content of coatings and solvents used by affected sites in the DFW area for the automobile and light-duty truck assembly coating CTG emission source category. To further reduce VOC emissions, the adopted rules will also implement work practice standards for coating-related activities and solvent cleaning operations.

The adopted rulemaking implements requirements of 42 USC, §7410, which requires states to adopt a SIP that provides for the implementation, maintenance, and enforcement of the NAAQS in each air quality control region of the state. While 42 USC, §7410 generally does not require specific programs, methods, or reductions in order to meet the standard, the SIP must include enforceable emission limitations and other control measures, means or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance as may be necessary or appropriate to meet the applicable requirements of this chapter (42 USC, Chapter 85, Air Pollution Prevention and Control). The provisions of the FCAA recognize that states are in the best position to determine what programs and controls are necessary or appropriate in order to meet the NAAQS. This flexibility allows states, affected industry, and the public, to collaborate on the best methods for attaining the NAAQS for the specific regions in the state. Even though the FCAA allows states to develop their own programs, this flexibility does not relieve a state from developing a program that meets the requirements of 42 USC, §7410. States are not free to ignore the requirements of 42 USC, §7410, and must develop programs to assure that their contributions to nonattainment areas are reduced so that these areas can be brought into attainment on schedule. Additionally, states have further obligations under FCAA, §172(c)(1) and §182(b)(2) to provide for RACT in nonattainment areas, such as HGB and DFW. The adopted rulemaking will implement RACT for flexible package printing; industrial cleaning solvents; large appliance coatings; metal furniture coatings; paper, film, and foil coatings; miscellaneous industrial adhesives; and miscellaneous metal and plastic parts coatings in the DFW and HGB areas, and for automobile and light-duty truck coatings in the DFW area, as well as implement work practice standards for coating-related activities and solvent cleaning operations. Implementation of RACT is a necessary and required component of developing the SIP for nonattainment areas as required by 42 USC, §7410.

The requirement to provide a fiscal analysis of proposed regulations in the Texas Government Code was amended by SB 633 during the 75th Legislature, 1997. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis of extraordinary rules. These are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program, or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 concluding that "based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for the agency due to its limited application." The commission also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted proposed rules from the full analysis unless the rule was a major environmental rule that exceeds a federal law.

As discussed earlier in this preamble, the FCAA does not always require specific programs, methods, or reductions in order to meet the NAAQS; thus, states must develop programs for each area contributing to nonattainment to help ensure that those areas will meet the attainment deadlines. Because of the ongoing need to address nonattainment issues, and to meet the requirements of 42 USC, §7410, the commission routinely proposes and adopts SIP rules. The legislature is presumed to understand this federal scheme. If each rule proposed for inclusion in the SIP was considered to be a major environmental rule that exceeds federal law, then every SIP rule would require the full regulatory impact analysis contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board (LBB) in its fiscal notes. Since the legislature is presumed to understand the fiscal impacts of the bills it passes, and that presumption is based on information provided by state agencies and the LBB, the commission believes that the intent of SB 633 was only to require the full regulatory impact analysis for rules that are extraordinary in nature. While the SIP rules will have a broad impact, the impact is no greater than is necessary or appropriate to meet the requirements of the FCAA. For these reasons, rules adopted for inclusion in the SIP fall under the exception in Texas Government Code, §2001.0225(a), because they are required by, and do not exceed, federal law. In addition, these rules do not exceed any contract between the state and a federal agency.

The commission has consistently applied this construction to its rules since this statute was enacted in 1997. Since that time, the legislature has revised the Texas Government Code, but left this provision substantially unamended. It is presumed that

"when an agency interpretation is in effect at the time the legislature amends the laws without making substantial change in the statute, the legislature is deemed to have accepted the agency's interpretation." Central Power & Light Co. v. Sharp, 919 S.W.2d 485, 489 (Tex. App. Austin 1995), *writ denied with per curiam opinion respecting another issue,* 960 S.W.2d 617 (Tex. 1997); Bullock v. Marathon Oil Co., 798 S.W.2d 353, 357 (Tex. App. Austin 1990, *no writ). Cf. Humble Oil & Refining Co. v. Calvert,* 414 S.W.2d 172 (Tex. 1967); *Dudney v. State Farm Mut. Auto Ins. Co.,* 9 S.W.3d 884, 893 (Tex. App. Austin 2000); *Southwestern Life Ins. Co. v. Montemayor,* 24 S.W.3d 581 (Tex. App. Austin 2000, pet. denied); and *Coastal Indust. Water Auth. v. Trinity Portland Cement Div.,* 563 S.W.2d 916 (Tex. 1978).

The commission's interpretation of the regulatory impact analysis requirements is also supported by a change made to the Texas Administrative Procedure Act (APA) by the legislature in 1999. In an attempt to limit the number of rule challenges based upon APA requirements, the legislature clarified that state agencies are required to meet these sections of the APA against the standard of "substantial compliance." The legislature specifically identified Texas Government Code, §2001.0225, as falling under this standard. The commission has substantially complied with the requirements of Texas Government Code, §2001.0225.

The specific intent of the adopted rulemaking is to protect the environment and to reduce risks to human health by requiring control measures for flexible package printing; industrial cleaning solvents; large appliance coatings; metal furniture coatings; paper, film, and foil coatings; miscellaneous industrial adhesives; and miscellaneous metal and plastic parts coatings in the DFW and HGB areas, and for automobile and light-duty truck assembly coatings in the DFW area that have been determined by the commission to be RACT. To further reduce VOC emissions, the adopted rules will also implement work practice standards for coating-related activities and solvent cleaning operations. The adopted rulemaking does not exceed a standard set by federal law or exceed an express requirement of state law. No contract or delegation agreement covers the topic that is the subject of this adopted rulemaking. Therefore, this adopted rulemaking is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b), because although the adopted rulemaking meets the definition of a "major environmental rule", it does not meet any of the four applicability criteria for a major environmental rule.

The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period. No comments were received on the draft regulatory impact analysis determination.

Takings Impact Assessment

The commission evaluated the adopted rulemaking and performed an assessment of whether Texas Government Code, Chapter 2007, is applicable. The specific purpose of the adopted rulemaking is to implement RACT for flexible package printing; industrial cleaning solvents; large appliance coatings; metal furniture coatings; paper, film, and foil coatings; miscellaneous industrial adhesives; and miscellaneous metal and plastic parts coatings facilities in the DFW and HGB areas, and for automobile and light-duty truck assembly coatings in the DFW area. To further reduce VOC emissions, the adopted rules will also implement work practice standards for coating-related activities and solvent cleaning operations. FCAA, §182(b)(2) provides that for certain nonattainment areas, states must revise their SIP to include RACT for sources of VOC emissions covered by a CTG document issued after November 15, 1990, and prior to the area's date of attainment. The EPA published CTG documents in 2006 for Industrial Cleaning Solvents (EPA 453/R-06-001) and Flexible Package Printing (EPA 453/R-06-003); in 2007 for Paper, Film, and Foil Coatings (EPA 453/R-07-003), Large Appliance Coatings (EPA 453/R-07-004), and Metal Furniture Coatings (EPA 453/R-07-005); and in 2008 for Miscellaneous Metal and Plastic Parts (EPA-453/R-08-003), Miscellaneous Industrial Adhesives (EPA-453/R-08-005), and Automobile and Light-Duty Truck Assembly Coatings (EPA-453/R-08-006). Texas Government Code, §2007.003(b)(4), provides that Texas Government Code, Chapter 2007 does not apply to this adopted rulemaking because it is an action reasonably taken to fulfill an obligation mandated by federal law.

In addition, the commission's assessment indicates that Texas Government Code, Chapter 2007 does not apply to these adopted rules because this is an action that is taken in response to a real and substantial threat to public health and safety; that is designed to significantly advance the health and safety purpose; and that does not impose a greater burden than is necessary to achieve the health and safety purpose. Thus, this action is exempt under Texas Government Code, §2007.003(b)(13). The adopted rules fulfill the FCAA requirement to implement RACT in nonattainment areas. These revisions will result in VOC emission reductions in ozone nonattainment areas which may contribute to the timely attainment of the ozone standard and reduced public exposure to VOCs. Consequently, the adopted rulemaking meets the exemption criteria in Texas Government Code, §2007.003(b)(4) and (13). For these reasons, Texas Government Code, Chapter 2007 does not apply to this adopted rulemaking.

Consistency with the Coastal Management Program

The commission reviewed the rulemaking and found that it is subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act, Texas Natural Resources Code, §§33.201 *et seq.,* and therefore must be consistent with all applicable CMP goals and policies. The commission conducted a consistency determination for the adopted rules in accordance with Coastal Coordination Act Implementation Rules, 31 TAC §505.22, and found the rulemaking is consistent with the applicable CMP goals and policies.

The CMP goal applicable to the adopted rulemaking is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(l)). The CMP policy applicable to the adopted rulemaking is the policy that commission rules comply with federal regulations in 40 CFR, to protect and enhance air quality in the coastal areas (31 TAC §501.32). The adopted rulemaking would not increase emissions of air pollutants and is therefore consistent with the CMP goal in 31 TAC §501.12(1) and the CMP policy in 31 TAC §501.32.

Promulgation and enforcement of these rules will not violate or exceed any standards identified in the applicable CMP goals and policies because the adopted rules are consistent with these CMP goals and policies and because these rules do not create or have a direct or significant adverse effect on any coastal natural resource areas. Therefore, in accordance with 31 TAC §505.22(e), the commission affirms that this rulemaking action is consistent with CMP goals and policies.

The commission invited public comment regarding the consistency with the CMP during the public comment period. No comments were received regarding consistency with the CMP.

Effect on Sites Subject to the Federal Operating Permits Program

Chapter 115 is an applicable requirement under 30 TAC Chapter 122, Federal Operating Permits Program. Owners or operators subject to the federal operating permit program must, consistent with the revision process in Chapter 122, upon the effective date of the rulemaking, revise their operating permit to include the new Chapter 115 requirements.

Public Comment

The commission held public hearings on July 14, 2011, at 10:00 a.m. and 6:30 p.m. at the Arlington City Council Chambers in Arlington; on July 18, 2011, at 6:30 p.m. at the Houston-Galveston Area Council offices in Houston; and on July 22, 2011, at 10:00 a.m. and 2:00 p.m. at the Texas Commission on Environmental Quality headquarters in Austin. The July 22, 2011, hearing scheduled for 10:00 a.m. was not officially opened because no party indicated a desire to provide comment. Oral comments regarding the Chapter 115 rulemaking was presented by the American Coatings Association (ACA) at the 6:30 p.m. hearing in Houston.

The proposal was published in the June 24, 2011, issue of the *Texas Register* (36 TexReg 3834). The comment period opened on June 24, 2011, and closed on August 8, 2011. Written comments were accepted via mail, fax, and through the e-Comments system.

The commission received written comments from ACA, Flexographic Technical Association (FTA), GREEN Environmental Consulting, Inc., Hensley Industries (Hensley), National Aeronautics and Space Administration (NASA), Texas Chemical Council (TCC), EPA, and United States Navy (US Navy), and one individual.

RESPONSE TO COMMENTS

General

Comment

EPA commented that approval of the portions of the control requirements in §115.453 for the surface coating of large appliances, metal furniture, and miscellaneous metal and plastic parts and products of the proposed rules that replace emissions limits previously adopted as RACT with less stringent emissions limits would not be possible without a demonstration from the state showing that the SIP-approved limits are no longer RACT. On March 17, 2011, the EPA issued a memorandum entitled *Approving SIP Revisions Addressing VOC RACT Requirements for Certain Coatings Categories* indicating that "for situations in which a State has previously determined that more stringent applicability thresholds and/or control levels are RACT for one or more sources in a source category and the sources have complied with those requirements, then those existing controls should be considered RACT for such sources. If a state chooses to revise more stringent rules that are already in the approved SIP, so that those rules reflect the less-stringent recommended limits in the new CTGs, there are additional considerations . . . The state would need to first demonstrate that the SIP-approved control requirements are not reasonably available considering technological and economic feasibility, consistent with EPA's definition of RACT." EPA requested the commission explain how the existing limits are no longer RACT for these sources that in some cases have been complying with these limits for 20 years or more.

Response

By letter dated December 8, 2008, the commission requested the EPA clarify several issues related to the recommendations in the following three CTG documents: Control Techniques Guidelines for Large Appliance Coatings (EPA 453/R-07-004), issued in 2007; Control Techniques Guidelines for Metal Furniture Coatings (EPA 453/R-07-005), issued in 2007; and Control Techniques Guidelines for Miscellaneous Metal and Plastic Parts Coatings (EPA 453/R-08-003), issued in 2008. A number of the recommended VOC content limits for specific coatings categories in these 2007 and 2008 CTG documents are less stringent than the more general VOC content limits specified in the following EPA guideline series recommendations: Control of Volatile Organic Emissions from Existing Stationary Sources - Volume V: Surface Coating of Large Appliances (EPA-450/2-77-034), issued in 1977; Control of Volatile Organic Emissions from Existing Stationary Sources - Volume III: Surface Coating of Metal Furniture (EPA-450/2-77-032), issued in 1977; and Control of Volatile Organic Emissions from Existing Stationary Sources - Volume VI: Surface Coating of Miscellaneous Metal Parts and Products (EPA-450/2-78-015), issued in 1978. The commission requested clarification to ensure that implementing the new 2007 and 2008 CTG recommendations would not be considered backsliding and to be certain that the commission has the appropriate information to determine whether the CTG recommendations actually represent RACT for Texas. On March 17, 2011, the EPA issued a guidance memorandum regarding these three CTG categories entitled *Approving SIP Revisions Addressing VOC RACT Requirements for Certain Coatings Categories.* The EPA stated in the memorandum that: "... if a state believes the volume usage distribution among the general and specialty categories in the docket is representative of the distribution in the nonattainment area, we believe that if a state undertakes wholesale adoption of the new categorical limits in a specific CTG, the state may rely on the assessments in the docket to demonstrate that the range of new limits will result in an overall reduction in emissions from the collection of covered coatings."

Consistent with this EPA memorandum, on June 8, 2011, the commission proposed rulemaking (Rule Project Number 2010-016-115-EN) to implement the 2007 and 2008 CTG-recommended RACT limits for these three emission source categories. The proposed rulemaking provided discussion regarding the estimated percent reductions for these CTG categories that supported the EPA's position that applying the new 2007 and 2008 CTG-recommended limits as a whole will result in net VOC emissions reductions. Despite the state's demonstration that implementing the 2007 and 2008 CTG-recommended approach would not interfere with attainment of, or reasonable progress towards attainment of, the ozone standard for the HGB and DFW areas, the EPA commented that in order for the proposed rules to be approved as RACT, the state must also demonstrate that the existing Chapter 115 limits for these CTG categories, which were based on the EPA's original 1977 and 1978 recommendations, are no longer technologically or economically feasible.

The commission contends that by promulgating higher CTG-recommended RACT limits for these source categories in 2007 and 2008, the EPA has established that the original 1977 and 1978

recommended limits, and thus the existing Chapter 115 limits, are no longer technologically or economically feasible. The EPA defines RACT as the lowest emission limitation that a particular source is capable of meeting by the application of control technology that is reasonably available considering technological and economic feasibility (44 FR 53762, September 17, 1979). In the 2007 and 2008 CTG documents the EPA provides recommendations for RACT for these source categories based on available information. The EPA claims the 2007 and 2008 CTG RACT recommendations were based on available information and a review of existing federal and state regulations, including the original 1977 and 1978 recommendations for these emission source categories. The EPA goes on to indicate that 21 states have adopted the EPA's 1977 recommendations for large appliance coating; 32 states have adopted the EPA's 1977 recommendations for metal furniture coating; and as many as 36 states have adopted the EPA's 1978 recommendations for metal parts surface coating. Given that Texas had previously adopted 1977 and 1978 recommendations for these three source categories, the Chapter 115 rules should have been included in the EPA's review of existing regulations. If upon review of the existing Chapter 115 regulations the EPA had determined that the limits recommended in 1977 and 1978 were technologically and economically feasible, then those limits presumably would have been included in the final 2007 and 2008 CTG recommendations for these source categories.

In accordance with FCAA, §183(e)(3)(C), the EPA determined the 2007 and 2008 CTG documents issued for these three source categories would be substantially as effective as national regulations in reducing VOC emissions (72 FR 57215, October 9, 2007; 73 FR 40230, July 14, 2008). FCAA, §183(e)(3)(A) requires any regulations issued under FCAA, §183(e), including the 2007 and 2008 CTG documents, to be based on best available controls, which are defined under FCAA, §183(e)(1)(A) as the degree of emissions reduction that the EPA determines, on the basis of technological and economic feasibility, health, environment, and energy impacts, is achievable through the application of the most effective equipment, measures, processes, methods, systems or techniques, including chemical reformulation, product or feedstock substitution, repackaging, and directions for use, consumption, storage, or disposal. If the lower limits in the EPA's original 1977 and 1978 recommendations were in fact technologically or economically feasible for these specialty coating categories, the EPA presumably would have retained these limits in the 2007 and 2008 final CTG documents in accordance with FCAA, §183(e)(1)(A).

The Large Appliance Coatings and Metal Furniture Coatings draft CTG only recommended general coating limits for these source categories. However in response to public comments (72 FR 57215, October 9, 2007), the EPA's final 2007 CTG recommendations for these two source categories also included higher limits for several specialty coatings. The specialty coating limits included in the 2007 CTG are higher than the EPA's 1977 recommendations for these two source categories. In the response to public comments, the EPA acknowledged that the higher specialty coating limits recommended in the final 2007 CTG were necessary to accommodate the range of coatings needed in these industries.

However, the EPA's 2007 and 2008 CTG documents do not specifically explain why the lower limits included in the EPA's original 1977 and 1978 recommendations for these source categories are no longer technologically or economically feasible. In absence of any specific information indicating that the existing Chapter 115 limits for these source categories are not technologically or economically feasible, and given the EPA's stated intention to disapprove the rules without such a demonstration, the commission is obligated under the FCAA to revise the proposed limits for these source categories. Therefore, in response to this comment, the commission is revising the proposed limits for these three source categories to only include the EPA's 2007 and 2008 CTG-recommended limits that are equivalent to or lower than the existing Chapter 115 limits. Where the EPA's 2007 and 2008 CTG-recommended limits are less stringent than the EPA's original 1977 and 1978 recommended limits, the commission is retaining the original emission limit in the current Chapter 115 rule, except for the high performance architectural coatings limit for the miscellaneous metal parts and products category.

The EPA only addressed the technological and economic feasibility issues associated with high performance architectural coatings in support of its presumptive RACT recommendations in the 2008 CTG for Miscellaneous Metal and Plastic Parts Coatings. The commission agrees with the EPA that the 6.2 lb VOC/gal coating constitutes RACT for this coating type and that promulgating a VOC limit less than 6.2 lb VOC/gal coating may restrict the application of liquid high performance architectural coatings that are currently available and in use today. The cost of converting to powder coatings or installing and operating add-on controls to meet a lower limit is not a reasonable alternative compared to the emission reduction that would be achieved. In light of this information, as provided in the EPA's 2008 CTG, the commission has determined a VOC limit of 6.2 lb VOC/gal coating for high performance architectural coatings to be RACT. The commission contends that the adoption of this coating VOC limit for high performance architectural coatings, which is higher than in the existing Chapter 115 rules, does not interfere with attainment of, or reasonable progress towards attainment of, the ozone standard for the HGB and DFW areas. Therefore, the commission is making no change to the proposed VOC limit of 6.2 lb VOC/gal coating for high performance architectural coatings in the Chapter 115 miscellaneous metal parts and products coatings rules in response to this comment; the commission is adopting to retain the EPA's 2008 Miscellaneous Metal and Plastic Parts CTG-recommended 6.2 lb VOC/gal coating limit for high performance architectural coatings in the adopted Chapter 115 miscellaneous metal parts and products coatings rules.

Comment

EPA expressed concern with the compliance schedules in §§115.439(d), 115.459(b), 115.469(b), and 115.479(b) due to the allowance of an additional 60 days for a source to comply with the rules after becoming subject. EPA suggested modifying the rules to require compliance with the rules, where possible, by the beginning of ozone season, March 1, 2013.

Response

The commenter misunderstood the context of these compliance schedule requirements. The additional 60-day period for compliance is only applicable to those sources that become subject to one of the rules affected by this rulemaking, after the original March 1, 2013, compliance date. Any source operating prior to March 1, 2013, is required under §§115.439(c), 115.459(a), 115.469(a), and 115.479(a) to be in compliance with all applicable rules on or before March 1, 2013. The compliance schedules cited by the commenter are intended to provide adequate time for an owner or operator to configure their process in order to comply with the rule requirements. This provision is consis-

tent with other adopted Chapter 115 rules and the commission maintains that is unreasonable to expect an owner or operator to comply with these rules immediately upon becoming subject. The commission makes no change in response to this comment.

Comment

EPA suggested changing the title of Division 5 to readily distinguish the rules in Division 2 from the rules in Division 5.

Response

The commission declines to make the suggested change. The title of Division 5 is similar to the title of Division 2 because both are indicative of the processes regulated in each. The commission believes that the titles are sufficient to appropriately direct owners and operators of surface coating processes to the rules that affect them.

Comment

ACA commented that the EPA's CTG should be consistent with other EPA rulemakings for this industrial sector. ACA commented that coatings manufacturers have provided EPA product information to assist in their evaluation of the National Emission Standard for Hazardous Air Pollutants for Shipbuilding and Ship Repair Operations, and that the industry supports rulemaking that will provide a consistent approach to reduce emissions of both VOC and hazardous air pollutants in this industrial sector.

Response

The commission appreciates the comment. However, ensuring consistency among future federal rulemakings for this coating category is beyond the scope of the commission's current rulemaking. The commission makes no change in response to this comment.

Comment

An individual commented that the one thing no successful businessman can handle is the constant changing of regulations that potentially require equipment and increased employment to support such equipment when one never knows if he or she will be allowed to operate the purchased equipment. The individual commented that a reasonable and prudent businessman needs to be able to plan and that has been impossible with the ever-changing regulations that EPA has come forth with.

Response

The commission appreciates the comment and acknowledges that the changing regulations can be challenging. The purpose of this rulemaking is to fulfill the state's obligation under FCAA, §172(c)(1) and §182(b)(2), to submit a SIP revision that implements RACT for VOC emission sources located in nonattainment areas classified as moderate and above, addressed in a CTG issued from November 15, 1990, through an area's attainment date. When enacting rules, the commission considers the appropriate implementation deadlines. The commission is making no changes in response to this comment.

Flexible Package Printing

Comment

FTA commented that it strongly disagrees with the requirement in §115.432(c)(1)(C) for flexible package printers to meet an 80% overall control efficiency regardless of the first installation date of the oxidizer. FTA commented that this approach may require printers that installed oxidizers at an earlier date to replace equipment and would be a significant financial hardship, as new oxidizers start in the hundreds of thousands of dollars. FTA commented that the EPA's Flexible Package Printing CTG recommends a more reasonable approach consistent with a RACT regulation, which allows add-on controls installed prior to specific dates to have lower overall control of VOC emissions. FTA added that the commission's claim that the EPA's approach would create backsliding is not justified.

Response

The commission maintains that the EPA's 2006 Flexible Package Printing CTG-recommended approach for controlling VOC emissions from flexible package printing may encourage the installation of older, less efficient equipment and may create backsliding issues if a source becomes subject to a lower efficiency standard as a result of equipment replacement.

The commission has determined that an 80% overall control efficiency represents RACT for flexible package printing processes in the DFW and HGB areas. Based on a review of permits for flexographic printing and rotogravure printing processes, the only two types of printing processes identified in the 2006 CTG as conducting flexible package printing, the majority of printers are using add-on control equipment that achieves at least an 80% overall control efficiency, demonstrating that this level of control is reasonably available considering technological and economic feasibility.

Flexible package printers with the potential to emit greater than or equal to 25 tpy of uncontrolled VOC emissions that choose to use a vapor control system to comply with the adopted rules, are not limited to operating at an 80% overall control efficiency. The adopted new control requirements in §115.432(c) provide different compliance options to provide flexibility for affected owners and operators. Flexible package printers can instead choose the compliance option that requires the use of coatings in conjunction with a vapor control system to meet the VOC limits. Under this compliance option, an owner or operator does not have to meet a certain VOC limit or meet a certain overall control efficiency; rather, the combined coating VOC content and the overall control efficiency must meet one of the VOC limits. The commission makes no changes in response to this comment.

Miscellaneous Metal and Plastic Parts Coatings

Applicability and Definitions

Comment

TCC commented that miscellaneous plastic parts and products are listed under the applicability section in §115.450(a)(4), but that there is no subsequent mention of these parts and products. TCC suggested that the commission clarify whether miscellaneous plastic parts and products are included in the Division 5 rules.

Response

In the EPA's 2008 Miscellaneous Metal and Plastic Parts Coatings CTG, the EPA did not recommend a definition for miscellaneous plastic parts and products. However, in order to clarify the types of such parts and products referred to in §115.450(a)(3), proposed as §115.450(a)(4), the commission is revising the rule to include a definition for miscellaneous plastic parts and products in §115.450(c)(5)(R) based on the description contained in the EPA's 2008 CTG.

Comment

GREEN Environmental Consulting, Inc., suggested revising the definition of extreme performance coating to include marine shipping containers and downhole drilling equipment as examples of products that may need the application of this coating type. GREEN Environmental Consulting, Inc., also suggested including extreme environmental conditions, such as continuous outdoor exposure, in the list of conditions that a miscellaneous metal parts and products may be subject to and would need the application of an extreme performance coating.

Response

The commission is revising the rules to reflect the suggested changes. The commenter's first suggested change provides additional clarification of the types of miscellaneous metal parts that may be coated with an extreme performance coating, without altering the meaning of the definition. Similarly, the commenter's other suggested change incorporates properties of an extreme performance coating that are listed in the existing rules but are not included in the EPA's 2008 Miscellaneous Metal and Plastic Parts Coatings CTG-recommended definitions and, therefore, were not included in the proposed extreme performance coating definition.

Additionally, because the definition of extreme performance coatings in §115.450(c)(3)(B) and (4)(B) for metal furniture and large appliances, respectively, are derived from the extreme performance coating definition in §115.450(c)(5)(Q) for miscellaneous metal and plastic parts coating, the change made in response to this comment extends to the other coating categories and is discussed in the Section by Section Discussion portion of this preamble for those categories.

Comment

Hensley commented that at its steel foundry, several types of pastes and coatings are used in the mold and core making processes such as mold-release, core paste, and refractory coating (mold wash). Hensley requested clarification of the mold-seal coating definition.

Response

As defined in the EPA's 2008 CTG and subsequently as proposed and adopted in §115.450(c)(5)(P), a mold-seal coating is the initial coating applied to a new mold or a repaired mold to provide a smooth surface that when coated with a mold release coating, prevents products from sticking to the mold. The miscellaneous metal and plastic parts coatings rules regulate the application of mold-seal coatings to the extent these coatings are applied during the fabrication or repair of the mold itself. The commission makes no change in response to this comment.

Comment

GREEN Environmental Consulting, Inc., suggested defining a designated on-site maintenance shop as an area designated at a site where coatings are applied to one or more miscellaneous metal parts or products on a routine basis. GREEN Environmental Consulting, Inc., suggested adding that the miscellaneous metal parts or products being coated in a designated on-site maintenance shop would be those that are used elsewhere on-site as part of that site's permanent operation.

Response

As described elsewhere in this Response to Comments section, the commission is including a new exemption in §115.427(a)(8) from the requirements in Chapter 115, Subchapter E, Division 2 for the re-coating of used miscellaneous metal parts and products at a designated on-site maintenance shop in DFW and HGB areas that was exempt from the VOC emission limits in §115.421(a)(9) prior to January 1, 2012, or that begins operation on or after January 1, 2012. However, the re-coating of used miscellaneous metal parts and products at a designated on-site maintenance shop that was subject to §115.421(a)(9) prior to January 1, 2012, remains subject to the Division 2 requirements. For additional clarification, §115.427(a)(8) indicates that for purposes of the exemption, a designated on-site maintenance shop is an area at a site where used miscellaneous metal parts or products are re-coated on a routine basis. Additionally, the adopted Division 5 rules do not apply to designated on-site maintenance shops and therefore a definition in §115.450 is not necessary.

With regard to the commenter's suggested alterations to the meaning of a designated on-site maintenance shop, the commission disagrees to the extent that the miscellaneous metal parts and products coated would be limited to those that are used elsewhere at the same site location as part of the permanent operation. While the designated on-site maintenance shop applicability does include coating conducted for this purpose, the coating of miscellaneous metal parts and products for use in a site's permanent operation at a separate location, where both the location of the coating and the location where the metal part or product serves its function are under the same ownership, is also considered a designated on-site maintenance shop coating operation. The commission makes no change in response to this comment.

Comment

NASA and the US Navy suggested the commission remove designated on-site maintenance shops from the rule applicability in both Divisions 2 and 5 for the following reasons: there is no definition of this type of facility in the proposed rules; the frequency of what is considered routine is unclear; the federal maximum available control technology standards for miscellaneous metal parts and products excludes facility maintenance operations; industrial maintenance coatings are already covered by the national Architectural and Industrial Maintenance rule; and the EPA's Miscellaneous Metal and Plastic Parts Coatings CTG does not include designated on-site maintenance shops in the applicability.

Response

The existing Chapter 115, Subchapter E, Division 2 rules were revised in July 2000 (25 TexReg 6754) to reflect a rule interpretation that determined the miscellaneous metal parts and products coatings rules should be applied to original equipment manufacturers, off-site job shops that coat new or used parts or products, and designated on-site maintenance shops that re-coat used parts or products. Because this rulemaking was submitted as a SIP revision and approved by the EPA, providing an exemption for designated on-site maintenance shops that are currently complying with the existing Chapter 115, Division 2 rules would be backsliding.

However, the commission has determined that it is not necessary to apply these RACT requirements to designated on-site maintenance shops that re-coat used parts or products in order to meet the mandates of the FCAA under §172(c)(1) and §182(b)(2). The EPA's 1978 CTG recommendations for this source category, which were the basis for the Division 2 rules, were clearly not intended to apply to designated on-site maintenance shops that re-coat used parts or products. The commission also agrees that the EPA's 2008 Miscellaneous Metal and Plastic Parts Coatings

CTG recommendations do not apply to designated on-site maintenance shops.

Therefore, in response to this comment, the commission is adopting §115.427(a)(8) to limit the rule applicability to the designated on-site maintenance shops in the DFW and HGB areas that were subject to §115.421(a)(9) prior to January 1, 2012. Only those designated on-site maintenance shops that re-coat used parts or products that were exempt from §115.421(a)(9) in Division 2 prior to January 1, 2012, the beginning of the calendar year immediately following the approximate effective date of these rules, or that begins operation on or after January 1, 2012, are exempt from all requirements in Division 2. Additionally, in response to this comment, the commission is revising §115.450(a) to exclude re-coating of used miscellaneous metal parts and products at designated on-site maintenance shops from the coatings rule applicability in Division 5. The adopted revisions prevent any potential backsliding concerns by requiring sources that are currently complying with these rules in Division 2 to continue to meet these VOC limits. The adopted revisions are consistent with the intent of EPA's 1978 and 2008 CTG RACT recommendations for miscellaneous metal parts and products coatings and the commission maintains the rules continue to satisfy RACT requirements for this CTG emission source category.

Comment

TCC commented that the rules define extreme performance coating in §115.450(c)(5)(I) and specifically mention chronic exposure to corrosive, caustic, or acidic agents. TCC requested clarification of whether the term is intended to cover the outer coating of pipes that carry acids and caustics.

Response

The extreme performance coating definition in §115.450(c)(5)(I) refers to the miscellaneous metal or plastic part surface that is physically exposed to the corrosive, caustic, or acidic agents. If the pipes carry corrosive, caustic, or acidic substances but no contact is made between the outer coating of these pipes and these agents, then the purpose of the coating does not meet the condition under §115.450(c)(5)(I)(i) in the extreme performance coating definition. However, it is possible that the pipes may meet a condition under one of the other clauses in the extreme performance coating definition. The commission makes no change in response to this comment.

Comment

TCC requested clarification on whether it is the commission's intent to regulate the coating of newly fabricated piping or other equipment at an on-site maintenance shop, which appears to fall outside of the miscellaneous metal parts and products definition, while the re-coating of some equipment at an on-site job shop appears to be included. In addition, TCC requested clarification on whether the coating of newly fabricated piping or other equipment at an on-site lay-down yard would be a regulated activity. TCC stated that the EPA excludes the coating of new and existing support structures, piping, and equipment as part of routine maintenance activities, considered to be facility maintenance operations, from 40 CFR, Part 63, Subpart MMMM for Surface Coating of Miscellaneous Metal Parts and Products.

Response

In response to other comments on this rulemaking, the commission is revising §115.450(a) to exclude designated on-site maintenance shops from the miscellaneous metal parts and products coatings rule applicability in Division 5. Additionally, the commission is adding §115.427(a)(8) to limit the Division 2 rule applicability to only those designated on-site maintenance shops that were required to comply with the emission specifications in §115.421(a)(9) prior to January 1, 2012, which is the beginning of the calendar year immediately following the effective date of this rulemaking. The re-coating of used miscellaneous metal parts and products at a designated on-site maintenance shop that was exempt from §115.421(a)(9) prior to January 1, 2012, or that begins operation on or after January 1, 2012, is exempt from all requirements in Division 2.

The coating of newly fabricated miscellaneous metal parts and products, including piping or other equipment, for a site's own use does not constitute coating at a designated on-site maintenance shop and does not meet the miscellaneous metal parts and products coatings rule applicability in Division 2. Only designated areas where the routine re-coating of miscellaneous metal parts and products takes place is considered a designated on-site maintenance shop. The location of the designated on-site maintenance shop is irrelevant for purposes of the Division 2 rules; the designated on-site maintenance shop may be an area reserved inside a site building or a location on the site's grounds outdoors.

Comment

TCC requested clarification on whether extreme performance coatings applied to newly fabricated piping and equipment, which do not meet the corresponding definition in the Division 5 rules, would now be considered a general-use coating.

Response

Coatings that do not meet a specific coating category definition in Division 5 are considered general-use coatings and are subject to the VOC content or emission limit for general-use coatings. This requirement is adopted directly from the EPA's 2008 Miscellaneous Metal and Plastic Parts Coatings CTG recommendations. As described elsewhere in this Response to Comments section, the commission recognizes that some coatings may meet more than one coating category definition. For these instances, the commission is revising the rules to indicate that the least stringent VOC limit applies.

Comment

TCC commented that an activity subject to the miscellaneous metal and plastic parts coatings rules may use a coating that could be classified as an extreme performance coating, heat resistant coating, or as a miscellaneous metal parts and products coating, depending on the application. TCC requested that the commission clarify the intended use of Table 1 and Table 2 in §115.453(a)(1)(C).

Response

The commission recognizes that some coatings may meet more than one coating category definition. This issue was not addressed in the EPA's CTG documents; however, the existing miscellaneous metal parts and products coatings rules provide this clarification. To facilitate compliance and improve the clarity of these rules, the commission is revising the adopted rules in response to this comment to indicate that in these instances, the coating type with the least stringent VOC limit applies.

Some of the coating categories regulated in §115.453(a)(1) provide various options to comply with the rules, including the use of low-VOC coatings and the use of coatings in conjunction with

the operation of a vapor control system. The VOC content limits in Table 1 in §115.453(a)(1)(C) are provided in lb VOC/gal coating and the VOC emission limits in Table 2 in §115.453(a)(1)(C) are provided in pounds of VOC per gallon of solids. As explained in the Section by Section Discussion portion of this preamble, affected sources choosing to meet the rule requirements through the use of low-VOC coatings are required to meet the VOC content limits established in Table 1 in §115.453(a)(1)(C). Affected sources choosing to meet the rule requirements through the use of coatings in conjunction with the operation of a vapor control system are required to meet the VOC emission limits established in Table 2 in §115.453(a)(1)(C).

Exemptions

Comment

ACA requested a small container exemption for pleasure craft touch-up and repair coatings to allow minor repairs at the end of the painting line and avoid having to completely re-coat the pleasure craft.

Response

In response to this comment, the commission is adopting new §115.451(n) to exempt touch-up and repair coatings from meeting the VOC limits in §115.453(a)(1)(F) if those coatings are supplied by the manufacturer in containers that do not exceed 1.0 quart and the use of those coatings at the site does not exceed 50 gallons per calendar year. The commenter did not suggest a quantity for the annual limit on touch-up and repair coatings. The 50-gallon limit is equivalent to the volume of coatings exempt in §115.451(i)(4) for miscellaneous plastic parts and products. In addition, the commission is including definitions for repair coatings and touch-up coatings in §115.450(c)(8)(I) and (K), respectively. The commission agrees that providing an exemption for touch-up and repair coatings used in small quantities eliminates the need to completely re-coat a pleasure craft and, as a result, reduces overall VOC emissions from pleasure craft coating. This exemption for coatings used in small quantities is also consistent with the EPA's recommended exemptions for other coating categories in the EPA's Miscellaneous Metal and Plastic Parts Coating CTG.

Comment

TCC requested confirmation on whether the exemptions and definition of architectural coating in Division 5 includes painting pipes in the process unit, because these pipes are in the field and are stationary structures. TCC requested confirmation on whether the Division 5 rules apply to the coating of pipes in the process unit in addition to the coating of miscellaneous metal parts and products in lay-down yards.

Response

As stated elsewhere in this Response to Comments section, the coating of process unit pipes that are in place is not a miscellaneous metal parts and products coating activity subject to the Division 2 or Division 5 rules. However, removing and transporting the process unit pipes to an on-site area where re-coating of these parts and products is conducted on a routine basis is considered a designated on-site maintenance shop coating operation that is subject to the miscellaneous metal parts and products coatings rules. As discussed elsewhere in this Response to Comments section, the applicability of miscellaneous metal parts and products coating at a designated on-site maintenance shop has been modified. The commission makes no change in response to this comment.

Comment

TCC requested the commission clarify whether safety-indicating coatings exempt under §115.451(f)(3) include those temperature-sensitive coatings used to identify hazards in an industrial setting.

Response

The EPA's 2008 CTG did not specify the types of coatings categorized as safety-indicating coatings. However, in order to facilitate the usability of this rule, the commission is incorporating a definition for safety-indicating coatings in §115.450(c)(5)(AA). A safety-indicating coating is defined as a coating that changes physical characteristics, such as color, to indicate unsafe conditions. In absence of an EPA-recommended definition, the commission relied on the definition for safety-indicating coatings established in the SCAQMD Rule 1107, Coating of Metal Parts and Products, since the definitions in the CTG pertaining to miscellaneous metal and plastic parts coating are based on this rule.

Comment

NASA and the US Navy requested an exemption be added to §115.451 for miscellaneous metal or plastic parts and product surface coating processes performed at on-site installations owned or operated by the Armed Forces of the United States or NASA, or the surface coating of military munitions manufactured by or for the Armed Forces of the United States. NASA and the US Navy requested the exemption because extensive field testing is required before reformulated coatings and solvents can be approved for use and because the proposed regulations would be impractical and extremely costly for NASA and the US Navy due to the complexity of coating operations, the number of coatings and solvents used, and the number of different items and substrates coated. NASA and the US Navy also requested exemption from the miscellaneous metal and plastic parts coatings rules because historically accurate coatings for these items must be used.

Response

The rules in Division 5 are necessary to implement RACT requirements for miscellaneous metal and plastic parts coatings as required in FCAA, §172(c)(1) and §182(b)(2). The commission disagrees that a complete exemption for the Armed Forces of the United States or NASA is consistent with the EPA's recommendations for this CTG emission source category. Some of the specific coating categories recommended by the EPA for miscellaneous metal and plastic parts and products are specific to military application. Granting the categorical exemption requested for NASA, the US Navy, and other military organizations could potentially result in EPA disapproval of the Chapter 115 RACT rules and corresponding SIP revisions.

However, the miscellaneous metal and plastic parts coatings rules do not apply to the other coating categories specifically regulated in Divisions 2 or 5. The commission recognizes that an explicit exemption for those specific coating categories from the miscellaneous metal and plastic parts coatings rules in Division 5, similar to the exemption provided in Division 2, was not incorporated into the proposed rules and may have created confusion. In response to this comment, the commission is adding an exemption in §115.451(b)(4) to reflect the exclusion of all other coating categories in Divisions 2 and 5 from the miscellaneous metal and plastic parts coatings rules. Adopted new §115.451(b)(4) clearly indicates that any item characterized by the other coating categories specified in Division 2 and Division 5

is not considered miscellaneous metal or plastic parts and products and is therefore not subject to any of the corresponding requirements. Additionally, the commission does not consider the adopted rules any less technologically or economically feasible for NASA and the US Navy as the rules are for other affected entities, which includes some small businesses.

Control Requirements

Comment

GREEN Environmental Consulting, Inc., suggested revising §115.453(a)(1) to remove the term low-VOC coatings from the compliance option that requires low-VOC coatings in combination with a vapor control system to meet the VOC emissions limits. GREEN Environmental Consulting, Inc., added that the removal of this term makes it clear that the option of using a VOC coating that exceeds the VOC emissions limits, when used in conjunction with controls, is available.

Response

The commission agrees that removing the term low-VOC with respect to the option allowing the use of low-VOC coatings in combination with the operation of a vapor control system, clarifies the rule. In addition to the rule modification in §115.453(a)(1), the commission is revising the rules where this option is provided in §§115.432(c)(1)(A), 115.453(a)(4) and (5), and 115.473(a)(1)(B), for consistency among the rules. These changes enhance the readability and usability, but do not alter the meaning of the respective rules.

Comment

GREEN Environmental Consulting, Inc., suggested including hand-held paint rollers in §115.453(c)(6) to ensure that this method is acceptable under this provision. GREEN Environmental Consulting, Inc., commented that often the term "roller coat" listed in §115.453(c)(4) refers to rollers used in an industrial rolling machine that mechanically applies coating.

Response

The commission expects that hand-held paint rollers are synonymous with brush coating listed in §115.453(b)(6). Therefore, the commission is revising §115.453(b)(6) to include the commenter's suggestion to include hand-held paint rollers as a complaint coating application system.

Comment

ACA commented that it is imperative to work with the EPA, its regional offices, and state and local agencies to develop RACT rules given that the pleasure craft industry was not afforded the usual opportunity to consult with the EPA on the development of its CTG RACT recommendations because the draft Miscellaneous Metal and Plastic Part Coatings CTG did not mention pleasure craft surface coating operations.

ACA commented that the pleasure craft coating limits in the EPA's final Miscellaneous Metal and Plastic Part Coatings CTG recommendations do not represent RACT for the pleasure craft industry. ACA commented that SCAQMD Rule 1106.1, which was the basis for these CTG recommendations, should not be identified as RACT for pleasure craft coating operations in other areas since these requirements were adopted to address the severe ozone nonattainment conditions in the South Coast air basin. ACA commented that the CTG-recommended VOC limits and compliance dates are too restrictive to allow coating manufacturers to formulate products that meet the VOC limits, while also maintaining adequate technical performance and meeting customer's aesthetic requirements.

ACA requested several revisions to the proposed rules to establish appropriate RACT requirements for pleasure craft coating operations.

For *extreme high-gloss coatings,* ACA suggested implementing a VOC limit of 5.0 lb VOC/gal coating and revising the definition to any coating that achieves greater than 90% reflectance on a 60 degree meter. ACA commented that the controlled application conditions that make the use of high solids and water-based technologies possible in other industries are not available for the pleasure craft coating industry. ACA also commented that the low-VOC technologies available at this time do not provide the aesthetic properties, functionality, and durability required from an extreme high-gloss coating.

For *finish primer/surfacer coatings,* ACA suggested implementing a VOC limit of 5.0 lb VOC/gal coating. ACA commented that a higher VOC solvent is required for both the topcoats and the primers that go beneath them to achieve the finish that is extremely smooth, glossy, and durable. In addition, high solids or low-VOC primers often require additional sanding to achieve the necessary smooth surface and the use of these coatings necessitates a change in traditional working practices in yards to overcome the increased health hazard associated with the increased dust levels.

For *other substrate antifoulant coatings,* the ACA suggested implementing a VOC limit of 3.34 lb VOC/gal coating. Antifouling coating formulations are currently registered with the EPA based on the percentage weight of biocide in the wet paint. Reducing the VOC content of the coating reduces the percentage of biocide in the dry film with a concomitant reduction in performance of the coating and increase in re-coating frequency. In addition, low-VOC antifoulant coatings often result in a rougher film; the roughness of the hull contributes directly to drag.

For *antifoulant sealer/tie coatings,* ACA suggested introducing a VOC limit of 3.5 lb VOC/gal coating and the following definition: a coating applied over biocidal antifoulant coating for the purpose of preventing release of biocides into the environment, or to promote adhesion between an antifoulant and a primer or other antifoulants. The 2007 International Maritime Organization Antifouling Systems convention prohibits the use of certain biocides in the antifoulant coatings applied to the hulls of any marine vessels entering the waters of countries that are signatories to the convention. A specialized coating, an antifoulant sealer/tie coat, is required to seal in certain prohibited antifoulant coatings and to promote adhesion of biocide-free, non-stick foul release coatings when applied to vessels. As alternative compliance options, the ACA suggested implementing an averaging approach and extending the compliance date to allow the development, testing, and commercial introduction of low-VOC pleasure craft coatings.

Response

In response to ACA's request for reconsideration of the pleasure craft CTG VOC limits, the EPA issued a memorandum on June 1, 2010, entitled *Control Technique Guidelines for Miscellaneous Metal and Plastic Part Coatings-Industry Request for Reconsideration,* "recommending that the pleasure craft industry work with state agencies during their RACT rule development process to assess what is reasonable for the specific sources regulated because the CTG impose no legally binding requirements on any entity, including pleasure craft coating facilities."

Based on the information submitted by ACA, and in accordance with the EPA's guidance to work with the pleasure craft industry on this issue, the commission agrees that some of the pleasure craft coating VOC limits included in the EPA's CTG recommendations are not technologically feasible at this time. The commission agrees that the coating VOC limits requested by ACA are technologically and economically feasible and therefore constitute RACT for the pleasure craft industry in Texas. In response to this comment, the commission is revising §115.453(a)(1)(F) to reflect ACA's recommended VOC limits for extreme high-gloss coating, finish primer-surfacer coating, other substrate antifoulant coating, and antifoulant sealer/tie coating. The commission is also revising §115.450(c)(8) to included ACA's suggested definitions for extreme high-gloss coating, pretreatment wash primer, and antifoulant sealer/tie coating. Because the commission is revising the rules to incorporate the suggested VOC limits, the commission does not agree it is also necessary to include the averaging approach and extended compliance period that were suggested as alternative compliance options.

Comment

The EPA commented that the alternate control requirements proposed in §115.454(b) should be revised to make clear that any alternative requirements to §115.453(a)(1)(A), approved by the executive director, would need to be submitted as a site-specific SIP revision for approval by EPA to ensure it meets the requirements for enforceability and public hearings.

Response

The adopted alternate control requirement in §115.454(b) is identical to the existing SIP-approved requirement in §115.423(4), except that the rule citations reference the applicable process in the adopted new Division 5 rules. The commission notes that the rule citation in the proposed rules incorrectly referenced large appliance coating, and the commission is revising §115.454(b) to accurately reference miscellaneous metal parts and products surface coating processes in §115.453(a)(1)(C).

The commission agrees that any alternate control requirement approved by the executive director under §115.454(b) would need to be submitted as a site-specific SIP revision for EPA approval. However, the commission does not agree that revisions to adopted §115.454(b) are warranted to clarify that EPA approval of alternate control requirements is necessary. The commission makes no change in response to this comment.

Industrial Cleaning Solvents

Comment

NASA and the US Navy commented that the rules in Chapter 115, Subchapter E, Division 1, were adopted in 1979 and need to be updated to reflect low-VOC and aqueous cleaning solvents. NASA and the US Navy suggested revising the industrial cleaning solvents rules to update or replace definitions and existing requirements for solvent degreasing processes in Division 1.

Response

The commission appreciates the comment. The processes regulated in Division 1 are not addressed in the EPA's 2006 Industrial Cleaning Solvents CTG applicability and are therefore not addressed in this rulemaking. The commission did not propose to amend the degreasing rules in Division 1 and therefore any changes to these rules are outside the scope of this rulemaking because affected sources were not provided the required opportunity to comment. The commission makes no change in response to this comment.

Comment

TCC suggested clearly exempting cleaning operations that do not involve the removal of uncured adhesives, inks, and coatings, and contaminants such as dirt, soil, oil, and grease from the industrial cleaning solvents rule. TCC commented that these cleaning operations would likely already be regulated by the vent gas control or batch processes rules in Chapter 115.

Response

The exemption suggested by the commenter is not necessary. The cleaning operations described by the commenter would not meet the definition of a solvent cleaning operation in §115.460(b)(10) and, therefore, would not be subject to the industrial cleaning solvents rule requirements.

The commission reiterates that any solvent cleaning operation that is already subject to requirements in another division in Chapter 115 is exempt from Division 6. Additionally, as discussed elsewhere in this Response to Comments section, the commission is revising the rules to include an exemption for any cleaning operation that is controlled in accordance with the control requirements or emission specifications in another Chapter 115 division. The commission makes no changes to the rules in response to this comment.

Comment

TCC commented that §115.461(b) should specifically exclude processes or operations that are subject to and complying with Chapter 115, Subchapter B, Division 2 or Division 6, including any qualifying exemptions. Specifically, TCC suggested revising §115.461(b) to exempt a cleaning operation from the requirements in Division 6 if all of the VOC emissions from the cleaning operation originate from a source for which another division within Chapter 115 has established a control requirement, emission specification, or exemption which applies to that VOC source category in that county.

Response

The commission agrees with TCC's suggestion to provide an exemption for cleaning operations that are controlled by emission specifications or control requirements established in another Chapter 115 division. As proposed, the rules for industrial cleaning solvents exempted cleaning operations subject to another division in Chapter 115 that establishes cleaning work practices or cleaning VOC limits used during a solvent cleaning operation. However, in light of this comment, the commission acknowledges that not all Chapter 115 rules contain cleaning requirements, but that owners and operators of some processes may consider cleaning activities to be a part of the production process or may find it to be more efficient to control emissions from cleaning activities in accordance with the process control requirements or emissions specifications.

However, the commission declines to incorporate TCC's request to exempt a cleaning operation from this division if the cleaning VOC emissions originate from a source that qualifies for an exemption in another Chapter 115 division. Basing an exemption for a cleaning operation on a process-specific exemption in another Chapter 115 division, is inconsistent with the EPA's stated purpose that the CTG recommendations are intended to apply to all industrial cleaning operations that are not already subject to or complying with other control requirements.

Therefore, in response to this comment, the commission is adopting new §115.461(c) to exempt from this division a solvent cleaning operation where the process the cleaning operation is associated with is subject to another division in Chapter 115 and the VOC emissions from the solvent cleaning operation are controlled in accordance with an emission specification or control requirement of the division that the process is subject to. This exemption is intended to provide affected owners and operators with the flexibility to comply with control requirements or emission specifications in another Chapter 115 rule to minimize compliance burden. The commission expects that an owner or operator choosing to comply with the control requirements or emission specifications for a cleaning operation is at least as effective as complying with the industrial cleaning solvent rule requirements.

Comment

TCC, NASA, and the US Navy commented that the term "janitorial cleaning" is defined in §115.460; however, there is no exemption for janitorial cleaning as recommended in the EPA's Industrial Cleaning Solvent CTG. NASA and the US Navy suggested excluding janitorial cleaning from the industrial cleaning solvents rule applicability. TCC suggested including an exemption in §115.461 for janitorial cleaning.

Response

The commission agrees that the EPA's 2006 CTG recommends excluding janitorial cleaning from the rule applicability. The exclusion was inadvertently left out at proposal, but the commission is revising the adopted rule applicability in §115.460(a) to exclude janitorial cleaning.

Comment

TCC claimed that the EPA's CTG intended to have broad applicability to industrial cleaning operations that have VOC emissions of at least 15 pounds per day, before controls. TCC added that the EPA suggested that cleaning of miscellaneous metal parts coating be excluded from applicability. TCC requested that the cleaning of miscellaneous metal parts in the petrochemical industry be exempt from the industrial cleaning solvents rule for these reasons.

Response

The commission disagrees with the commenter's interpretation of the EPA's 2006 CTG recommendation concerning the exclusion of specific source categories from the industrial cleaning solvents rule applicability. The EPA's 2006 CTG recommends that states exclude from the applicability, those industries relevant to the product categories listed for regulation under FCAA, §183(e), which includes miscellaneous metal and plastic parts coating. The EPA made this recommendation because the cleaning operations associated with the product categories listed under FCAA, §183(e) have been addressed elsewhere. Cleaning a part or product defined as a miscellaneous metal part or product, but not in any way related to the coating application, is not the intent of the EPA's 2006 CTG. Any solvent cleaning operation that is not associated with miscellaneous metal and plastic parts coatings, or the categories listed for regulation under FCAA, §183(e) constitutes a cleaning activity that could potentially be subject to the industrial cleaning solvents rules in Division 6. The commission makes no change in response to this comment.

Comment

ACA requested the commission exempt resin manufacturing from the Chapter 115, Subchapter E, Division 6, industrial cleaning solvents rules since the proposed VOC limits would not allow effective cleaning of resin manufacturing equipment. ACA commented that both the BAAQMD and SCAQMD rules, which the EPA relied on to develop its CTG recommendations, exempt resin manufacturing operations from solvent cleaning VOC limits as follows: SCAQMD Rule 1171(g)(2)(E) exempts cleaning operations subject to Rule 1141 - Control of Volatile Organic Compound Emissions from Resin Manufacturing, and Rule 1141.1 - Coatings and Ink Manufacturing; and BAAQMD Regulation 8, Rule 4, Section 113 exempts operations that are subject to the requirements of other rules of Regulation 8, or which comply with appropriate limitations of those rules prior to the effective dates. ACA commented that since BAAQMD regulates resin manufacturing under Regulation 8, Rule 36, the BAAQMD solvent cleaning rule does not apply to resin manufacturing operations. As an alternative to completely exempting resin manufacturing operations from the Chapter 115 industrial cleaning solvents rules, ACA suggested implementing a VOC limit of 1.67 lb VOC/gal solution, work practices, and an overall control efficiency of at least 80% or 90% if incineration is used.

Response

The commission agrees that requiring the resin manufacturing operations to comply with the 0.42 lb VOC/gal solution limit for cleaning solutions poses technical feasibility issues, as described in the commenter's formal comments and supporting documentation. The EPA's 2006 Industrial Cleaning Solvents CTG recommends excluding ink, adhesive, and coating manufacturing from the industrial cleaning solvents rule applicability because the 0.42 lb VOC/gal solution VOC content limit is not technologically and economically feasible for these manufacturing processes. The commission expects that the same technological and economic feasibility issues associated with manufacturing inks, coatings, and adhesives also exist for resin manufacturing. The VOC limit established in the industrial cleaning solvents rules prevent the use of adequate cleaning solutions, potentially causing cross contamination of manufactured products and poor product quality resulting in disposal of off-specification products. The 0.42 lb VOC/gal solution VOC content limit is not technologically feasible for resin manufacturing operations and therefore does not represent RACT for this industry. In response to this comment, the commission is revising §115.461(d)(13) to exempt resin manufacturing from the VOC content limit for industrial cleaning solvents.

Miscellaneous Industrial Adhesives

Applicability and Definitions

Comment

NASA and the US Navy commented that the categories regulated in §115.473 are a number of substances that are more likely to be used for institutional purposes or at construction sites rather than in manufacturing facilities. NASA and the US Navy added that it is unclear how the rule will apply to these materials that are used at thousands of sites statewide that are not manufacturing facilities. The US Navy suggested exempting adhesives or adhesive primers used for general consumer or non-manufacturing applications from the requirements in Division 7. Additionally, NASA suggested exempting adhesives and adhesive primers that are subject to the National Volatile Organic Compound Emission Standards for Consumer Products, 40 CFR Part 59, Subpart Public, because the EPA states in the *Federal*

Register notice for the Industrial Adhesive CTG (73 FR 40255) that the miscellaneous industrial adhesives category does not include materials that are subject to this rule.

Response

The commission is adopting the rules in Division 7 to implement the EPA's 2008 Miscellaneous Industrial Adhesives CTG recommendations. The commenter's requested exemption for the National Volatile Organic Compound Emission Standards for Consumer Products, 40 CFR Part 59, Subpart C from the Division 7 rules is unnecessary because these federal rules regulate the manufacturers and importers of consumer products, not the end-user of the products. Conversely, Division 7 applies to a subset of the consumer product end-user universe. Because aerosol adhesives and adhesive primers are regulated under the federal consumer products rules, the use of these materials is exempt under §115.471(b)(5) from the Division 7 VOC content limits, as recommended in the EPA's 2008 CTG. The commission makes no change in response to this comment.

However, in response to this comment the commission agrees that it is necessary to clarify the miscellaneous industrial adhesives rule applicability. In the final rule for the 2008 Miscellaneous Industrial Adhesives CTG (73 FR 58489), the EPA clearly states that the CTG recommendations are intended to only apply to the FCAA, §183(e) miscellaneous industrial adhesives product category, which only includes adhesives used at industrial manufacturing operations. In the final rule, the EPA also clearly states that the 2008 Miscellaneous Industrial Adhesives CTG recommendations do not include field applied adhesives (e.g., plastic solvent welding cements used by plumbers to join plumbing pipes on construction jobs in the field). Therefore, in response to this comment, the commission is revising §115.470(a) to clarify the rules in Division 7 apply to manufacturing operations in the DFW and HGB areas that use adhesives for any of the adhesive application processes specified in the control requirements in §115.473(a); adhesives applied in the field (e.g., adhesives applied at construction jobs in the field) are not subject to this division. The revised rule applicability in §115.470(a) more accurately reflects the sources affected by the EPA's 2008 Miscellaneous Industrial Adhesives CTG and clarifies the Division 7 rule applicability for affected sources.

Comment

NASA commented that adhesives are applied to non-production mock-ups, prototypes, fixtures, and displays at manned spacecraft centers. NASA requested an exemption be added to §115.471 for adhesives or adhesive primers used on site at installations owned or operated by the Armed Forces of the United States (including the Coast Guard and the Texas National Guard) and NASA. NASA requested the exemption because extensive field testing is required before adhesives can be approved for use and the proposed regulations would be impractical and extremely costly for NASA due to the complexity of adhesive operations, the number of adhesives used, and the number of different items and substrates bonded together.

Response

The rules in Division 7 are necessary to implement RACT for miscellaneous industrial adhesives as required in FCAA, §172(c)(1) and §182(b)(2). The commission disagrees that a complete exemption for NASA is consistent with the EPA's recommendations for this CTG emission source category. Granting the categorical exemption requested for NASA and other military organizations could potentially result in EPA disapproval of the Chapter 115 RACT rules and corresponding SIP revisions. The commission does not consider the adopted rules any less technologically or economically feasible for NASA and the US Navy as the rules are for other affected entities, which includes some small businesses.

The EPA's 2008 CTG is intended to apply to adhesive and adhesive primer application processes at manufacturing operations that are not already regulated. For purposes of the rules, a manufacturing operation refers to a manufacturer that uses adhesives to join surfaces in the assembly or construction of a product involving the application processes listed in §115.473(a). Accordingly, the adopted rules in Division 7 do not apply to adhesives and adhesive primers used in the application processes specified in §115.473(a) that are subject to another division in Chapter 115. For example, owners and operators subject to the aerospace surface coating requirements in Division 2 qualify for the exemption in §115.471(c) because adhesives are regulated under the Division 2 aerospace rules. Additionally, the EPA's 2008 CTG explicitly states that the miscellaneous industrial adhesives rules are not intended to include adhesives that are addressed by CTG documents already issued for categories listed under FCAA, §183(e) or by an earlier CTG, which includes aerospace coatings. The commission makes no change in response to this comment.

Comment

TCC requested the other adhesive primers application process category be replaced with other adhesive primers, other than incidental industrial use. TCC based the exemption request on the expectation that chemical plants may use limited amounts of adhesives for various maintenance activities. TCC stated that although the adhesive use associated with these repairs is expected to be below the 3.0 tpy exemption threshold in §115.471, recordkeeping would still be required under §115.478(b).

Response

The adhesive use described by the commenter is beyond the scope of the miscellaneous industrial adhesives rule applicability. As discussed elsewhere in this Response to Comments section, the commission is clarifying that the Division 7 rules apply to manufacturing operations using adhesives and adhesive primers for the adhesive application processes specified in §115.473(a). For purposes of the rules, a manufacturing operation refers to a manufacturer that uses adhesives to join surfaces in the assembly or construction of a product involving the application processes listed in §115.473(a). As discussed elsewhere in this Response to Comments section, the commission is revising the rule applicability in §115.470(a) to clearly indicate that adhesives applied in the field (e.g., adhesives applied at construction jobs in the field) are not subject to the Division 7 rules. Any source that does not qualify for an exemption in §115.471 and is considered a manufacturing operation is subject to and required to comply with the Division 7 rules. The commission makes no change in response to this comment.

DIVISION 2. SURFACE COATING PROCESSES

30 TAC §§115.422, 115.427, 115.429

Statutory Authority

The amendments are adopted under Texas Water Code (TWC), §5.102, concerning General Powers, that provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, that authorizes the commission to adopt rules necessary to carry out its powers

and duties under the TWC; TWC, §5.105, concerning General Policy, that authorizes the commission by rule to establish and approve all general policy of the commission; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, that authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amended sections are also adopted under THSC, §382.002, concerning Policy and Purpose, that establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, that authorizes the commission to control the quality of the state's air; and THSC, §382.012, concerning State Air Control Plan, that authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air. The amended sections are also adopted under THSC, §382.016, concerning Monitoring Requirements; Examination of Records, that authorizes the commission to prescribe reasonable requirements for the measuring and monitoring of air contaminant emissions and THSC, §382.021, concerning Sampling Methods and Procedures, that authorizes the commission to prescribe the sampling methods and procedures to determine compliance with its rules. The amended sections are also adopted under Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7401, *et seq.,* which requires states to submit state implementation plan revisions that specify the manner in which the National Ambient Air Quality Standards will be achieved and maintained within each air quality control region of the state.

The adopted amendments implement THSC, §§382.002, 382.011, 382.012, 382.016, 382.017, and 382.021, and FCAA, 42 USC, §§7401 *et seq.*

§115.422. Control Requirements.

In the Beaumont-Port Arthur, Dallas-Fort Worth, El Paso, and Houston-Galveston-Brazoria areas, as defined in §115.10 of this title (relating to Definitions), the following control requirements apply.

(1) The owner or operator of each vehicle refinishing (body shop) operation shall minimize volatile organic compounds (VOC) emissions during equipment cleanup by using the following procedures:

(A) install and operate a system that totally encloses spray guns, cups, nozzles, bowls, and other parts during washing, rinsing, and draining procedures. Non-enclosed cleaners may be used if the vapor pressure of the cleaning solvent is less than 100 millimeters of mercury (mm Hg) at 20 degrees Celsius (68 degrees Fahrenheit) and the solvent is directed towards a drain that leads directly to an enclosed remote reservoir;

(B) keep all wash solvents in an enclosed reservoir that is covered at all times, except when being refilled with fresh solvents; and

(C) keep all waste solvents and other cleaning materials in closed containers.

(2) Each vehicle refinishing (body shop) operation must use coating application equipment with a transfer efficiency of at least 65%, unless otherwise specified in an alternate means of control approved by the executive director in accordance with §115.910 of this title (relating to Availability of Alternate Means of Control). High-volume, low-pressure (HVLP) spray guns are assumed to comply with the 65% transfer efficiency requirement.

(3) The following requirements apply to each wood furniture manufacturing facility subject to §115.421(a)(14) of this title (relating to Emission Specifications).

(A) No compounds containing more than 8.0% by weight of VOC may be used for cleaning spray booth components other than conveyors, continuous coaters and their enclosures, and/or metal filters, unless the spray booth is being refurbished. If the spray booth is being refurbished, that is, the spray booth coating or other material used to cover the booth is being replaced, no more than 1.0 gallon of organic solvent may be used to prepare the booth prior to applying the booth coating.

(B) Normally closed containers must be used for storage of finishing, cleaning, and washoff materials.

(C) Conventional air spray guns may not be used for applying finishing materials except under one or more of the following circumstances:

(i) to apply finishing materials that have a VOC content no greater than 1.0 kilogram of VOC per kilogram of solids (1.0 pound of VOC per pound of solids), as delivered to the application system;

(ii) for touch-up and repair under the following circumstances:

(I) the finishing materials are applied after completion of the finishing operation; or

(II) the finishing materials are applied after the stain and before any other type of finishing material is applied, and the finishing materials are applied from a container that has a volume of no more than 2.0 gallons.

(iii) if spray is automated, that is, the spray gun is aimed and triggered automatically, not manually;

(iv) if emissions from the finishing application station are directed to a vapor control system;

(v) the conventional air gun is used to apply finishing materials and the cumulative total usage of that finishing material is no more than 5.0% of the total gallons of finishing material used during that semiannual period; or

(vi) the conventional air gun is used to apply stain on a part for which:

(I) the production speed is too high or the part shape is too complex for one operator to coat the part and the application station is not large enough to accommodate an additional operator; or

(II) the excessively large vertical spray area of the part makes it difficult to avoid sagging or runs in the stain.

(D) All organic solvent used for line cleaning or to clean spray guns must be pumped or drained into a normally closed container.

(E) Emissions from washoff operations must be minimized by:

(i) using normally closed tanks for washoff; and

(ii) minimizing dripping by tilting or rotating the part to drain as much organic solvent as possible.

(4) The following requirements apply to each shipbuilding and ship repair surface coating facility subject to §115.421(a)(15) of this title.

(A) All handling and transfer of VOC-containing materials to and from containers, tanks, vats, drums, and piping systems must be conducted in a manner that minimizes spills.

(B) All containers, tanks, vats, drums, and piping systems must be free of cracks, holes, and other defects and remain closed unless materials are being added to or removed from them.

(C) All organic solvent used for line cleaning or to clean spray guns must be pumped or drained into a normally closed container.

(5) The following requirements apply to each aerospace vehicle or component coating process subject to §115.421(a)(11) or (b)(10) of this title.

(A) One or more of the following application techniques must be used to apply any primer or topcoat to aerospace vehicles or components: flow/curtain coating; dip coating; roll coating; brush coating; cotton-tipped swab application; electrodeposition coating; HVLP spraying; electrostatic spraying; or other coating application methods that achieve emission reductions equivalent to HVLP or electrostatic spray application methods, unless one of the following situations apply:

(i) any situation that normally requires the use of an airbrush or an extension on the spray gun to properly reach limited access spaces;

(ii) the application of specialty coatings;

(iii) the application of coatings that contain fillers that adversely affect atomization with HVLP spray guns and that the executive director has determined cannot be applied by any of the specified application methods;

(iv) the application of coatings that normally have a dried film thickness of less than 0.0013 centimeter (0.0005 in.) and that the executive director has determined cannot be applied by any of the specified application methods in this subparagraph;

(v) the use of airbrush application methods for stenciling, lettering, and other identification markings;

(vi) the use of aerosol coating (spray paint) application methods; and

(vii) touch-up and repair operations.

(B) Cleaning solvents used in hand-wipe cleaning operations must meet the definition of aqueous cleaning solvent in §115.420(b)(1)(I) of this title (relating to Surface Coating Definitions) or have a VOC composite vapor pressure less than or equal to 45 mm Hg at 20 degrees Celsius, unless one of the following situations apply:

(i) cleaning during the manufacture, assembly, installation, maintenance, or testing of components of breathing oxygen systems that are exposed to the breathing oxygen;

(ii) cleaning during the manufacture, assembly, installation, maintenance, or testing of parts, subassemblies, or assemblies that are exposed to strong oxidizers or reducers (e.g., nitrogen tetroxide, liquid oxygen, hydrazine);

(iii) cleaning and surface activation prior to adhesive bonding;

(iv) cleaning of electronics parts and assemblies containing electronics parts;

(v) cleaning of aircraft and ground support equipment fluid systems that are exposed to the fluid, including air-to-air heat exchangers and hydraulic fluid systems;

(vi) cleaning of fuel cells, fuel tanks, and confined spaces;

(vii) surface cleaning of solar cells, coated optics, and thermal control surfaces;

(viii) cleaning during fabrication, assembly, installation, and maintenance of upholstery, curtains, carpet, and other textile materials used on the interior of the aircraft;

(ix) cleaning of metallic and nonmetallic materials used in honeycomb cores during the manufacture or maintenance of these cores, and cleaning of the completed cores used in the manufacture of aerospace vehicles or components;

(x) cleaning of aircraft transparencies, polycarbonate, or glass substrates;

(xi) cleaning and solvent usage associated with research and development, quality control, or laboratory testing;

(xii) cleaning operations, using nonflammable liquids, conducted within five feet of energized electrical systems. Energized electrical systems means any alternating current or direct current electrical circuit on an assembled aircraft once electrical power is connected, including interior passenger and cargo areas, wheel wells and tail sections; and

(xiii) cleaning operations identified as essential uses under the Montreal Protocol that the United States Environmental Protection Agency (EPA) has allocated essential use allowances or exemptions in 40 Code of Federal Regulations §82.4 (as amended through May 10, 1995 (60 FR 24986)), including any future amendments promulgated by the EPA.

(C) For cleaning solvents used in the flush cleaning of parts, assemblies, and coating unit components, the used cleaning solvent must be emptied into an enclosed container or collection system that is kept closed when not in use or captured with wipers provided they comply with the housekeeping requirements of subparagraph (E) of this paragraph. Aqueous and semiaqueous cleaning solvents are exempt from this subparagraph.

(D) All spray guns must be cleaned by one or more of the following methods:

(i) enclosed spray gun cleaning system provided that it is kept closed when not in use and leaks are repaired within 14 days from when the leak is first discovered. If the leak is not repaired by the 15th day after detection, the solvent must be removed and the enclosed cleaner must be shut down until the leak is repaired or its use is permanently discontinued;

(ii) unatomized discharge of solvent into a waste container that is kept closed when not in use;

(iii) disassembly of the spray gun and cleaning in a vat that is kept closed when not in use; or

(iv) atomized spray into a waste container that is fitted with a device designed to capture atomized solvent emissions.

(E) All fresh and used cleaning solvents used in solvent cleaning operations must be stored in containers that are kept closed at all times except when filling or emptying. Cloth and paper, or other absorbent applicators, moistened with cleaning solvents must be stored in closed containers. Cotton-tipped swabs used for very small cleaning operations are exempt from this subparagraph. In addition, the owner or operator shall implement handling and transfer procedures to minimize spills during filling and transferring the cleaning solvent to or from enclosed systems, vats, waste containers, and other cleaning oper-

ation equipment that hold or store fresh or used cleaning solvents. The requirements of this subparagraph are known collectively as housekeeping measures. Aqueous, semiaqueous, and hydrocarbon-based cleaning solvents, as defined in §115.420(b)(1) of this title, are exempt from this subparagraph.

(6) Any surface coating operation that becomes subject to §115.421(a) of this title by exceeding the exemption limits in §115.427(a) of this title (relating to Exemptions) is subject to the provisions in §115.421(a) of this title, even if throughput or emissions later fall below exemption limits unless emissions are maintained at or below the controlled emissions level achieved while complying with §115.421(a) of this title and one of the following conditions is met.

(A) The project that caused the throughput or emission rate to fall below the exemption limits in §115.427(a) of this title must be authorized by a permit, permit amendment, standard permit, or permit by rule required by Chapter 116 or Chapter 106 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification; and Permits by Rule). If a permit by rule is available for the project, the owner or operator shall continue to comply with §115.421(a) of this title for 30 days after the filing of documentation of compliance with that permit by rule.

(B) If authorization by permit, permit amendment, standard permit, or permit by rule is not required for the project, the owner or operator shall provide the executive director 30 days notice of the project in writing.

(7) Beginning March 1, 2013, in the Dallas-Fort Worth and Houston-Galveston-Brazoria areas, the owner or operator of a paper surface coating line subject to this division shall implement the following work practices to limit VOC emissions from storage, mixing, and handling of cleaning and cleaning-related waste materials.

(A) All VOC-containing cleaning materials must be stored in closed containers.

(B) Mixing and storage containers used for VOC-containing materials must be kept closed at all times except when depositing or removing these materials.

(C) Spills of VOC-containing cleaning materials must be minimized.

(D) VOC-containing cleaning materials must be conveyed from one location to another in closed containers or pipes.

(E) VOC emissions from the cleaning of storage, mixing, and conveying equipment must be minimized.

§115.427. Exemptions.

(a) In the Beaumont-Port Arthur, Dallas-Fort Worth, El Paso, and Houston-Galveston-Brazoria areas as defined in §115.10 of this title (relating to Definitions), the following exemptions apply.

(1) The following coating operations are exempt from §115.421(a)(9) of this title (relating to Emission Specifications):

(A) aerospace vehicles and components;

(B) vehicle refinishing (body shops), except as required by §115.421(a)(8)(B) and (C) of this title; and

(C) ships and offshore oil or gas drilling platforms, except as required by §115.421(a)(15) of this title.

(2) The following coating operations are exempt from §115.421(a)(10) of this title:

(A) the manufacture of exterior siding;

(B) tile board; or

(C) particle board used as a furniture component.

(3) The following exemptions apply to surface coating operations, except for vehicle refinishing (body shops) controlled by §115.421(a)(8)(B) and (C) of this title. Excluded from the volatile organic compounds (VOC) emission calculations are coatings and solvents used in surface coating activities that are not addressed by the surface coating categories of §115.421(a)(1) - (15) or §115.453 of this title (relating to Control Requirements). For example, architectural coatings (i.e., coatings that are applied in the field to stationary structures and their appurtenances, to portable buildings, to pavements, or to curbs) at a property would not be included in the calculations.

(A) Surface coating operations on a property that, when uncontrolled, will emit a combined weight of VOC of less than 3.0 pounds per hour and 15 pounds in any consecutive 24-hour period are exempt from §115.421(a) of this title and §115.423 of this title (relating to Alternate Control Requirements).

(B) Surface coating operations on a property that, when uncontrolled, will emit a combined weight of VOC of less than 100 pounds in any consecutive 24-hour period are exempt from §115.421(a) and §115.423 of this title if documentation is provided to and approved by both the executive director and the United States Environmental Protection Agency to demonstrate that necessary coating performance criteria cannot be achieved with coatings that satisfy applicable emission specifications and that control equipment is not technically or economically feasible.

(C) Surface coating operations on a property for which total coating and solvent usage does not exceed 150 gallons in any consecutive 12-month period are exempt from §115.421(a) and §115.423 of this title.

(D) Mirror backing coating operations located on a property that, when uncontrolled, emit a combined weight of VOC less than 25 tons in one year (based on historical coating and solvent usage) are exempt from this division (relating to Surface Coating Processes).

(E) Wood furniture manufacturing facilities that are subject to and are complying with §115.421(a)(14) of this title and §115.422(3) of this title (relating to Control Requirements) are exempt from §115.421(a)(13) of this title. These wood furniture manufacturing facilities must continue to comply with §115.421(a)(13) of this title until these facilities are in compliance with §115.421(a)(14) and §115.422(3) of this title.

(F) Wood furniture manufacturing facilities that, when uncontrolled, emit a combined weight of VOC from wood furniture manufacturing operations less than 25 tons per year are exempt from §115.421(a)(14) and §115.422(3) of this title.

(G) Wood parts and products coating facilities in Hardin, Jefferson, and Orange Counties are exempt from §115.421(a)(13) of this title.

(H) Shipbuilding and ship repair operations in Hardin, Jefferson, and Orange Counties that, when uncontrolled, emit a combined weight of VOC from ship and offshore oil or gas drilling platform surface coating operations less than 50 tons per year are exempt from §115.421(a)(15) and §115.422(4) of this title.

(I) Shipbuilding and ship repair operations in Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties that, when uncontrolled, emit a combined weight of VOC from ship and offshore oil or gas drilling platform surface coating operations less than 25 tons per year are exempt from §115.421(a)(15) and §115.422(4) of this title.

(J) The following activities where cleaning and coating of aerospace vehicles or components may take place are exempt from this division: research and development, quality control, laboratory testing, and electronic parts and assemblies, except for cleaning and coating of completed assemblies.

(4) Vehicle refinishing (body shops) in Hardin, Jefferson, and Orange Counties are exempt from §115.421(a)(8)(B) and §115.422(1) and (2) of this title.

(5) The coating of vehicles at in-house (fleet) vehicle refinishing operations and the coating of vehicles by private individuals are exempt from §115.421(a)(8)(B) and §115.422(1) and (2) of this title. This exemption is not applicable if the coating of a vehicle by a private individual occurs at a commercial operation.

(6) Aerosol coatings (spray paint) are exempt from this division.

(7) Beginning March 1, 2013, in the Dallas-Fort Worth and Houston-Galveston-Brazoria areas, the following surface coating categories that are subject to the requirements of Chapter 115, Subchapter E, Division 5 of this title (relating to Control Requirements for Surface Coating Processes) are exempt from the requirements in this division:

(A) large appliance coating;

(B) metal furniture coating;

(C) miscellaneous metal parts and products coating;

(D) each paper coating line with the potential to emit equal to or greater than 25 tons per year of VOC from all coatings applied; and

(E) automobile and light-duty truck manufacturing coating.

(8) In the Dallas-Fort Worth and Houston-Galveston-Brazoria areas, the re-coating of used miscellaneous metal parts and products at a designated on-site maintenance shop that was exempt from §115.421(a)(9) of this title prior to January 1, 2012, or that begins operation on or after January 1, 2012, is exempt from all requirements in this division. The re-coating of used miscellaneous metal parts and products at a designated on-site maintenance shop that was subject to §115.421(a)(9) of this title prior to January 1, 2012, remains subject to this division. For purposes of this exemption, a designated on-site maintenance shop is an area at a site where used miscellaneous metal parts or products are re-coated on a routine basis.

(b) For Gregg, Nueces, and Victoria Counties, the following exemptions apply.

(1) Surface coating operations located at any property that, when uncontrolled, will emit a combined weight of VOC less than 550 pounds (249.5 kilograms) in any continuous 24-hour period are exempt from §115.421(b) of this title. Excluded from this calculation are coatings and solvents used in surface coating activities that are not addressed by the surface coating categories of §115.421(b)(1) - (10) of this title. For example, architectural coatings (i.e., coatings that are applied in the field to stationary structures and their appurtenances, to portable buildings, to pavements, or to curbs) at a property would not be included in the calculation.

(2) The following coating operations are exempt from §115.421(b)(8) of this title:

(A) aerospace vehicles and components;

(B) vehicle refinishing (body shops); and

(C) ships and offshore oil or gas drilling platforms.

(3) The following coating operations are exempt from §115.421(b)(9) of this title:

(A) the manufacture of exterior siding;

(B) tile board; or

(C) particle board used as a furniture component.

(4) Aerosol coatings (spray paint) are exempt from this division.

§115.429. Counties and Compliance Schedules.

(a) The owner or operator of each surface coating operation in Brazoria, Chambers, Collin, Dallas, Denton, El Paso, Fort Bend, Galveston, Gregg, Hardin, Harris, Jefferson, Liberty, Montgomery, Nueces, Orange, Tarrant, Victoria, and Waller Counties shall continue to comply with this division as required by §115.930 of this title (relating to Compliance Dates).

(b) In Ellis, Johnson, Kaufman, Parker, and Rockwall Counties the compliance date has already passed and the owner or operator of each surface coating operation shall continue to comply with this division.

(c) In Hardin, Jefferson, and Orange Counties the compliance date has already passed and the owner or operator of each shipbuilding and ship repair operation that, when uncontrolled, emits a combined weight of volatile organic compounds from ship and offshore oil or gas drilling platform surface coating operations equal to or greater than 50 tons per year and less than 100 tons per year shall continue to comply with this division.

(d) The owner or operator of a paper surface coating process located in the Dallas-Fort Worth and Houston-Galveston-Brazoria areas, as defined in §115.10 of this title (relating to Definitions), shall comply with the requirements in §115.422(7) of this title (relating to Control Requirements), no later than March 1, 2013.

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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Robert Martinez
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DIVISION 3. FLEXOGRAPHIC AND ROTOGRAVURE PRINTING

30 TAC §§115.430 - 115.433, 115.435, 115.436, 115.439

Statutory Authority

The amendments and new section are adopted under Texas Water Code (TWC), §5.102, concerning General Powers, that provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, that authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; TWC, §5.105, concerning General Policy, that authorizes the commission by rule to estab-

lish and approve all general policy of the commission; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, that authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The new and amended sections are also adopted under THSC, §382.002, concerning Policy and Purpose, that establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, that authorizes the commission to control the quality of the state's air; and THSC, §382.012, concerning State Air Control Plan, that authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air. The new and amended sections are also adopted under THSC, §382.016, concerning Monitoring Requirements; Examination of Records, that authorizes the commission to prescribe reasonable requirements for the measuring and monitoring of air contaminant emissions and THSC, §382.021, concerning Sampling Methods and Procedures, that authorizes the commission to prescribe the sampling methods and procedures to determine compliance with its rules. The new and amended sections are also adopted under Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7401, *et seq.,* which requires states to submit state implementation plan revisions that specify the manner in which the National Ambient Air Quality Standards will be achieved and maintained within each air quality control region of the state.

The adopted amendments and new section implement THSC, §§382.002, 382.011, 382.012, 382.016, 382.017, and 382.021, and FCAA, 42 USC, §§7401 *et seq.*

§115.430. Applicability and Definitions.

(a) Applicability. The requirements in this division apply to the following flexographic and rotogravure printing processes in the Beaumont-Port Arthur, Dallas-Fort Worth, El Paso, and Houston-Galveston-Brazoria areas, as defined in §115.10 of this title (relating to Definitions), and in Gregg, Nueces, and Victoria Counties:

(1) packaging rotogravure printing lines;

(2) publication rotogravure printing lines;

(3) flexographic printing lines; and

(4) flexible package printing lines.

(b) Definitions. Unless specifically defined in the Texas Clean Air Act (Texas Health and Safety Code, Chapter 382) or in §§3.2, 101.1, or 115.10 of this title (relating to Definitions), the terms in this division have the meanings commonly used in the field of air pollution control. In addition, the following meanings apply in this division unless the context clearly indicates otherwise.

(1) Cleaning operation--The cleaning of a press, press parts, or removing dried ink from areas around a press. A cleaning operation does not include cleaning electronic components of a press; cleaning in pre-press (e.g., platemaking) or post-press (e.g., binding) operations; the use of janitorial supplies (e.g., detergents or floor cleaners) to clean areas around a press; and parts washers or cold cleaners.

(2) Daily weighted average--The total weight of volatile organic compounds (VOC) emissions from all materials subject to the same VOC content limit in §115.432 of this title (relating to Control Requirements) divided by the total volume or weight of those materials (minus water and exempt solvent), where applicable, or divided by the total volume or weight of solids applied to each printing line per day.

(3) Flexible package printing--Flexographic or rotogravure printing on any package or part of a package the shape of which can be readily changed including, but not limited to, bags, pouches, liners, and wraps using paper, plastic, film, aluminum foil, metallized or coated paper or film, or any combination of these materials.

(4) Flexographic printing--A method of printing in which the image areas are raised above the non-image areas, and the image carrier is made of an elastomeric material.

(5) Packaging rotogravure printing--Any rotogravure printing on paper, paper board, metal foil, plastic film, or any other substrate that is, in subsequent operations, formed into packaging products or labels.

(6) Publication rotogravure printing--Any rotogravure printing on paper that is subsequently formed into books, magazines, catalogues, brochures, directories, newspaper supplements, or other types of printed materials.

(7) Rotogravure printing--The application of words, designs, or pictures to any substrate by means of a roll printing technique that involves a recessed image area. The recessed area is loaded with ink and pressed directly to the substrate for image transfer.

§115.431. Exemptions.

(a) In the Beaumont-Port Arthur, Dallas-Fort Worth, El Paso, and Houston-Galveston-Brazoria areas, as defined in §115.10 of this title (relating to Definitions), the following exemptions apply.

(1) In the Beaumont-Port Arthur, Dallas-Fort Worth, and El Paso areas, all rotogravure and flexographic printing lines on a property that, when uncontrolled, have a maximum potential to emit a combined weight of volatile organic compounds (VOC) less than 50 tons per year (based on historical ink and VOC solvent usage, and at maximum production capacity) are exempt from the requirements in §115.432(a) of this title (relating to Control Requirements).

(2) In the Houston-Galveston-Brazoria area, all rotogravure and flexographic printing lines on a property that, when uncontrolled, have a maximum potential to emit a combined weight of VOC less than 25 tons per year (based on historical ink and VOC solvent usage, and at maximum production capacity) are exempt from the requirements in §115.432(a) of this title.

(3) Beginning March 1, 2013, in the Dallas-Fort Worth and Houston-Galveston-Brazoria areas, all flexible package printing lines located on a property that have a combined weight of total actual VOC emissions less than 3.0 tons per year from all coatings, as defined in §101.1 of this title (relating to Definitions), and all associated cleaning operations are exempt from the requirements in §115.432(c) and (d) of this title.

(4) Beginning March 1, 2013, in the Dallas-Fort Worth and Houston-Galveston-Brazoria areas, each flexible package printing line that, when uncontrolled, has a maximum potential to emit total VOC emissions less than 25 tons per year from all coatings is exempt from the requirements in §115.432(c) of this title.

(b) In Gregg, Nueces, and Victoria Counties, all rotogravure and flexographic printing lines on a property that, when uncontrolled, emit a combined weight of VOC less than 100 tons per year (based on historical ink and VOC solvent usage) are exempt from the requirements in §115.432(b) of this title.

§115.432. Control Requirements.

(a) In the Beaumont-Port Arthur, Dallas-Fort Worth, El Paso, and Houston-Galveston-Brazoria areas, as defined in §115.10 of this title (relating to Definitions), the following control requirements apply.

Beginning March 1, 2013, this subsection no longer applies to flexible package printing lines in the Dallas-Fort Worth and Houston-Galveston-Brazoria areas that are required to comply with the requirements in subsection (c) of this section.

(1) The owner or operator shall limit the volatile organic compounds (VOC) emissions from solvent-containing ink used on each packaging rotogravure, publication rotogravure, flexible package, and flexographic printing line by using one of the following options.

(A) The owner or operator shall apply low solvent ink with a volatile fraction containing 25% by volume or less of VOC solvent and 75% by volume or more of water and exempt solvent.

(B) The owner or operator shall apply high solids solvent-borne ink containing 60% by volume or more of nonvolatile material (minus water and exempt solvent).

(C) The owner or operator shall operate a vapor control system to reduce the VOC emissions from an effective capture system by at least 90% by weight. The design and operation of the capture system for each printing line must be consistent with good engineering practice and must achieve, as demonstrated to the satisfaction of the executive director, upon request, of at least the following weight percentages:

(i) 75% for a publication rotogravure process;

(ii) 65% for a packaging rotogravure process;

(iii) 60% for a flexographic printing process; or

(iv) for a flexible package printing process, the overall control efficiency in clause (ii) or (iii) of this subparagraph, depending on the type of press used.

(2) A flexographic and rotogravure printing line that becomes subject to paragraph (1) of this subsection by exceeding the exemption limits in §115.431(a) of this title (relating to Exemptions) is subject to the provisions of this subsection even if throughput or emissions later fall below exemption limits unless emissions are maintained at or below the controlled emissions level achieved while complying with paragraph (1) of this subsection and one of the following conditions is met.

(A) The project that caused the throughput or emission rate to fall below the exemption limits in §115.431(a) of this title must be authorized by a permit, permit amendment, standard permit, or permit by rule required by Chapter 116 of this title (relating to Control of Air Pollution by Permit for New Construction or Modification) or Chapter 106 of this title (relating to Permits by Rule). If a permit by rule is available for the project, the owner or operator shall continue to comply with paragraph (1) of this subsection for 30 days after the filing of documentation of compliance with that permit by rule.

(B) If authorization by permit, permit amendment, standard permit, or permit by rule is not required for the project, the owner or operator shall provide the executive director 30 days notice of the project in writing.

(3) Any capture efficiency testing of the capture system must be conducted in accordance with §115.435(a) of this title (relating to Testing Requirements).

(b) In Gregg, Nueces, and Victoria Counties, the owner or operator shall limit the VOC emissions from solvent-containing ink used on each packaging rotogravure, publication rotogravure, flexible package, and flexographic printing line by using one of the following options.

(1) The owner or operator shall apply low solvent ink with a volatile fraction containing 25% by volume or less of VOC solvent and 75% by volume or more of water and exempt solvent.

(2) The owner or operator shall apply high solids solvent-borne ink containing 60% by volume or more of nonvolatile material (minus water and exempt solvent).

(3) The owner or operator shall operate a vapor control system to reduce the VOC emissions from an effective capture system by at least 90% by weight. The design and operation of the capture system for each printing line must be consistent with good engineering practice and must achieve an overall control efficiency, as demonstrated to the satisfaction of the executive director, upon request, of at least the following weight percentages:

(A) 75% for a publication rotogravure process;

(B) 65% for a packaging rotogravure process;

(C) 60% for a flexographic printing process; or

(D) for a flexible package printing process, the overall control efficiency in subparagraph (B) or (C) of this paragraph, depending on the type of press used.

(c) Beginning March 1, 2013, in the Dallas-Fort Worth and Houston-Galveston-Brazoria areas, the following control requirements apply to each flexible package printing line.

(1) The owner or operator shall limit the VOC emissions from coatings, as defined in §101.1 of this title (relating to Definitions), applied on each flexible package printing line by using one of the following options. These limits are based on the daily weighted average, as defined in §115.430(b) of this title (relating to Applicability and Definitions).

(A) The owner or operator shall limit the VOC emissions from the coatings to 0.80 pound of VOC per pound of solids applied. The VOC emission limit can be met through the use of low-VOC coatings or a combination of coatings and the operation of a vapor control system.

(B) The owner or operator shall limit the VOC emissions from the coatings to 0.16 pound of VOC per pound of coating applied. The VOC emission limit can be met through the use of low-VOC coatings or a combination of coatings and the operation of a vapor control system.

(C) The owner or operator shall operate a vapor control system that achieves an overall control efficiency of at least 80% by weight.

(2) A flexographic and rotogravure printing line that becomes subject to paragraph (1) of this subsection by exceeding the exemption limits in §115.431(a) of this title is subject to paragraph (1) of this subsection even if throughput or emissions later fall below exemption limits unless emissions are maintained at or below the controlled emissions level achieved while complying with paragraph (1) of this subsection and one of the following conditions is met.

(A) The project that caused the throughput or emission rate to fall below the exemption limits in §115.431(a) of this title must be authorized by a permit, permit amendment, standard permit, or permit by rule required by Chapter 116 of this title or Chapter 106 of this title. If a permit by rule is available for the project, the owner or operator shall continue to comply with paragraph (1) of this subsection for 30 days after the filing of documentation of compliance with that permit by rule.

(B) If authorization by permit, permit amendment, standard permit, or permit by rule is not required for the project, the owner or operator shall provide the executive director 30 days notice of the project in writing.

(3) An owner or operator applying coatings in combination with a vapor control system to meet the VOC emission limits in paragraph (1)(A) or (B) of this subsection shall use the following equation to determine the minimum overall control efficiency necessary to demonstrate equivalency. Control device and capture efficiency testing must be performed in accordance with the testing requirements in §115.435(a) of this title.
Figure: 30 TAC §115.432(c)(3)

(d) The owner or operator of a flexible package printing process shall implement the following work practices for cleaning materials:

(1) keep all cleaning solvents and used shop towels in closed containers; and

(2) convey cleaning solvents from one location to another in closed containers or pipes.

§115.436. Monitoring and Recordkeeping Requirements.

(a) In the Beaumont-Port Arthur, Dallas-Fort Worth, El Paso, and Houston-Galveston-Brazoria areas, as defined in §115.10 of this title (relating to Definitions), the owner or operator of a rotogravure or flexographic printing line subject to this division shall:

(1) maintain records of the volatile organic compounds (VOC) content of all inks as applied to the substrate. Additionally, records of the quantity of each ink and solvent used must be maintained. The composition of inks may be determined by the methods referenced in §115.435(a) of this title (relating to Testing Requirements) or by examining the manufacturer's formulation data and the amount of dilution solvent added to adjust the viscosity of inks prior to application to the substrate;

(2) maintain daily records of the quantity of each ink and solvent used at a facility subject to the requirements of an alternate means of control approved by the executive director in accordance with §115.433 of this title (relating to Alternate Control Requirements) that allows the application of inks exceeding the applicable control limits. Such records must be sufficient to demonstrate compliance with the applicable emission limitation on a daily weighted average;

(3) install and maintain monitors to continuously measure and record operational parameters of any control device installed to meet applicable control requirements. Such records must be sufficient to demonstrate proper functioning of those devices to design specifications, including:

(A) the exhaust gas temperature of direct-flame incinerators or gas temperature immediately upstream and downstream of any catalyst bed;

(B) the total amount of VOC recovered by a carbon adsorption or other solvent recovery system during a calendar month;

(C) the exhaust gas VOC concentration of any carbon adsorption system, as defined in §115.10 of this title, to determine if breakthrough has occurred; and

(D) the dates and reasons for any maintenance and repair of the required control devices and the estimated quantity and duration of VOC emissions during such activities;

(4) maintain the results of any testing conducted at an affected facility in accordance with the provisions specified in §115.435(a) of this title;

(5) maintain all records at the affected facility for at least two years and make such records available upon request to authorized representatives of the executive director, the United States Environmental Protection Agency (EPA), or any local air pollution agency with jurisdiction; and

(6) maintain on file the capture efficiency protocol submitted under §115.435(a)(8) of this title. The owner or operator shall submit all results of the test methods and capture efficiency protocols to the executive director within 60 days of the actual test date. The source owner or operator shall maintain records of the capture efficiency operating parameter values on-site for a minimum of one year. If any changes are made to capture or control equipment, the owner or operator is required to notify the executive director in writing within 30 days of these changes, and a new capture efficiency or control device destruction or removal efficiency test may be required.

(b) In Gregg, Nueces, and Victoria Counties, the owner or operator of any rotogravure or flexographic printing line shall:

(1) maintain records of the VOC content of all inks as applied to the substrate. Additionally, records of the quantity of each ink and solvent used must be maintained. The composition of inks may be determined by the methods referenced in §115.435(b) of this title or by examining the manufacturer's formulation data and the amount of dilution solvent added to adjust the viscosity of inks prior to application to the substrate;

(2) maintain daily records of the quantity of each ink and solvent used at a facility subject to the requirements of an alternate means of control approved by the executive director in accordance with §115.433 of this title that allows the application of inks exceeding the applicable control limits. Such records must be sufficient to demonstrate compliance with the applicable emission limitation on a daily weighted average;

(3) install and maintain monitors to continuously measure and record operational parameters of any control device installed to meet applicable control requirements. Such records must be sufficient to demonstrate proper functioning of those devices to design specifications, including:

(A) the exhaust gas temperature of direct-flame incinerators or the gas temperature immediately upstream and downstream of any catalyst bed;

(B) the total amount of VOC recovered by a carbon adsorption or other solvent recovery system during a calendar month;

(C) in Victoria County, the exhaust gas VOC concentration of any carbon adsorption system, as defined in §115.10 of this title, to determine if breakthrough has occurred; and

(D) the dates and reasons for any maintenance and repair of the required control devices and the estimated quantity and duration of VOC emissions during such activities;

(4) maintain the results of any testing conducted at an affected facility in accordance with the provisions specified in §115.435(b) of this title; and

(5) maintain all records at the affected facility for at least two years and make such records available upon request to authorized representatives of the executive director, the EPA, or any local air pollution agency with jurisdiction.

(c) Beginning March 1, 2013, in the Dallas-Fort Worth and Houston-Galveston-Brazoria areas, the owner or operator of a flexible package printing line subject to this division shall comply with the following monitoring and recordkeeping requirements.

(1) The owner or operator shall maintain records of the VOC content of all coatings, as defined in §101.1 of this title (relating to Definitions), as applied to the substrate. The composition of coatings may be determined by the methods referenced in §115.435(a) of this title or by examining the manufacturer's formulation data and the amount of dilution solvent added to adjust the viscosity of coatings prior to application to the substrate. Additionally, records of the quantity of each coating used must be maintained.

(2) For flexible package printing lines subject to the control requirements in §115.432(c) of this title (relating to Control Requirements), the owner or operator shall maintain records of the quantity and type of each coating and solvent consumed if any of the coatings, as applied, exceed the applicable VOC content or emission limits in §115.432(c) of this title. Records must be sufficient to demonstrate compliance with the applicable VOC content or emission limit on a daily weighted average.

(3) For flexible package printing lines subject to the control requirements in §115.432(a) of this title, the owner or operator shall maintain daily records of the quantity of each ink and solvent used at a facility subject to the requirements of an alternate means of control approved by the executive director in accordance with §115.433 of this title that allows the application of inks exceeding the applicable control limits. Such records must be sufficient to demonstrate compliance with the applicable emission limitation in §115.432(a) of this title on a daily weighted average.

(4) The owner or operator shall install and maintain monitors to continuously measure and record operational parameters of any control device installed to meet applicable control requirements in §115.432(a) or (c) of this title. Such records must be sufficient to demonstrate proper functioning of those devices to design specifications, including:

(A) the exhaust gas temperature of direct-flame incinerators or gas temperature immediately upstream and downstream of any catalyst bed;

(B) the total amount of VOC recovered by a carbon adsorption or other solvent recovery system during a calendar month;

(C) the exhaust gas VOC concentration of any carbon adsorption system, as defined in §115.10 of this title, to determine if breakthrough has occurred; and

(D) the dates and reasons for any maintenance and repair of the required control devices and the estimated quantity and duration of VOC emissions during such activities.

(5) The owner or operator shall maintain the results of any testing conducted at an affected facility in accordance with the provisions specified in §115.435(a) of this title.

(6) The owner or operator shall maintain all records at the affected facility for at least two years and make such records available upon request to authorized representatives of the executive director, the EPA, or any local air pollution agency with jurisdiction.

(7) The owner or operator shall maintain on file the capture efficiency protocol submitted under §115.435(a)(8) of this title. The owner or operator shall submit all results of the test methods and capture efficiency protocols to the executive director within 60 days of the actual test date. The source owner or operator shall maintain records of the capture efficiency operating parameter values on-site for a minimum of one year. If any changes are made to capture or control equipment, the owner or operator is required to notify the executive director in writing within 30 days of these changes, and a new capture efficiency or control device destruction or removal efficiency test may be required.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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30 TAC §115.437

Statutory Authority

The repealed section is adopted under Texas Water Code (TWC), §5.102, concerning General Powers, that provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, that authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; TWC, §5.105, concerning General Policy, that authorizes the commission by rule to establish and approve all general policy of the commission; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, that authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The repealed section is also adopted under THSC, §382.002, concerning Policy and Purpose, that establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, that authorizes the commission to control the quality of the state's air; and THSC, §382.012, concerning State Air Control Plan, that authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air. The repealed section is also proposed under THSC, §382.016, concerning Monitoring Requirements; Examination of Records, that authorizes the commission to prescribe reasonable requirements for the measuring and monitoring of air contaminant emissions. The repealed section is also adopted under Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7401, *et seq.,* which requires states to submit state implementation plan revisions that specify the manner in which the National Ambient Air Quality Standards will be achieved and maintained within each air quality control region of the state.

The repeal implements THSC, §§382.002, 382.011, 382.012, and 382.016, 382.017; and FCAA, 42 USC, §§7401 *et seq.*

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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DIVISION 5. CONTROL REQUIREMENTS FOR SURFACE COATING PROCESSES

30 TAC §§115.450, 115.451, 115.453 - 115.455, 115.458, 115.459

Statutory Authority

The new sections are adopted under Texas Water Code (TWC), §5.102, concerning General Powers, that provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, that authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; TWC, §5.105, concerning General Policy, that authorizes the commission by rule to establish and approve all general policy of the commission; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, that authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The new sections are also adopted under THSC, §382.002, concerning Policy and Purpose, that establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, that authorizes the commission to control the quality of the state's air; and THSC, §382.012, concerning State Air Control Plan, that authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air. The new sections are also adopted under THSC, §382.016, concerning Monitoring Requirements; Examination of Records, that authorizes the commission to prescribe reasonable requirements for the measuring and monitoring of air contaminant emissions; and THSC, §382.021, concerning Sampling Methods and Procedures, that authorizes the commission to prescribe the sampling methods and procedures to determine compliance with its rules. The new sections are also adopted under Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7401, *et seq.,* which requires states to submit state implementation plan revisions that specify the manner in which the National Ambient Air Quality will be achieved and maintained within each air quality control region of the state.

The new sections implement THSC, §§382.002, 382.011, 382.012, 382.016, 382.017, and 382.021; and FCAA, 42 USC, §§7401 *et seq.*

§115.450. Applicability and Definitions.

(a) Applicability. In the Dallas-Fort Worth and Houston-Galveston-Brazoria areas, as defined in §115.10 of this title (relating to Definitions), the requirements in this division apply to the following surface coating processes, except as specified in paragraph (6) of this subsection:

(1) large appliance surface coating;

(2) metal furniture surface coating;

(3) miscellaneous metal parts and products surface coating, miscellaneous plastic parts and products coating, pleasure craft surface coating, and automotive/transportation and business machine plastic parts surface coating at the original equipment manufacturer and off-site job shops that coat new parts and products or that re-coat used parts and products;

(4) motor vehicle materials applied to miscellaneous metal and plastic parts specified in paragraph (3) of this subsection, at the original equipment manufacturer and off-site job shops that coat new metal and plastic parts;

(5) paper, film, and foil surface coating lines with the potential to emit from all coatings greater than or equal to 25 tons per year of volatile organic compounds (VOC) when uncontrolled; and

(6) in the Dallas-Fort Worth area, automobile and light-duty truck assembly surface coating processes conducted by the original equipment manufacturer and operators that conduct automobile and light-duty truck surface coating processes under contract with the original equipment manufacturer.

(b) General definitions. Unless specifically defined in the Texas Clean Air Act (Texas Health and Safety Code, Chapter 382) or in §§3.2, 101.1, or 115.10 of this title (relating to Definitions), the terms in this division have the meanings commonly used in the field of air pollution control. In addition, the following meanings apply in this division unless the context clearly indicates otherwise.

(1) Aerosol coating (spray paint)--A hand-held, pressurized, non-refillable container that expels an adhesive or a coating in a finely divided spray when a valve on the container is depressed.

(2) Air-dried coating--A coating that is cured at a temperature below 194 degrees Fahrenheit (90 degrees Celsius). These coatings may also be referred to as low-bake coatings.

(3) Baked Coating--A coating that is cured at a temperature at or above 194 degrees Fahrenheit (90 degrees Celsius). These coatings may also be referred to as high-bake coatings.

(4) Coating application system--Devices or equipment designed for the purpose of applying a coating material to a surface. The devices may include, but are not be limited to, brushes, sprayers, flow coaters, dip tanks, rollers, knife coaters, and extrusion coaters.

(5) Coating line--An operation consisting of a series of one or more coating application systems and associated flash-off area(s), drying area(s), and oven(s) wherein a surface coating is applied, dried, or cured. The coating line ends at the point the coating is dried or cured, or prior to any subsequent application of a different coating.

(6) Coating solids (or solids)--The part of a coating that remains on the substrate after the coating is dried or cured.

(7) Daily weighted average--The total weight of volatile organic compounds (VOC) emissions from all coatings subject to the same VOC limit in §115.453 of this title (relating to Control Requirements), divided by the total volume or weight of those coatings (minus water and exempt solvent), where applicable, or divided by the total volume or weight of solids, delivered to the application system on each coating line each day. Coatings subject to different VOC content limits in §115.453 of this title may not be combined for purposes of calculating the daily weighted average.

(8) Multi-component coating--A coating that requires the addition of a separate reactive resin, commonly known as a catalyst or hardener, before application to form an acceptable dry film. These coatings may also be referred to as two-component coatings.

(9) Normally closed container--A container that is closed unless an operator is actively engaged in activities such as adding or removing material.

(10) One-component coating--A coating that is ready for application as it comes out of its container to form an acceptable dry film. A thinner, necessary to reduce the viscosity, is not considered a component.

(11) Pounds of volatile organic compounds (VOC) per gallon of coating (minus water and exempt solvent)--The basis for content limits for surface coating processes that can be calculated by the following equation:
Figure: 30 TAC §115.450(b)(11)

(12) Pounds of volatile organic compounds (VOC) per gallon of solids--The basis for emission limits for surface coating processes that can be calculated by the following equation:
Figure: 30 TAC §115.450(b)(12)

(13) Spray gun--A device that atomizes a coating or other material and projects the particulates or other material onto a substrate.

(14) Surface coating processes--Operations that use a coating application system.

(c) Specific surface coating definitions. The following meanings apply in this division unless the context clearly indicates otherwise.

(1) Automobile and light-duty truck manufacturing--The following definitions apply to this surface coating category.

(A) Adhesive--Any chemical substance that is applied for the purpose of bonding two surfaces together other than by mechanical means.

(B) Automobile and light-duty truck adhesive--An adhesive, including glass-bonding adhesive, used in an automobile or light-duty truck assembly surface coating process and applied for the purpose of bonding two vehicle surfaces together without regard to the substrates involved.

(C) Automobile and light-duty truck bedliner--A multicomponent coating used in an automobile or light-duty truck assembly surface coating process and applied to a cargo bed after the application of topcoat and outside of the topcoat operation to provide additional durability and chip resistance.

(D) Automobile and light-duty truck cavity wax--A coating, used in an automobile or light-duty truck assembly surface coating process, applied into the cavities of the vehicle primarily for the purpose of enhancing corrosion protection.

(E) Automobile and light-duty truck deadener--A coating used in an automobile or light-duty truck assembly surface coating process and applied to selected vehicle surfaces primarily for the purpose of reducing the sound of road noise in the passenger compartment.

(F) Automobile and light-duty truck gasket/gasket sealing material--A fluid used in an automobile or light-duty truck assembly surface coating process and applied to coat a gasket or replace and perform the same function as a gasket. Automobile and light-duty truck gasket/gasket sealing material includes room temperature vulcanization seal material.

(G) Automobile and light-duty truck glass-bonding primer--A primer, used in an automobile or light-duty truck assembly surface coating process, applied to windshield or other glass, or to body openings, to prepare the glass or body opening for the application of glass-bonding adhesives or the installation of adhesive-bonded glass. Automobile and light-duty truck glass-bonding primer includes glass-bonding/cleaning primers that perform both functions (cleaning and priming of the windshield or other glass, or body openings) prior to the application of an adhesive or the installation of adhesive-bonded glass.

(H) Automobile and light-duty truck lubricating wax/compound--A protective lubricating material used in an automobile or light-duty truck assembly surface coating process and applied to vehicle hubs and hinges.

(I) Automobile and light-duty truck sealer--A high viscosity material used in an automobile or light-duty truck assembly surface coating process and generally, but not always, applied in the paint shop after the body has received an electrodeposition primer coating and before the application of subsequent coatings (e.g., primer-surfacer). The primary purpose of automobile and light-duty truck sealer is to fill body joints completely so that there is no intrusion of water, gases, or corrosive materials into the passenger area of the body compartment. Such materials are also referred to as sealant, sealant primer, or caulk.

(J) Automobile and light-duty truck trunk interior coating--A coating used in an automobile or light-duty truck assembly surface coating process outside of the primer-surfacer and topcoat operations and applied to the trunk interior to provide chip protection.

(K) Automobile and light-duty truck underbody coating--A coating used in an automobile or light-duty truck assembly surface coating process and applied to the undercarriage or firewall to prevent corrosion or provide chip protection.

(L) Automobile and light-duty truck weather strip adhesive--An adhesive used in an automobile or light-duty truck assembly surface coating process and applied to weather-stripping materials for the purpose of bonding the weather-stripping material to the surface of the vehicle.

(M) Automobile assembly surface coating process--The assembly-line coating of new passenger cars, or passenger car derivatives, capable of seating 12 or fewer passengers.

(N) Electrodeposition primer--A process of applying a protective, corrosion-resistant waterborne primer on exterior and interior surfaces that provides thorough coverage of recessed areas. Electrodeposition primer is a dip-coating method that uses an electrical field to apply or deposit the conductive coating onto the part; the object being painted acts as an electrode that is oppositely charged from the particles of paint in the dip tank. Electrodeposition primer is also referred to as E-Coat, Uni-Prime, and ELPO Primer.

(O) Final repair--The operation(s) performed and coating(s) applied to completely assembled motor vehicles or to parts that are not yet on a completely assembled vehicle to correct damage or imperfections in the coating. The curing of the coatings applied in these operations is accomplished at a lower temperature than that used for curing primer-surfacer and topcoat. This lower temperature cure avoids the need to send parts that are not yet on a completely assembled vehicle through the same type of curing process used for primer-surfacer and topcoat and is necessary to protect heat-sensitive components on completely assembled vehicles.

(P) In-line repair--The operation(s) performed and coating(s) applied to correct damage or imperfections in the topcoat on parts that are not yet on a completely assembled vehicle. The curing of the coatings applied in these operations is accomplished at essentially the same temperature as that used for curing the previously applied topcoat. In-line repair is also referred to as high-bake repair

or high-bake reprocess. In-line repair is considered part of the topcoat operation.

(Q) Light-duty truck assembly surface coating process--The assembly-line coating of new motor vehicles rated at 8,500 pounds gross vehicle weight or less and designed primarily for the transportation of property, or derivatives such as pickups, vans, and window vans.

(R) Primer-surfacer--An intermediate protective coating applied over the electrodeposition primer and under the topcoat. Primer-surfacer provides adhesion, protection, and appearance properties to the total finish. Primer-surfacer is also referred to as guide coat or surfacer. Primer-surfacer operations may include other coatings (e.g., anti-chip, lower-body anti-chip, chip-resistant edge primer, spot primer, blackout, deadener, interior color, basecoat replacement coating, etc.) that are applied in the same spray booth(s).

(S) Topcoat--The final coating system applied to provide the final color or a protective finish. The topcoat may be a monocoat color or basecoat/clearcoat system. In-line repair and two-tone are part of topcoat. Topcoat operations may include other coatings (e.g., blackout, interior color, etc.) that are applied in the same spray booth(s).

(T) Solids turnover ratio (RT')--The ratio of total volume of coating solids that is added to the electrodeposition primer system (EDP) in a calendar month divided by the total volume design capacity of the EDP system.

(2) Automotive/transportation and business machine plastic parts--The following definitions apply to this surface coating category.

(A) Adhesion prime--A coating that is applied to a polyolefin part to promote the adhesion of a subsequent coating. An adhesion prime is clearly identified as an adhesion prime or adhesion promoter on its accompanying material safety data sheet.

(B) Black coating--A coating that has a maximum lightness of 23 units and a saturation less than 2.8, where saturation equals the square root of $A^2 + B^2$. These criteria are based on Cielab color space, 0/45 geometry. For spherical geometry, specular included, maximum lightness is 33 units.

(C) Business machine--A device that uses electronic or mechanical methods to process information, perform calculations, print or copy information, or convert sound into electrical impulses for transmission. This definition includes devices listed in Standard Industrial Classification codes 3572, 3573, 3574, 3579, and 3661 and photocopy machines, a subcategory of Standard Industrial Classification code 3861.

(D) Clear coating--A coating that lacks color and opacity or is transparent and that uses the undercoat as a reflectant base or undertone color.

(E) Coating of plastic parts of automobiles and trucks--The coating of any plastic part that is or will be assembled with other parts to form an automobile or truck.

(F) Coating of business machine plastic parts--The coating of any plastic part that is or will be assembled with other parts to form a business machine.

(G) Electrostatic prep coat--A coating that is applied to a plastic part solely to provide conductivity for the subsequent application of a prime, a topcoat, or other coating through the use of electrostatic application methods. An electrostatic prep coat is clearly identified as an electrostatic prep coat on its accompanying material safety data sheet.

(H) Flexible coating--A coating that is required to comply with engineering specifications for impact resistance, mandrel bend, or elongation as defined by the original equipment manufacturer.

(I) Fog coat--A coating that is applied to a plastic part for the purpose of color matching without masking a molded-in texture. A fog coat may not be applied at a thickness of more than 0.5 mil of coating solids.

(J) Gloss reducer--A coating that is applied to a plastic part solely to reduce the shine of the part. A gloss reducer may not be applied at a thickness of more than 0.5 mil of coating solids.

(K) Red coating--A coating that meets all of the following criteria:

(i) yellow limit: the hue of hostaperm scarlet;

(ii) blue limit: the hue of monastral red-violet;

(iii) lightness limit for metallics: 35% aluminum flake;

(iv) lightness limit for solids: 50% titanium dioxide white;

(v) solid reds: hue angle of -11 to 38 degrees and maximum lightness of 23 to 45 units; and

(vi) metallic reds: hue angle of -16 to 35 degrees and maximum lightness of 28 to 45 units. These criteria are based on Cielab color space, 0/45 geometry. For spherical geometry, specular included, the upper limit is 49 units. The maximum lightness varies as the hue moves from violet to orange. This is a natural consequence of the strength of the colorants, and real colors show this effect.

(L) Resist coat--A coating that is applied to a plastic part before metallic plating to prevent deposits of metal on portions of the plastic part.

(M) Stencil coat--A coating that is applied over a stencil to a plastic part at a thickness of 1.0 mil or less of coating solids. Stencil coats are most frequently letters, numbers, or decorative designs.

(N) Texture coat--A coating that is applied to a plastic part which, in its finished form, consists of discrete raised spots of the coating.

(O) Vacuum-metalizing coatings--Topcoats and basecoats that are used in the vacuum-metalizing process.

(3) Large appliance coating--The coating of doors, cases, lids, panels, and interior support parts of residential and commercial washers, dryers, ranges, refrigerators, freezers, water heaters, dishwashers, trash compactors, air conditioners, and other large appliances.

(A) Extreme high-gloss coating--A coating which, when tested by the American Society for Testing Material Test Method D523 adopted in 1980, shows a reflectance of 75% or more on a 60 degree meter.

(B) Extreme performance coating--A coating used on a metal surface where the coated surface is, in its intended use, subject to:

(i) chronic exposure to corrosive, caustic or acidic agents, chemicals, chemical fumes, chemical mixtures, or solutions;

(ii) repeated exposure to temperatures in excess of 250 degrees Fahrenheit (121 degrees Celsius);

(iii) repeated heavy abrasion, including mechanical wear and repeated scrubbing with industrial grade solvents, cleansers, or scouring agents; or

(iv) exposure to extreme environmental conditions, such as continuous outdoor exposure.

(C) Heat-resistant coating--A coating that must withstand a temperature of at least 400 degrees Fahrenheit (204 degrees Celsius) during normal use.

(D) Metallic coating--A coating that contains more than 0.042 pounds of metal particles per gallon of coating as applied. Metal particles are pieces of a pure elemental metal or a combination of elemental metals.

(E) Pretreatment coating--A coating that contains no more than 12% solids by weight and at least 0.50% acid by weight; is used to provide surface etching; and is applied directly to metal surfaces to provide corrosion resistance, adhesion, and ease of stripping.

(F) Solar-absorbent coating--A coating that has as its prime purpose the absorption of solar radiation.

(4) Metal furniture coating--The coating of metal furniture including, but not limited to, tables, chairs, wastebaskets, beds, desks, lockers, benches, shelves, file cabinets, lamps, and other metal furniture products or the coating of any metal part that will be a part of a nonmetal furniture product.

(A) Extreme high-gloss coating--A coating which, when tested by the American Society for Testing Material Test Method D523 adopted in 1980, shows a reflectance of 75% or more on a 60 degree meter.

(B) Extreme performance coating--A coating used on a metal surface where the coated surface is, in its intended use, subject to:

(i) chronic exposure to corrosive, caustic or acidic agents, chemicals, chemical fumes, chemical mixtures, or solutions;

(ii) repeated exposure to temperatures in excess of 250 degrees Fahrenheit (121 degrees Celsius);

(iii) repeated heavy abrasion, including mechanical wear and repeated scrubbing with industrial grade solvents, cleansers, or scouring agents; or

(iv) exposure to extreme environmental conditions, such as continuous outdoor exposure.

(C) Heat-resistant coating--A coating that must withstand a temperature of at least 400 degrees Fahrenheit (204 degrees Celsius) during normal use.

(D) Metallic coating--A coating containing more than 5.0 grams of metal particles per liter of coating as applied. Metal particles are pieces of a pure elemental metal or a combination of elemental metals.

(E) Pretreatment coating--A coating that contains no more than 12% solids by weight and at least 0.50% acid by weight; is used to provide surface etching; and is applied directly to metal surfaces to provide corrosion resistance, adhesion, and ease of stripping.

(F) Solar-absorbent coating--A coating that has as its primary purpose the absorption of solar radiation.

(5) Miscellaneous metal and plastic parts--The following definitions apply to this surface coating category.

(A) Camouflage coating--A coating used, principally by the military, to conceal equipment from detection.

(B) Clear coat--A coating that lacks opacity or is transparent and may or may not have an undercoat that is used as a reflectant base or undertone color.

(C) Drum (metal)--Any cylindrical metal shipping container with a capacity equal to or greater than 12 gallons but equal to or less than 110 gallons.

(D) Electric-dissipating coating--A coating that rapidly dissipates a high-voltage electric charge.

(E) Electric-insulting varnish--A non-convertible-type coating applied to electric motors, components of electric motors, or power transformers, to provide electrical, mechanical, and environmental protection or resistance.

(F) EMI/RFI shielding--A coating used on electrical or electronic equipment to provide shielding against electromagnetic interference (EMI), radio frequency interference (RFI), or static discharge.

(G) Etching filler--A coating that contains less than 23% solids by weight and at least 0.50% acid by weight and is used instead of applying a pretreatment coating followed by a primer.

(H) Extreme high-gloss coating--A coating which, when tested by the American Society for Testing and Materials Test Method D523 adopted in 1980, shows a reflectance of 75% or more on a 60 degree meter.

(I) Extreme performance coating--A coating used on a metal or plastic surface where the coated surface is, in its intended use, subject to one of the following conditions. Extreme performance coatings include, but are not limited to, coatings applied to locomotives, railroad cars, farm machinery, marine shipping containers, downhole drilling equipment, and heavy-duty trucks:

(i) chronic exposure to corrosive, caustic or acidic agents, chemicals, chemical fumes, chemical mixtures, or solutions;

(ii) repeated exposure to temperatures in excess of 250 degrees Fahrenheit (121 degrees Celsius);

(iii) repeated heavy abrasion, including mechanical wear and repeated scrubbing with industrial grade solvents, cleansers, or scouring agents; or

(iv) exposure to extreme environmental conditions, such as continuous outdoor exposure.

(J) Heat-resistant coating--A coating that must withstand a temperature of at least 400 degrees Fahrenheit (204 degrees Celsius) during normal use.

(K) High performance architectural coating--A coating used to protect architectural subsections and meets the requirements of the American Architectural Manufacturers Association's publication number AAMA 2604-05 (Voluntary Specification, Performance Requirements and Test Procedures for High Performance Organic Coatings on Aluminum Extrusions and Panels) or 2605-05 (Voluntary Specification, Performance Requirements and Test Procedures for Superior Performing Organic Coatings on Aluminum Extrusions and Panels).

(L) High temperature coating--A coating that is certified to withstand a temperature of 1000 degrees Fahrenheit (538 degrees Celsius) for 24 hours.

(M) Mask coating--A thin film coating applied through a template to coat a small portion of a substrate.

(N) Metallic coating--A coating containing more than 5.0 grams of metal particles per liter of coating as applied. Metal particles are pieces of a pure elemental metal or a combination of elemental metals.

(O) Military specification coating--A coating that has a formulation approved by a United States Military Agency for use on military equipment.

(P) Mold-seal coating--The initial coating applied to a new mold or a repaired mold to provide a smooth surface that when coated with a mold release coating, prevents products from sticking to the mold.

(Q) Miscellaneous metal parts and products--Parts and products considered miscellaneous metal parts and products include:

(i) large farm machinery (harvesting, fertilizing, and planting machines, tractors, combines, etc.);

(ii) small farm machinery (lawn and garden tractors, lawn mowers, rototillers, etc.);

(iii) small appliances (fans, mixers, blenders, crock pots, dehumidifiers, vacuum cleaners, etc.);

(iv) commercial machinery (computers and auxiliary equipment, typewriters, calculators, vending machines, etc.);

(v) industrial machinery (pumps, compressors, conveyor components, fans, blowers, transformers, etc.);

(vi) fabricated metal products (metal-covered doors, frames, etc.); and

(vii) any other category of coated metal products, including, but not limited to, those that are included in the Standard Industrial Classification Code major group 33 (primary metal industries), major group 34 (fabricated metal products), major group 35 (nonelectrical machinery), major group 36 (electrical machinery), major group 37 (transportation equipment), major group 38 (miscellaneous instruments), and major group 39 (miscellaneous manufacturing industries). Excluded are those surface coating processes specified in §115.420(b)(1) - (8) and (10) - (14) of this title (relating to Surface Coating Definitions) and paragraphs (1) - (4) and (6) - (8) of this subsection.

(R) Miscellaneous plastic parts and products--Parts and products considered miscellaneous plastic parts and products include, but are not limited to:

(i) molded plastic parts;

(ii) small and large farm machinery;

(iii) commercial and industrial machinery and equipment;

(iv) interior or exterior automotive parts;

(v) construction equipment;

(vi) motor vehicle accessories;

(vii) bicycles and sporting goods;

(viii) toys;

(ix) recreational vehicles;

(x) lawn and garden equipment;

(xi) laboratory and medical equipment;

(xii) electronic equipment; and

(xiii) other industrial and household products. Excluded are those surface coating processes specified in §115.420(b)(1) - (14) of this title and paragraphs (1) - (4) and (6) - (8) of this subsection.

(S) Multi-colored coating--A coating that exhibits more than one color when applied, is packaged in a single container, and applied in a single coat.

(T) Off-site job shop--A non-manufacturer of metal or plastic parts and products that applies coatings to such products at a site under contract with one or more parties that operate under separate ownership and control.

(U) Optical coating--A coating applied to an optical lens.

(V) Pail (metal)--Any cylindrical metal shipping container with a capacity equal to or greater than 1 gallon but less than 12 gallons and constructed of 29 gauge or heavier material.

(W) Pan-backing coating--A coating applied to the surface of pots, pans, or other cooking implements that are exposed directly to a flame or other heating elements.

(X) Prefabricated architectural component coating--A coating applied to metal parts and products that are to be used as an architectural structure.

(Y) Pretreatment coating--A coating that contains no more than 12% solids by weight and at least 0.50% acid by weight; is used to provide surface etching; and is applied directly to metal surfaces to provide corrosion resistance, adhesion, and ease of stripping.

(Z) Repair coating--A coating used to re-coat portions of a previously coated product that has sustained mechanical damage to the coating following normal surface coating processes.

(AA) Safety-indicating coating--A coating that changes physical characteristics, such as color, to indicate unsafe conditions.

(BB) Shock-free coating--A coating applied to electrical components to protect the user from electric shock. The coating has characteristics of being low-capacitance and high-resistance and having resistance to breaking down under high voltage.

(CC) Silicone-release coating--A coating that contains silicone resin and is intended to prevent food from sticking to metal surfaces such as baking pans.

(DD) Solar-absorbent coating--A coating that has as its primary purpose the absorption of solar radiation.

(EE) Stencil coating--A pigmented coating or ink that is rolled or brushed onto a template or stamp in order to add identifying letters, symbols, or numbers.

(FF) Touch-up coating--A coating used to cover minor coating imperfections appearing after the main surface coating process.

(GG) Translucent coating--A coating that contains binders and pigment and formulated to form a colored, but not opaque, film.

(HH) Vacuum-metalizing coating--The undercoat applied to the substrate on which the metal is deposited or the overcoat applied directly to the metal film. Vacuum metalizing or physical vapor deposition is the process whereby metal is vaporized and deposited on a substrate in a vacuum chamber.

(6) Motor vehicle materials--The following definitions apply to this surface coating category.

(A) Motor vehicle bedliner--A multi-component coating, used in a process that is not an automobile or light-duty truck manufacturing assembly coating process, applied to a cargo bed after the application of topcoat to provide additional durability and chip resistance.

(B) Motor vehicle cavity wax--A coating used in a process that is not an automobile or light-duty truck assembly coating process and applied into the cavities of the vehicle primarily for the purpose of enhancing corrosion protection.

(C) Motor vehicle deadener--A coating used in a process that is not an automobile or light-duty truck assembly coating process and applied to selected vehicle surfaces primarily for the purpose of reducing the sound of road noise in the passenger compartment.

(D) Motor vehicle gasket/sealing material--A fluid used in a process that is not an automobile or light-duty truck assembly coating process and applied to coat a gasket or replace and perform the same function as a gasket. Automobile and light-duty truck gasket/gasket sealing material includes room temperature vulcanization seal material.

(E) Motor vehicle lubricating wax/compound--A protective lubricating material used in a process that is not an automobile or light-duty truck assembly coating process and applied to vehicle hubs and hinges.

(F) Motor vehicle sealer--A high viscosity material used in a process that is not an automobile or light-duty truck assembly coating process and is generally, but not always, applied in the paint shop after the body has received an electrodeposition primer coating and before the application of subsequent coatings (e.g., primer-surfacer). The primary purpose of motor vehicle sealer is to fill body joints completely so that there is no intrusion of water, gases, or corrosive materials into the passenger area of the body compartment. Such materials are also referred to as sealant, sealant primer, or caulk.

(G) Motor vehicle trunk interior coating--A coating used in a process that is not an automobile or light-duty truck assembly coating process and applied to the trunk interior to provide chip protection.

(H) Motor vehicle underbody coating--A coating used in a process that is not an automobile or light-duty truck assembly coating process and applied to the undercarriage or firewall to prevent corrosion or provide chip protection.

(7) Paper, film, and foil coating--The coating of paper and pressure-sensitive tapes (regardless of substrate and including paper, fabric, and plastic film), related web coating processes on plastic film (including typewriter ribbons, photographic film, and magnetic tape), metal foil (including decorative, gift wrap, and packaging), industrial and decorative laminates, abrasive products (including fabric coated for use in abrasive products), and flexible packaging.

(A) Paper, film, and foil coating includes the application of a continuous layer of a coating material across the entire width or any portion of the width of a paper, film, or foil web substrate to:

(i) provide a covering, finish, or functional or protective layer to the substrate;

(ii) saturate the substrate for lamination; or

(iii) provide adhesion between two substrates for lamination.

(B) Paper, film, and foil coating excludes coating performed on or in-line with any offset lithographic, screen, letterpress, flexographic, rotogravure, or digital printing press; or size presses and on-machine coaters that function as part of an in-line papermaking system.

(8) Pleasure craft--Any marine or fresh-water vessel used by individuals for noncommercial, nonmilitary, and recreational purposes that is less than 65.6 feet in length. A vessel rented exclusively to, or chartered for, individuals for such purposes is considered a pleasure craft.

(A) Antifoulant coating--A coating applied to the underwater portion of a pleasure craft to prevent or reduce the attachment of biological organisms, and registered with the United States Environmental Protection Agency as a pesticide under the Federal Insecticide, Fungicide, and Rodenticide Act (7 United States Code, §136).

(B) Antifoulant sealer/tie coating--A coating applied over an antifoulant coating to prevent the release of biocides into the environment or to promote adhesion between an antifoulant coating and a primer or other antifoulants.

(C) Extreme high-gloss coating--A coating that achieves at least 90% reflectance on a 60 degree meter when tested by American Society for Testing and Materials Method D523-89.

(D) Finish primer-surfacer--A coating applied with a wet film thickness less than 10 mils prior to the application of a topcoat for purposes of providing corrosion resistance, adhesion of subsequent coatings, a moisture barrier, or promotion of a uniform surface necessary for filling in surface imperfections.

(E) High-build primer-surfacer--A coating applied with a wet film thickness of 10 mils or more prior to the application of a topcoat for purposes of providing corrosion resistance, adhesion of subsequent coatings, or a moisture barrier, or promoting a uniform surface necessary for filling in surface imperfections.

(F) High-gloss coating--A coating that achieves at least 85% reflectance on a 60 degree meter when tested by American Society for Testing and Materials Test Method D523-89.

(G) Pleasure craft coating--A marine coating, except unsaturated polyester resin (fiberglass) coatings, applied by brush, spray, roller, or other means to a pleasure craft.

(H) Pretreatment wash primer--A coating that contains no more than 25% solids by weight and at least 0.10% acids by weight; used to provide surface etching; and applied directly to fiberglass and metal surfaces to provide corrosion resistance and adhesion of subsequent coatings.

(I) Repair coating--A coating used to re-coat portions of a previously coated product that has sustained mechanical damage to the coating following normal surface coating processes.

(J) Topcoat--A final coating applied to the interior or exterior of a pleasure craft.

(K) Touch-up coating--A coating used to cover minor coating imperfections appearing after the main surface coating process.

§115.451. Exemptions.

(a) The volatile organic compounds (VOC) from coatings and solvents used in surface coating processes and associated cleaning operations not addressed by the surface coating categories in §115.421(a)(3), (5) - (7), and (10) - (15) of this title (relating to Emission Specifications) or §115.453 of this title (relating to Control Requirements,) are excluded from the VOC emission calculations for the purposes of paragraphs (1) - (3) of this subsection. For example, architectural coatings applied in the field to stationary structures and

their appurtenances, portable buildings, pavements, or curbs at a property would not be included in the calculations.

(1) All surface coating processes on a property that, when uncontrolled, will emit a combined weight of VOC of less than 3.0 pounds per hour and 15 pounds in any consecutive 24-hour period are exempt from §115.453 of this title.

(2) Surface coating processes on a property that, when uncontrolled, will emit a combined weight of VOC of less than 100 pounds in any consecutive 24-hour period are exempt from §115.453(a) of this title if documentation is provided to and approved by both the executive director and the United States Environmental Protection Agency to demonstrate that necessary coating performance criteria cannot be achieved with coatings that satisfy applicable VOC limits and that control equipment is not technologically or economically feasible.

(3) Surface coating processes on a property where total coating and solvent usage does not exceed 150 gallons in any consecutive 12-month period are exempt from the VOC limits in §115.453(a) of this title.

(b) The following surface coating processes are exempt from the VOC limits for miscellaneous metal and plastic parts coatings in §115.453(a)(1)(C) and (D) of this title and motor vehicle materials in §115.453(a)(2) of this title:

(1) large appliance surface coating;

(2) metal furniture surface coating;

(3) automobile and light-duty truck assembly surface coating; and

(4) surface coating processes specified in §115.420(b)(1) - (8) and (10) - (14) of this title (relating to Surface Coating Definitions).

(c) Paper, film, and foil surface coating processes are exempt from the coating application system requirements in §115.453(c) of this title and the coating use work practice requirements in §115.453(d)(1) of this title.

(d) Automobile and light-duty truck assembly surface coating processes are exempt from the coating application system requirements in §115.453(c) of this title and the cleaning-related work practice requirements in §115.453(d)(2) of this title.

(e) Automobile and light-duty truck assembly surface coating materials supplied in containers with a net volume of 16 ounces or less, or a net weight of 1.0 pound or less, are exempt from the VOC limits in Table 2 in §115.453(a)(3) of this title.

(f) The following miscellaneous metal part and product surface coatings and surface coating processes are exempt from the coating application system requirements in §115.453(c) of this title:

(1) touch-up coatings, repair coatings, and textured finishes;

(2) stencil coatings;

(3) safety-indicating coatings;

(4) solid-film lubricants;

(5) electric-insulating and thermal-conducting coatings;

(6) magnetic data storage disk coatings; and

(7) plastic extruded onto metal parts to form a coating.

(g) All miscellaneous plastic part airbrush surface coatings and surface coating processes where total coating usage is less than 5.0 gallons per year are exempt from the coating application system requirements in §115.453(c) of this title.

(h) The application of extreme high-gloss coatings to pleasure craft is exempt from the coating application system requirements in §115.453(c) of this title.

(i) The following miscellaneous plastic parts surface coatings and surface coating processes are exempt from the coating VOC limits in §115.453(a)(1)(D) of this title:

(1) touch-up and repair coatings;

(2) stencil coatings applied on clear or transparent substrates;

(3) clear or translucent coatings;

(4) any individual coating type used in volumes less than 50 gallons in any one year, if substitute compliant coatings are not available, provided that the total usage of all such coatings does not exceed 200 gallons per year, per property;

(5) reflective coating applied to highway cones;

(6) mask coatings that are less than 0.5 mil thick dried and the area coated is less than 25 square inches;

(7) electromagnetic interference/radio frequency interference (EMI/RFI) shielding coatings; and

(8) heparin-benzalkonium chloride-containing coatings applied to medical devices, if the total usage of all such coatings does not exceed 100 gallons per year, per property.

(j) The following automotive/transportation and business machine plastic part surface coatings and surface coating processes are exempt from the VOC limits in §115.453(a)(1)(E) of this title:

(1) texture coatings;

(2) vacuum-metalizing coatings;

(3) gloss reducers;

(4) texture topcoats;

(5) adhesion prime;

(6) electrostatic preparation coatings;

(7) resist coatings; and

(8) stencil coatings.

(k) Powder coatings applied during metal and plastic parts surface coating processes are exempt from the requirements in this division, except as specified in §115.458(b)(5) of this title (relating to Monitoring and Recordkeeping Requirements).

(l) Aerosol coatings (spray paint) are exempt from this division.

(m) Coatings applied to test panels and coupons as part of research and development, quality control, or performance testing activities at paint research or manufacturing facilities are exempt from the requirements in this division.

(n) Pleasure craft touch-up and repair coatings supplied in containers less than or equal to 1.0 quart, are exempt from the VOC limits in §115.453(a)(1)(F) of this title provided that the total usage of all such coatings does not exceed 50 gallons per calendar year per property.

(o) Pleasure craft surface coating processes are exempt from the VOC limits in §115.453(a)(1)(C) and (D) of this title.

§115.453. Control Requirements.

(a) The following control requirements apply to surface coating processes subject to this division. Except as specified in paragraph (3) of this subsection, these limitations are based on the daily weighted average of all coatings, as defined in §101.1 of this title (relating to Definitions), as delivered to the application system.

(1) The following limits must be met by applying low-volatile organic compound (VOC) coatings to meet the specified VOC content limits on a pound of VOC per gallon of coating basis (lb VOC/gal coating) (minus water and exempt solvent), or by applying coatings in combination with the operation of a vapor control system, as defined in §115.10 (relating to Definitions), to meet the specified VOC emission limits on a pound of VOC per gallon of solids basis (lb VOC/gal solids). If a coating meets more than one coating type definition, then the coating with the least stringent VOC limit applies.

(A) Large appliances. If a coating does not meet a specific coating type definition, then it can be assumed to be a general-use coating and the VOC limit for general coating applies.
Figure: 30 TAC §115.453(a)(1)(A)

(B) Metal furniture. If a coating does not meet a specific coating type definition, then it can be assumed to be a general-use coating and the VOC limit for general coating applies.
Figure: 30 TAC §115.453(a)(1)(B)

(C) Miscellaneous metal parts and products. If a coating does not meet a specific coating type definition, then it can be assumed to be a general-use coating and the VOC limit for general coating applies.
Figure: 30 TAC §115.453(a)(1)(C)

(D) Miscellaneous plastic parts and products. If a coating does not meet a specific coating category definition, then it can be assumed to be a general-use coating and the VOC limit for general coating applies.
Figure: 30 TAC §115.453(a)(1)(D)

(E) Automotive/transportation and business machine plastic parts. For red, yellow, and black automotive/transportation coatings, except touch-up and repair coatings, the VOC limit is determined by multiplying the appropriate limit in Table 1 of this subparagraph by 1.15.
Figure: 30 TAC §115.453(a)(1)(E)

(F) Pleasure craft. If a coating does not meet a specific coating category definition, then it can be assumed to be a general-use coating and the VOC limits for other coatings applies.
Figure: 30 TAC §115.453(a)(1)(F)

(2) The coating VOC limits for motor vehicle materials applied to the metal and plastic parts in paragraph (1)(C) - (F) of this subsection, as delivered to the application system, must be met using low-VOC coatings (minus water and exempt solvent).
Figure: 30 TAC §115.453(a)(2)

(3) The coating VOC limits for automobile and light-duty truck assembly surface coating processes must be met by applying low-VOC coatings.
Figure: 30 TAC §115.453(a)(3)

(A) The owner or operator shall determine compliance with the VOC limits for electrodeposition primer operations on a monthly weighted average in accordance with §115.455(a)(2)(D) of this title (relating to Approved Test Methods and Testing Requirements).

(B) As an alternative to the VOC limit in Table 1 of this paragraph for final repair coatings, if an owner or operator does not compile records sufficient to enable determination of the daily weighted average, compliance may be demonstrated each day by meeting a standard of 4.8 lb VOC/gal coating (minus water and exempt solvent) on an occurrence weighted average basis. Compliance with the VOC limits on an occurrence weighted average basis must be determined in accordance with the procedure specified in §115.455(a)(2) of this title.

(C) The owner or operator shall determine compliance with the VOC limits in Table 2 of this paragraph in accordance with §115.455(a)(1) or (2)(C) of this title, as appropriate.

(4) The coating VOC limits for paper, film, and foil surface coating processes must be met by applying low-VOC coatings to meet the specified VOC content limits on a pound of VOC per pound of coating basis, as delivered to the application system, or by applying coatings in combination with the operation of a vapor control system to meet the specified VOC emission limits on a pound of VOC per pound of solids basis, as delivered to the application system.
Figure: 30 TAC §115.453(a)(4)

(5) An owner or operator applying coatings in combination with the operation of a vapor control system to meet the VOC emission limits in paragraph (1) or (4) of this subsection shall use the following equation to determine the minimum overall control efficiency necessary to demonstrate equivalency. Control device and capture efficiency testing must be performed in accordance with the testing requirements in §115.455 (a)(3) and (4) of this title.
Figure: 30 TAC §115.453(a)(5)

(b) Except for the surface coating process in subsection (a)(2) of this section, the owner or operator of a surface coating process may operate a vapor control system capable of achieving a 90% overall control efficiency, as an alternative to subsection (a) of this section. Control device and capture efficiency testing must be performed in accordance with the testing requirements in §115.455(a)(3) and (4) of this title. If the owner or operator complies with the overall control efficiency option under this subsection, then the owner or operator is exempt from the application system requirements of subsection (c) of this section.

(c) The owner or operator of any surface coating process subject to this division shall not apply coatings unless one of the following coating application systems is used:

(1) electrostatic application;

(2) high-volume, low-pressure (HVLP) spray;

(3) flow coat;

(4) roller coat;

(5) dip coat;

(6) brush coat or hand-held paint rollers; or

(7) other coating application system capable of achieving a transfer efficiency equivalent to or better than that achieved by HVLP spray. For the purpose of this requirement, the transfer efficiency of HVLP spray is assumed to be 65%.

(d) The following work practices apply to the owner or operator of each surface coating process subject to this division.

(1) For all coating-related activities including, but not limited to, solvent storage, mixing operations, and handling operations for coatings and coating-related waste materials, the owner or operator shall:

(A) store all VOC-containing coatings and coating-related waste materials in closed containers;

(B) minimize spills of VOC-containing coatings;

(C) convey all coatings in closed containers or pipes;

(D) close mixing vessels and storage containers that contain VOC coatings and other materials except when specifically in use;

(E) clean up spills immediately; and

(F) for automobile and light-duty truck assembly coating processes, minimize VOC emissions from the cleaning of storage, mixing, and conveying equipment.

(2) For all cleaning-related activities including, but not limited to, waste storage, mixing, and handling operations for cleaning materials, the owner or operator shall:

(A) store all VOC-containing cleaning materials and used shop towels in closed containers;

(B) ensure that storage containers used for VOC-containing cleaning materials are kept closed at all times except when depositing or removing these materials;

(C) minimize spills of VOC-containing cleaning materials;

(D) convey VOC-containing cleaning materials from one location to another in closed containers or pipes;

(E) minimize VOC emissions from cleaning of storage, mixing, and conveying equipment;

(F) clean up spills immediately; and

(G) for metal and plastic parts surface coating processes specified in §115.450(a)(3) - (5) of this title (relating to Applicability and Definitions), minimize VOC emission from the cleaning of application, storage, mixing, and conveying equipment by ensuring that equipment cleaning is performed without atomizing the cleaning solvent and all spent solvent is captured in closed containers.

(3) The owner or operator of automobile and light-duty truck assembly surface coating processes shall implement a work practice plan containing procedures to minimize VOC emissions from cleaning activities and purging of coating application equipment. Properties with a work practice plan already in place to comply with requirements specified in 40 Code of Federal Regulations (CFR) §63.3094(b) (as amended through April 20, 2006 (71 FR 20464)), may incorporate procedures for minimizing non-hazardous air pollutant VOC emissions to comply with the work practice plan required by this paragraph.

(e) A surface coating process that becomes subject to subsection (a) of this section by exceeding the exemption limits in §115.451 of this title (relating to Exemptions) is subject to the provisions in subsection (a) of this section even if throughput or emissions later fall below exemption limits unless emissions are maintained at or below the controlled emissions level achieved while complying with subsection (a) of this section and one of the following conditions is met.

(1) The project that caused throughput or emission rate to fall below the exemption limits in §115.451 of this title must be authorized by a permit, permit amendment, standard permit, or permit by rule required by Chapters 106 or 116 of this title (relating to Permits by Rule; and Control of Air Pollution by Permits for New Construction or Modification, respectively). If a permit by rule is available for the project, the owner or operator shall continue to comply with subsection (a) of this section for 30 days after the filing of documentation of compliance with that permit by rule.

(2) If authorization by permit, permit amendment, standard permit, or permit by rule is not required for the project, the owner or operator shall provide the executive director 30 days notice of the project in writing.

§115.454. Alternate Control Requirements.

(a) For the owner or operator of a surface coating process subject to this division, alternate methods of demonstrating and documenting continuous compliance with the applicable control requirements or exemption criteria in this division may be approved by the executive director in accordance with §115.910 of this title (relating to Availability of Alternate Means of Control) if emission reductions are demonstrated to be substantially equivalent.

(b) For any surface coating process at a specific property, the executive director may approve requirements different from those in §115.453(a)(1)(C) of this title (relating to Control Requirements) based upon the executive director's determination that such requirements will result in the lowest emission rate that is technologically and economically reasonable. When the executive director makes such a determination, the executive director shall specify the date or dates by which such different requirements must be met and shall specify any requirements to be met in the interim. If the emissions resulting from such different requirements equal or exceed 25 tons a year for a property, the determinations for that property must be reviewed every five years. Executive director approval does not necessarily constitute satisfaction of all federal requirements nor eliminate the need for approval by the United States Environmental Protection Agency in cases where specified criteria for determining equivalency have not been clearly identified in applicable sections of this chapter.

§115.455. Approved Test Methods and Testing Requirements.

(a) Approved Test Methods and Testing Requirements. Compliance with the requirements in this division must be determined by applying one or more of the following test methods, as appropriate. As an alternative to the test methods in paragraph (1) of this subsection, the volatile organic compounds (VOC) content of coatings and, if necessary dilution solvent, may be determined by using analytical data from the material safety data sheet.

(1) The owner or operator shall demonstrate compliance with the VOC limits in §115.453 of this title (relating to Control Requirements), by applying the following test methods, as appropriate. Where a test method also inadvertently measures compounds that are exempt solvent an owner or operator may exclude the exempt solvent when determining compliance with a VOC limit. The methods include:

(A) Method 24 (40 Code of Federal Regulations (CFR) Part 60, Appendix A);

(B) American Society for Testing and Materials (ASTM) Test Methods D1186-06.01, D1200-06.01, D3794-06.01, D2832-69, D1644-75, and D3960-81;

(C) the United States Environmental Protection Agency (EPA) guidelines series document "Procedures for Certifying Quantity of Volatile Organic Compounds Emitted by Paint, Ink, and Other Coatings," EPA-450/3-84-019, as in effect December, 1984;

(D) additional test procedures described in 40 CFR §60.446 (as amended through October 17, 2000 (65 FR 61761)); and

(E) minor modifications to these test methods approved by the executive director.

(2) The owner or operator shall determine compliance with the VOC limits for automobile and light-duty truck assembly coating processes in §115.453(a)(3) of this title by applying the following test methods in addition to paragraph (1) of this subsection, as appropriate. The methods include:

(A) Protocol for Determining the Daily VOC Emission Rate of Automobile and Light-Duty Truck Topcoat Operations (EPA-453/R-08-002);

(B) the procedure contained in subparagraph (A) of this paragraph for determining daily compliance with the alternative emission limitation in §115.453(a)(3) of this title for final repair. Calculation of occurrence weighted average for each combination of repair coatings (primer, specific basecoat, clearcoat) must be determined by the following procedure;

(i) the relative occurrence weighted usage calculated as follows for each repair coating:
Figure: 30 TAC §115.455(a)(2)(B)(i)

(ii) the occurrence weighted average (Q) in pounds of VOC per gallon of coating (minus water and exempt solvents) as applied, for each potential combination of repair coatings calculated according to this subparagraph;
Figure: 30 TAC §115.455(a)(2)(B)(ii)

(C) the procedure contained in 40 CFR Part 63, Subpart PPPP, Appendix A (as amended through April 24, 2007 (72 FR 20237)), for reactive adhesives; and

(D) the procedure contained in 40 CFR Part 60, Subpart MM (as amended October 17, 2000 (65 FR 61760)) for determining the monthly weighted average for electrodeposition primer.

(3) The owner or operator shall determine compliance with the vapor control system requirements in §115.453 of this title by applying the following test methods, as appropriate:

(A) Methods 1 - 4 (40 CFR Part 60, Appendix A) for determining flow rates, as necessary;

(B) Method 25 (40 CFR Part 60, Appendix A) for determining total gaseous nonmethane organic emissions as carbon;

(C) Method 25A or 25B (40 CFR Part 60, Appendix A) for determining total gaseous organic concentrations using flame ionization or nondispersive infrared analysis;

(D) additional performance test procedures described in 40 CFR §60.444 (as amended through October 18, 1983 (48 FR 48375)); or

(E) minor modifications to these test methods approved by the executive director.

(4) The owner or operator of a surface coating process subject to §115.453(a)(5) or (b) of this title shall measure the capture efficiency using applicable procedures outlined in 40 CFR §52.741, Subpart O, Appendix B (as amended through October 21, 1996 (61 FR 54559)). These procedures are: Procedure T - Criteria for and Verification of a Permanent or Temporary Total Enclosure; Procedure L - VOC Input; Procedure G.2 - Captured VOC Emissions (Dilution Technique); Procedure F.1 - Fugitive VOC Emissions from Temporary Enclosures; and Procedure F.2 - Fugitive VOC Emissions from Building Enclosures.

(A) The following exemptions apply to capture efficiency testing requirements.

(i) If a source installs a permanent total enclosure that meets the specifications of Procedure T and that directs all VOC to a control device, then the capture efficiency is assumed to be 100%, and the source is exempted from capture efficiency testing requirements. This does not exempt the source from performance of any control device efficiency testing that may be required. In addition, a source must demonstrate all criteria for a permanent total enclosure are met during testing for control efficiency.

(ii) If a source uses a vapor control system designed to collect and recover VOC (e.g., carbon adsorption system), an explicit measurement of capture efficiency is not necessary if the following conditions are met. The overall control of the system can be determined by directly comparing the input liquid VOC to the recovered liquid VOC. The general procedure for use in this situation is given in 40 CFR §60.433 (as amended through October 17, 2000 (65 FR 61761)), with the following additional restrictions.

(I) The source must be able to equate solvent usage with solvent recovery on a 24-hour (daily) basis, rather than a 30-day weighted average. This verification must be done within 72 hours following each 24-hour period of the 30-day period.

(II) The solvent recovery system (i.e., capture and control system) must be dedicated to a single process line (e.g., one process line venting to a carbon adsorber system); or if the solvent recovery system controls multiple process lines, the source must be able to demonstrate that the overall control (i.e., the total recovered solvent VOC divided by the sum of liquid VOC input to all process lines venting to the control system) meets or exceeds the most stringent standard applicable for any process line venting to the control system.

(B) The capture efficiency must be calculated using one of the following protocols referenced. Any affected source must use one of these protocols, unless a suitable alternative protocol is approved by the executive director and the EPA.

(i) Gas/gas method using temporary total enclosure (TTE). The EPA specifications to determine whether a temporary enclosure is considered a TTE are given in Procedure T. The capture efficiency equation to be used for this protocol is:
Figure: 30 TAC §115.455(a)(4)(B)(i)

(ii) Liquid/gas method using TTE. The EPA specifications to determine whether a temporary enclosure is considered a TTE are given in Procedure T. The capture efficiency equation to be used for this protocol is:
Figure: 30 TAC §115.455(a)(4)(B)(ii)

(iii) Gas/gas method using the building or room enclosure (BE) in which the affected source is located and in which the mass of VOC captured and delivered to a control device and the mass of fugitive VOC that escapes from BE are measured while operating only the affected facility. All fans and blowers in the BE must be operating as they would under normal production. The capture efficiency equation to be used for this protocol is:
Figure: 30 TAC §115.455(a)(4)(B)(iii)

(iv) Liquid/gas method using a BE in which the mass of liquid VOC input to process and the mass of fugitive VOC that escapes from BE are measured while operating only the affected facility. All fans and blowers in the building or room must be operated as they would under normal production. The capture efficiency equation to be used for this protocol is:
Figure: 30 TAC §115.455(a)(4)(B)(iv)

(C) The operating parameters selected for monitoring of the capture system for compliance with the requirements in §115.458(a) of this title (relating to Monitoring and Recordkeeping Requirements) must be monitored and recorded during the initial capture efficiency test and thereafter during facility operation. The executive director may require a new capture efficiency test if the operating parameter values change significantly from those recorded during the initial capture efficiency test.

(5) Test methods other than those specified in paragraphs (1) - (4) of this subsection may be used if approved by the executive director and validated by Method 301 (40 CFR Part 63, Appendix A). For the purposes of this paragraph, substitute "executive director" each place that Method 301 references "administrator."

(b) Inspection requirements. The owner or operator of each surface coating process subject to §115.453 of this title shall provide samples, without charge, upon request by authorized representatives of the executive director, the EPA, or any local air pollution agency with jurisdiction. The representative or inspector requesting the sample will determine the amount of coating needed to test the sample to determine compliance.

§115.458. Monitoring and Recordkeeping Requirements.

(a) Monitoring requirements. The following monitoring requirements apply to the owner or operator of a surface coating process subject to this division that uses a vapor control system in accordance with §115.453 of this title (relating to Control Requirements). The owner or operator shall install and maintain monitors to accurately measure and record operational parameters of all required control devices to ensure the proper functioning of those devices in accordance with design specifications, including:

(1) continuous monitoring of the exhaust gas temperature immediately downstream of direct-flame incinerators or the gas temperature immediately upstream and downstream of any catalyst bed;

(2) the total amount of volatile organic compounds (VOC) recovered by carbon adsorption or other solvent recovery systems during a calendar month;

(3) continuous monitoring of carbon adsorption bed exhaust; and

(4) appropriate operating parameters for capture systems and control devices other than those specified in paragraphs (1) - (3) of this subsection.

(b) Recordkeeping requirements. The following recordkeeping requirements apply to the owner or operator of a surface coating process subject to this division.

(1) The owner or operator shall maintain records of the testing data or the material safety data sheets (MSDS) in accordance with the requirements in §115.455(a) of this title (relating to Approved Test Methods and Testing Requirements). The MSDS must document relevant information regarding each coating and solvent available for use in the affected surface coating processes including the VOC content, composition, solids content, and solvent density. Records must be sufficient to demonstrate continuous compliance with the VOC limits in §115.453(a) of this title.

(2) Records must be maintained of the quantity and type of each coating and solvent consumed during the specified averaging period if any of the coatings, as delivered to the coating application system, exceed the applicable VOC limits. Such records must be sufficient to calculate the applicable weighted average of VOC content for all coatings.

(3) As an alternative to the recordkeeping requirements of paragraph (2) of this subsection, the owner or operator that qualifies for exemption under §115.451(a)(3) of this title (relating to Exemptions) may maintain records of the total gallons of coating and solvent used in each month and total gallons of coating and solvent used in the previous 12 months.

(4) The owner or operator shall maintain, on file, the capture efficiency protocol submitted under §115.455(a)(4) of this title. The owner or operator shall submit all results of the test methods and capture efficiency protocols to the executive director within 60 days of the actual test date. The owner or operator shall maintain records of the capture efficiency operating parameter values on-site for a minimum of one year. If any changes are made to capture or control equipment, the owner or operator is required to notify the executive director in writing within 30 days of these changes and a new capture efficiency or control device destruction or removal efficiency test may be required.

(5) The owner or operator claiming an exemption in §115.451 of this title shall maintain records sufficient to demonstrate continuous compliance with the applicable exemption criteria.

(6) Records must be maintained of any testing conducted in accordance with the provisions specified in §115.455(a) of this title.

(7) Records must be maintained a minimum of two years and be made available upon request to authorized representatives of the executive director, the United States Environmental Protection Agency, or any local air pollution agency with jurisdiction.

§115.459. Compliance Schedules.

(a) The owner or operator of a surface coating process subject to this division shall comply with the requirements of this division no later than March 1, 2013.

(b) The owner or operator of a surface coating process that becomes subject to this division on or after March 1, 2013, shall comply with the requirements in this division no later than 60 days after becoming subject.

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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For further information, please call: (512) 239-2548

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DIVISION 6. INDUSTRIAL CLEANING SOLVENTS

30 TAC §§115.460, 115.461, 115.463 - 115.465, 115.468, 115.469

Statutory Authority

The new sections are adopted under Texas Water Code (TWC), §5.102, concerning General Powers, that provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, that authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; TWC, §5.105, concerning General Policy, that authorizes the commission by rule to establish and approve all general policy of the commission; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, that authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The new sections are also adopted under THSC, §382.002, concerning Policy and Purpose, that establishes the commission's purpose

to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, that authorizes the commission to control the quality of the state's air; and §382.012, concerning State Air Control Plan, that authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air. The new sections are also adopted under THSC, §382.016, concerning Monitoring Requirements; Examination of Records, that authorizes the commission to prescribe reasonable requirements for the measuring and monitoring of air contaminant emissions; and §382.021, concerning Sampling Methods and Procedures, that authorizes the commission to prescribe the sampling methods and procedures to determine compliance with its rules. The new sections are also adopted under Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7401, *et seq.,* which requires states to submit state implementation plan revisions that specify the manner in which the National Ambient Air Quality Standards will be achieved and maintained within each air quality control region of the state.

The new sections implement THSC, §§382.002, 382.011, 382.012, 382.016, 382.017, and 382.021; and FCAA, 42 USC, §§7401 *et seq.*

§115.460. Applicability and Definitions.

(a) Applicability. Except as specified in §115.461 of this title (relating to Exemptions), the requirements in this division apply to solvent cleaning operations in the Dallas-Fort Worth and Houston-Galveston-Brazoria areas, as defined in §115.10 of this title (relating to Definitions). Residential cleaning and janitorial cleaning are not considered solvent cleaning operations.

(b) Definitions. Unless specifically defined in the Texas Clean Air Act (Texas Health and Safety Code, Chapter 382) or in §§3.2, 101.1, or 115.10 of this title (relating to Definitions), the terms in this division have the meanings commonly used in the field of air pollution control. In addition, the following meanings apply in this division unless the context clearly indicates otherwise.

(1) Aerosol can--A hand-held, non-refillable container that expels pressurized product by means of a propellant-induced force.

(2) Electrical and electronic components--Components and assemblies of components that generate, convert, transmit, or modify electrical energy. Electrical and electronic components include, but are not limited to, wires, windings, stators, rotors, magnets, contacts, relays, printed circuit boards, printed wire assemblies, wiring boards, integrated circuits, resistors, capacitors, and transistors. Cabinets that house electrical and electronic components are not considered electrical and electronic components.

(3) Janitorial cleaning--The cleaning of building or building components including, but not limited to, floors, ceilings, walls, windows, doors, stairs, bathrooms, furnishings, and exterior surfaces of office equipment, excluding the cleaning of work areas where manufacturing or repair activity is performed.

(4) Magnet wire--Wire used in electromagnetic field application in electrical machinery and equipment such as transformers, motors, generators, and magnetic tape recorders.

(5) Magnet wire coating operation--The process of applying insulation coatings such as varnish or enamel on magnet wire where wire is continuously drawn through a coating applicator.

(6) Medical device--An instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent, or other similar article, including any component or accessory that is, intended for use in the diagnosis of disease or other conditions, or in the cure, mitigation, treatment, or prevention of diseases; intended to affect the structure or any function of the body; or defined in the National Formulary or the United States Pharmacopoeia or any supplement to it.

(7) Medical device and pharmaceutical preparation operations--Medical devices, pharmaceutical products, and associated manufacturing and product handling equipment and material, work surfaces, maintenance tools, and room surfaces that are subject to the United States Federal Drug Administration current Good Manufacturing/Laboratory Practice, or Center for Disease Control or National Institute of Health guidelines for biological disinfection of surfaces.

(8) Polyester resin operation--The fabrication, rework, repair, or touch-up of composite products for commercial, military, or industrial uses by mixing, pouring, manual application, molding, impregnating, injecting, forming, spraying, pultrusion, filament winding, or centrifugally casting with polyester resins.

(9) Precision optics--The optical elements used in electro-optical devices that are designed to sense, detect, or transmit light energy, including specific wavelengths of light energy and changes of light energy levels.

(10) Solvent cleaning operation--The removal of uncured adhesives, inks, and coatings; and contaminants such as dirt, soil, oil, and grease from parts, products, tools, machinery, equipment, vessels, floors, walls, and other work production-related areas.

(11) Volatile organic compound (VOC) composite partial pressure--The sum of the partial pressures of the compounds that meet the definition of VOC in §101.1 of this title (relating to Definitions). The VOC composite partial pressure is calculated as follows.
Figure: 30 TAC §115.460(b)(11)

§115.461. Exemptions.

(a) Solvent cleaning operations located on a property with total actual volatile organic compounds (VOC) emissions of less than 3.0 tons per calendar year from all cleaning solvents, when uncontrolled, are exempt from the requirements of this division, except as specified in §115.468(b)(2) of this title (relating to Monitoring and Recordkeeping Requirements). When calculating the VOC emissions, solvents used for cleaning operations that are exempt from this division under subsections (b) - (e) of this section are excluded.

(b) The owner or operator of any process or operation subject to another division of this chapter that specifies solvent cleaning operation requirements related to that process or operation is exempt from the requirements in this division.

(c) A solvent cleaning operation is exempt from this division if:

(1) the process or operation that the solvent cleaning operation is associated with is subject to another division in this chapter; and

(2) the VOC emissions from the solvent cleaning operation are controlled in accordance with an emission specification or control requirement of the division that the process or operation is subject to.

(d) The following are exempt from the VOC limits in §115.463(a) of this title (relating to Control Requirements):

(1) electrical and electronic components;

(2) precision optics;

(3) numisimatic dies;

(4) resin mixing, molding, and application equipment;

(5) coating, ink, and adhesive mixing, molding, and application equipment;

(6) stripping of cured inks, cured adhesives, and cured coatings;

(7) research and development laboratories;

(8) medical device or pharmaceutical preparation operations;

(9) performance or quality assurance testing of coatings, inks, or adhesives;

(10) architectural coating manufacturing and application operations;

(11) magnet wire coating operations;

(12) semiconductor wafer fabrication;

(13) coating, ink, resin, and adhesive manufacturing;

(14) polyester resin operations;

(15) flexographic and rotogravure printing processes;

(16) screen printing operations; and

(17) digital printing operations.

(e) Cleaning solvents supplied in aerosol cans are exempt from the VOC limits in §115.463(a) of this title if total use for the property is less than 160 fluid ounces per day.

§115.463. Control Requirements.

(a) The owner or operator shall limit the volatile organic compounds (VOC) content of cleaning solutions to:

(1) 0.42 pound of VOC per gallon of solution (lb VOC/gal solution), as applied; or

(2) limit the composite partial vapor pressure of the cleaning solution to 8.0 millimeters of mercury at 20 degrees Celsius (68 degrees Fahrenheit).

(b) As an alternative to subsection (a) of this section, the owner or operator shall operate a vapor control system capable of achieving an overall control efficiency of 85% by mass. Control device and capture efficiency testing must be performed in accordance with the testing requirements in §115.465 of this title (relating to Approved Test Methods and Testing Requirements).

(c) The owner or operator of a solvent cleaning operation shall implement the following work practices during the handling, storage, and disposal of cleaning solvents and shop towels:

(1) cover open containers and used applicators;

(2) minimize air circulation around solvent cleaning operations;

(3) properly dispose of used solvent and shop towels; and

(4) implement equipment practices that minimize emissions (e.g. maintaining cleaning equipment to repair solvent leaks).

(d) A solvent cleaning operation that becomes subject to subsection (a) of this section by exceeding the exemption limits in §115.461 of this title (relating to Exemptions) is subject to the provisions in subsection (a) of this section even if throughput or emissions later fall below exemption limits unless emissions are maintained at or below the controlled emissions level achieved while complying with subsection (a) of this section and one of the following conditions is met.

(1) The project that caused throughput or emission rate to fall below the exemption limits in §115.461 of this title must be authorized by a permit, permit amendment, standard permit, or permit by rule required by Chapter 116 or Chapter 106 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification; and Permits by Rule, respectively). If a permit by rule is available for the project, the owner or operator shall continue to comply with subsection (a) of this section for 30 days after the filing of documentation of compliance with that permit by rule.

(2) If authorization by permit, permit amendment, standard permit, or permit by rule is not required for the project, the owner or operator shall provide the executive director 30 days notice of the project in writing.

§115.464. Alternate Control Requirements.

For solvent cleaning operations subject to §115.463 of this title (relating to Control Requirements), alternate methods of demonstrating and documenting continuous compliance with the applicable control requirements or exemption criteria in this division may be approved by the executive director in accordance with §115.910 of this title (relating to Availability of Alternate Means of Control) if emission reductions are demonstrated to be substantially equivalent.

§115.465. Approved Test Methods and Testing Requirements.

The owner or operator shall demonstrate compliance with the control requirements in §115.463 of this title (relating to Control Requirements) by applying the following test methods, as appropriate.

(1) Compliance with the volatile organic compound (VOC) limits in §115.463(a) of this title must be determined by the following methods, as applicable:

(A) Method 24 (40 Code of Federal Regulations (CFR) Part 60, Appendix A);

(B) American Society for Testing and Materials Method D2879, Standard Test Method for Vapor Pressure-Temperature Relationship and Initial Decomposition Temperature of Liquids by Isoteniscope to demonstrate compliance with §115.463(a)(2) of this title;

(C) using standard reference texts for the true vapor pressure of each VOC component to demonstrate compliance with §115.463(a)(2) of this title; or

(D) using analytical data from the cleaning solvent supplier or manufacturer's material safety data sheet.

(2) The owner or operator subject to §115.463(b) of this title shall measure the capture efficiency using applicable procedures outlined in 40 CFR §52.741, Subpart O, Appendix B (as amended through October 21, 1996 (61 FR 54559)). These procedures are: Procedure T - Criteria for and Verification of a Permanent or Temporary Total Enclosure; Procedure L - VOC Input; Procedure G.2 - Captured VOC Emissions (Dilution Technique); Procedure F.1 - Fugitive VOC Emissions from Temporary Enclosures; and Procedure F.2 - Fugitive VOC Emissions from Building Enclosures.

(A) The following exemptions apply to capture efficiency testing requirements.

(i) If a source installs a permanent total enclosure that meets the specifications of Procedure T and that directs all VOC to a control device, then the capture efficiency is assumed to be 100%, and the source is exempted from capture efficiency testing requirements. This does not exempt the source from performance of any control device efficiency testing that may be required. In addition, a source must demonstrate all criteria for a permanent total enclosure are met during testing for control efficiency.

(ii) If a source uses a vapor control system designed to collect and recover VOC (e.g., carbon adsorption system), an explicit measurement of capture efficiency is not necessary if the following conditions are met. The overall control of the system can be determined by directly comparing the input liquid VOC to the recovered liquid VOC. The general procedure for use in this situation is given in 40 CFR §60.433 (as amended through October 17, 2000 (65 FR 61761)), with the following additional restrictions.

(I) The source must be able to equate solvent usage with solvent recovery on a 24-hour (daily) basis, rather than a 30-day weighted average. This verification must be done within 72 hours following each 24-hour period of the 30-day period.

(II) The solvent recovery system (i.e., capture and control system) must be dedicated to a single process line (e.g., one process line venting to a carbon adsorber system) or if the solvent recovery system controls multiple process lines, the source must be able to demonstrate that the overall control (i.e., the total recovered solvent VOC divided by the sum of liquid VOC input to all process lines venting to the control system) meets or exceeds the most stringent standard applicable for any process line venting to the control system.

(B) The capture efficiency must be calculated using one of the following protocols referenced. Any affected source must use one of these protocols, unless a suitable alternative protocol is approved by the executive director and the United States Environmental Protection Agency (EPA).

(i) Gas/gas method using temporary total enclosure (TTE). The EPA specifications to determine whether a temporary enclosure is considered a TTE are given in Procedure T. The capture efficiency equation to be used for this protocol is:
Figure: 30 TAC §115.465(2)(B)(i)

(ii) Liquid/gas method using TTE. The EPA specifications to determine whether a temporary enclosure is considered a TTE are given in Procedure T. The capture efficiency equation to be used for this protocol is:
Figure: 30 TAC §115.465(2)(B)(ii)

(iii) Gas/gas method using the building or room enclosure (BE) in which the affected source is located and in which the mass of VOC captured and delivered to a control device and the mass of fugitive VOC that escapes from the BE are measured while operating only the affected facility. All fans and blowers in the BE must be operating as they would under normal production. The capture efficiency equation to be used for this protocol is:
Figure: 30 TAC §115.465(2)(B)(iii)

(iv) Liquid/gas method using a BE in which the mass of liquid VOC input to process and the mass of fugitive VOC that escapes from the BE are measured while operating only the affected facility. All fans and blowers in the BE must be operated as they would under normal production. The capture efficiency equation to be used for this protocol is:
Figure: 30 TAC §115.465(2)(B)(iv)

(C) The operating parameters selected for monitoring of the capture system for compliance with the requirements in §115.468(a) of this title (relating to Monitoring and Recordkeeping Requirements) must be monitored and recorded during the initial capture efficiency testing and thereafter during facility operation. The executive director may require a new capture efficiency test if the operating parameter values change significantly from those recorded during the initial capture efficiency test.

(3) In addition to the requirements of paragraph (2) of this section, the owner or operator shall determine compliance with §115.463(b) of this title by applying the following test methods, as appropriate:

(A) Methods 1 - 4 (40 CFR Part 60, Appendix A) for determining flow rates, as necessary;

(B) Method 25 (40 CFR Part 60, Appendix A) for determining total gaseous nonmethane organic emissions as carbon;

(C) Method 25A or 25B (40 CFR Part 60, Appendix A) for determining total gaseous organic concentrations using flame ionization or nondispersive infrared analysis; and

(D) additional performance test procedures described in 40 CFR §60.444 (as amended through October 18, 1983 (48 FR 48375)).

(4) Minor modifications to the methods in paragraphs (1) - (3) of this section maybe approved by the executive director. Methods other than those specified in paragraphs (1) - (3) of this section may be used if approved by the executive director and validated using Method 301 (40 CFR Part 63, Appendix A). For the purposes of this paragraph, substitute "executive director" each place that Method 301 references "administrator."

§115.468. Monitoring and Recordkeeping Requirements.

(a) Monitoring requirements. The following monitoring requirements apply to the owner or operator of a solvent cleaning operation subject to this division that uses a vapor control system in accordance with §115.463(b) of this title (relating to Control Requirements). The owner or operator shall install and maintain monitors to accurately measure and record operational parameters of all required control devices, as necessary, to ensure the proper functioning of those devices in accordance with design specifications, including:

(1) continuous monitoring of the exhaust gas temperature immediately downstream of direct-flame incinerators or the gas temperature immediately upstream and downstream of any catalyst bed;

(2) the total amount of volatile organic compounds (VOC) recovered by carbon adsorption or other solvent recovery systems during a calendar month;

(3) continuous monitoring of carbon adsorption bed exhaust; and

(4) appropriate operating parameters for vapor control systems other than those specified in paragraphs (1) - (3) of this subsection.

(b) Recordkeeping requirements. The following recordkeeping requirements apply to the owner or operator of a solvent cleaning operation subject to this division.

(1) The owner or operator shall maintain records of the testing data, the material safety data sheet, or documentation of the standard reference texts used to determine the true vapor pressure of each VOC component, in accordance with the requirements in §115.465(1) of this title (relating to Approved Test Methods and Testing Requirements). The concentration of all VOC used to prepare the cleaning solution and, if diluted prior to use, the proportions that each of these materials is used must be recorded. Records must be sufficient to demonstrate continuous compliance with the VOC limits in §115.463(a) of this title.

(2) The owner or operator claiming an exemption in §115.461 of this title (relating to Exemptions) shall maintain records sufficient to demonstrate continuous compliance with the applicable exemption criteria.

(3) The owner or operator claiming exemption from this division in accordance with §115.461(c) of this title shall maintain

records indicating the applicable division the process or operation is subject to as specified in §115.461(c)(1) of this title and the control requirements or emission specifications used to control the VOC emissions from the solvent cleaning operation as specified in §115.461(c)(2) of this title. The owner or operator shall also comply with the applicable recordkeeping requirements from the division the process or operation is subject to sufficient to demonstrate that the VOC emissions from the solvent cleaning operation are controlled in accordance with the control requirements or emission specifications of that division.

(4) The owner or operator shall maintain records of any testing conducted in accordance with the provisions specified in §115.465(2) - (4) of this title.

(5) Records must be maintained a minimum of two years and be made available upon request to authorized representatives of the executive director, the United States Environmental Protection Agency, or any local air pollution agency with jurisdiction.

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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DIVISION 7. MISCELLANEOUS INDUSTRIAL ADHESIVES

30 TAC §§115.470, 115.471, 115.473 - 115.475, 115.478, 115.479

Statutory Authority

The new sections are adopted under Texas Water Code (TWC), §5.102, concerning General Powers, that provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, that authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; TWC, §5.105, concerning General Policy, that authorizes the commission by rule to establish and approve all general policy of the commission; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, that authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The new sections are also adopted under THSC, §382.002, concerning Policy and Purpose, that establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, that authorizes the commission to control the quality of the state's air; and THSC, §382.012, concerning State Air Control Plan, that authorizes the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air. The new sections are also adopted under THSC, §382.016, concerning Monitoring Requirements; Examination of Records, that authorizes the commission to prescribe reasonable requirements for the measuring and monitoring of air contaminant emissions; and THSC, §382.021, concerning Sampling Methods and Procedures, that authorizes the commission to prescribe the sampling methods and procedures to determine compliance with its rules. The new sections are also adopted under Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7401, *et seq.,* which requires states to submit state implementation plan revisions that specify the manner in which the National Ambient Air Quality Standards will be achieved and maintained within each air quality control region of the state.

The new sections implement THSC, §§382.002, 382.011, 382.012, 382.016, 382.017, and 382.021; and FCAA, 42 USC, §§7401 *et seq.*

§115.470. Applicability and Definitions.

(a) Applicability. Except as specified in §115.471 of this title (relating to Exemptions), the requirements in this division apply to the owner or operator of a manufacturing operation using adhesives or adhesive primers for any of the application processes specified in §115.473(a) of this title (relating to Control Requirements) in the Dallas-Fort Worth and Houston-Galveston-Brazoria areas, as defined in §115.10 of this title (relating to Definitions). Adhesives or adhesive primers applied in the field (e.g., construction jobs in the field) are not subject to this division.

(b) Definitions. Unless specifically defined in the Texas Clean Air Act (Texas Health and Safety Code, Chapter 382) or in §§3.2, 101.1, or 115.10 of this title (relating to Definitions), the terms in this division have the meanings commonly used in the field of air pollution control. In addition, the following meanings apply in this division unless the context clearly indicates otherwise.

(1) Acrylonitrile-butadiene-styrene or ABS welding--Any process to weld acrylonitrile-butadiene-styrene pipe.

(2) Adhesive--Any chemical substance applied for the purpose of bonding two surfaces together other than by mechanical means.

(3) Adhesive primer--Any product intended by the manufacturer for application to a substrate, prior to the application of an adhesive, to provide a bonding surface.

(4) Aerosol adhesive or adhesive primer--An adhesive or adhesive primer packaged as an aerosol product in which the spray mechanism is permanently housed in a non-refillable can designed for handheld application without the need for ancillary hoses or spray equipment.

(5) Aerospace component--Any fabricated part, processed part, assembly of parts, or completed unit of any aircraft including but not limited to airplanes, helicopters, missiles, rockets, and space vehicles. This definition includes electronic components.

(6) Application process--A series of one or more application systems and any associated drying area or oven where an adhesive or adhesive primer is applied, dried, or cured. An application process ends at the point where the adhesive is dried or cured, or prior to any subsequent application of a different adhesive. It is not necessary for an application process to have an oven or flash-off area.

(7) Application system--Devices or equipment designed for the purpose of applying an adhesive or adhesive primer to a surface. The devices may include, but are not be limited to, brushes, sprayers, flow coaters, dip tanks, rollers, and extrusion coaters.

(8) Ceramic tile installation adhesive--Any adhesive intended by the manufacturer for use in the installation of ceramic tiles.

(9) Chlorinated polyvinyl chloride plastic or CPVC plastic welding--A polymer of the vinyl chloride monomer that contains 67% chlorine and is normally identified with a chlorinated polyvinyl chloride marking.

(10) Chlorinated polyvinyl chloride welding or CPVC welding--An adhesive labeled for welding of chlorinated polyvinyl chloride.

(11) Contact adhesive--An adhesive:

(A) designed for application to both surfaces to be bonded together;

(B) allowed to dry before the two surfaces are placed in contact with each other;

(C) forms an immediate bond that is impossible, or difficult, to reposition after both adhesive-coated surfaces are placed in contact with each other;

(D) does not need sustained pressure or clamping of surfaces after the adhesive-coated surfaces have been brought together using sufficient momentary pressure to establish full contact between both surfaces; and

(E) does not include rubber cements that are primarily intended for use on paper substrates or vulcanizing fluids that are designed and labeled for tire repair only.

(12) Cove base--A flooring trim unit, generally made of vinyl or rubber, having a concave radius on one edge and a convex radius on the opposite edge that is used in forming a junction between the bottom wall course and the floor or to form an inside corner.

(13) Cove base installation adhesive--Any adhesive intended by the manufacturer to be used for the installation of cove base or wall base on a wall or vertical surface at floor level.

(14) Cyanoacrylate adhesive--Any adhesive with a cyanoacrylate content of at least 95% by weight.

(15) Daily weighted average--The total weight of volatile organic compounds (VOC) emissions from all adhesives or adhesive primers subject to the same VOC content limit in §115.473(a) of this title (relating to Control Requirements), divided by the total volume of those adhesives or adhesive primers (minus water and exempt solvent) delivered to the application system each day. Adhesives or adhesive primers subject to different emission standards in §115.473(a) of this title must not be combined for purposes of calculating the daily weighted average. In addition, determination of compliance is based on each adhesive or adhesive primer application process.

(16) Ethylene propylenediene monomer (EPDM) roof membrane--A prefabricated single sheet of elastomeric material composed of ethylene propylenediene monomer and that is field-applied to a building roof using one layer or membrane material.

(17) Flexible vinyl--Non-rigid polyvinyl chloride plastic with a 5.0% by weight plasticizer content.

(18) Indoor floor covering installation adhesive--Any adhesive intended by the manufacturer for use in the installation of wood flooring, carpet, resilient tile, vinyl tile, vinyl-backed carpet, resilient sheet and roll, or artificial grass. Adhesives used to install ceramic tile and perimeter-bonded sheet flooring with vinyl backing onto a non-porous substrate, such as flexible vinyl, are excluded from this definition.

(19) Laminate--A product made by bonding together two or more layers of material.

(20) Metal to urethane/rubber molding or casting adhesive--Any adhesive intended by the manufacturer to bond metal to high density or elastomeric urethane or molded rubber materials, in heater molding or casting processes, to fabricate products such as rollers for computer printers or other paper handling equipment.

(21) Motor vehicle adhesive--An adhesive, including glass-bonding adhesive, used in a process that is not an automobile or light-duty truck assembly coating process, applied for the purpose of bonding two vehicle surfaces together without regard to the substrates involved.

(22) Motor vehicle glass-bonding primer--A primer, used in a process that is not an automobile or light-duty truck assembly coating process, applied to windshield or other glass, or to body openings, to prepare the glass or body opening for the application of glass-bonding adhesives or the installation of adhesive-bonded glass. Motor vehicle glass-bonding primer includes glass-bonding/cleaning primers that perform both functions (cleaning and priming of the windshield or other glass, or body openings) prior to the application of adhesive or the installation of adhesive-bonded glass.

(23) Motor vehicle weatherstrip adhesive--An adhesive, used in a process that is not an automobile or light-duty truck assembly coating process, applied to weatherstripping materials for the purpose of bonding the weatherstrip material to the surface of the vehicle.

(24) Multipurpose construction adhesive--Any adhesive intended by the manufacturer for use in the installation or repair of various construction materials, including but not limited to drywall, subfloor, panel, fiberglass reinforced plastic (FRP), ceiling tile, and acoustical tile.

(25) Outdoor floor covering installation adhesive--Any adhesive intended by the manufacturer for use in the installation of floor covering that is not in an enclosure and that is exposed to ambient weather conditions during normal use.

(26) Panel installation--The installation of plywood, pre-decorated hardboard or tileboard, fiberglass reinforced plastic, and similar pre-decorated or non-decorated panels to studs or solid surfaces using an adhesive formulated for that purpose.

(27) Perimeter bonded sheet flooring installation--The installation of sheet flooring with vinyl backing onto a nonporous substrate using an adhesive designed to be applied only to a strip of up to four inches wide around the perimeter of the sheet flooring.

(28) Plastic solvent welding adhesive--Any adhesive intended by the manufacturer for use to dissolve the surface of plastic to form a bond between mating surfaces.

(29) Plastic solvent welding adhesive primer--Any primer intended by the manufacturer for use to prepare plastic substrates prior to bonding or welding.

(30) Plastic foam--Foam constructed of plastics.

(31) Plastics--Synthetic materials chemically formed by the polymerization of organic (carbon-based) substances. Plastics are usually compounded with modifiers, extenders, or reinforcers and are capable of being molded, extruded, cast into various shapes and films, or drawn into filaments.

(32) Polyvinyl chloride plastic or PVC plastic--A polymer of the chlorinated vinyl monomer that contains 57% chlorine.

(33) Polyvinyl chloride welding adhesive or PVC welding adhesive--Any adhesive intended by the manufacturer for use in the welding of polyvinyl chloride plastic pipe.

(34) Porous material--A substance that has tiny openings, often microscopic, in which fluids may be absorbed or discharged, including, but not limited to, paper and corrugated paperboard. For the purposes of this definition, porous material does not include wood.

(35) Pounds of volatile organic compounds (VOC) per gallon of adhesive (minus water and exempt solvent)--The basis for content limits for application processes that can be calculated by the following equation:
Figure: 30 TAC §115.470(b)(35)

(36) Pounds of volatile organic compounds (VOC) per gallon of solids--The basis for content limits for application processes that can be calculated by the following equation:
Figure: 30 TAC §115.470(b)(36)

(37) Reinforced plastic composite--A composite material consisting of plastic reinforced with fibers.

(38) Rubber--Any natural or manmade rubber substrate, including, but not limited to, styrene-butadiene rubber, polychloroprene (neoprene), butyl rubber, nitrile rubber, chlorosulfonated polyethylene, and ethylene propylene diene terpolymer.

(39) Sheet rubber lining installation--The process of applying sheet rubber liners by hand to metal or plastic substrates to protect the underlying substrate from corrosion or abrasion. These processes also include laminating sheet rubber to fabric by hand.

(40) Single-ply roof membrane--A prefabricated single sheet of rubber, normally ethylene propylenediene terpolymer, that is field-applied to a building roof using one layer of membrane material. For the purposes of this definition, single-ply roof membrane does not include membranes prefabricated from ethylene propylenediene monomer.

(41) Single-ply roof membrane installation and repair adhesive--Any adhesive labeled for use in the installation or repair of single-ply roof membrane. Installation includes, as a minimum, attaching the edge of the membrane to the edge of the roof and applying flashings to vents, pipes, and ducts that protrude through the membrane. Repair includes gluing the edges of torn membrane together, attaching a patch over a hole, and reapplying flashings to vents, pipes, or ducts installed through the membrane.

(42) Single-ply roof membrane adhesive primer--Any primer labeled for use to clean and promote adhesion of the single-ply roof membrane seams or splices prior to bonding.

(43) Structural glazing--A process that includes the application of adhesive to bond glass, ceramic, metal, stone, or composite panels to exterior building frames.

(44) Subfloor installation--The installation of subflooring material over floor joists, including the construction of any load-bearing joists. Subflooring is covered by a finish surface material.

(45) Thin metal laminating adhesive--Any adhesive intended by the manufacturer for use in bonding multiple layers of metal to metal or metal to plastic in the production of electronic or magnetic components in which the thickness of the bond line(s) is less than 0.25 mil.

(46) Tire repair--A process that includes expanding a hole, tear, fissure, or blemish in a tire casing by grinding or gouging, applying adhesive, and filling the hole or crevice with rubber.

(47) Undersea-based weapon system components--The fabrication of parts, assembly of parts or completed units of any portion of a missile launching system used on undersea ships.

(48) Waterproof resorcinol glue--A two-part resorcinol-resin-based adhesive designed for applications where the bond line must be resistant to conditions of continuous immersion in fresh or salt water.

§115.471. Exemptions.

(a) The owner or operator of application processes located on a property with actual combined emissions of volatile organic compounds (VOC) less than 3.0 tons per calendar year, when uncontrolled, from all adhesives, adhesive primers, and solvents used during related cleaning operations, is exempt from the requirements of this division, except as specified in §115.478(b)(2) of this title (relating to Monitoring and Recordkeeping Requirements). When calculating the VOC emissions, adhesives and adhesive primers that are exempt under subsections (b) and (c) of this section are excluded.

(b) The following application processes are exempt from the VOC limits in §115.473(a) of this title (relating to Control Requirements) and the application system requirements in §115.473(b) of this title:

(1) adhesives or adhesive primers being tested or evaluated in any research and development, quality assurance, or analytical laboratory;

(2) adhesives or adhesive primers used in the assembly, repair, or manufacture of aerospace components or undersea-based weapon system components;

(3) adhesives or adhesive primers used in medical equipment manufacturing operations;

(4) cyanoacrylate adhesive application processes;

(5) aerosol adhesive and aerosol adhesive primer application processes;

(6) polyester-bonding putties used to assemble fiberglass parts at fiberglass boat manufacturing properties and at other reinforced plastic composite manufacturing properties; and

(7) processes using adhesives and adhesive primers that are supplied to the manufacturer in containers with a net volume of 16 ounces or less or a net weight of 1.0 pound or less.

(c) The owner or operator of any process or operation subject to another division of this chapter that specifies VOC content limits for adhesives or adhesive primers used during any of the application processes listed in §115.473(a) of this title, is exempt from the requirements in this division.

§115.473. Control Requirements.

(a) The owner or operator shall limit volatile organic compounds (VOC) emissions from all adhesives and adhesive primers used during the specified application processes to the following VOC content limits in pounds of VOC per gallon of adhesive (lb VOC/gal adhesive) (minus water and exempt solvent compounds), as delivered to the application system. These limits are based on the daily weighted average of all adhesives or adhesive primers delivered to the application system each day. If an adhesive or adhesive primer is used to bond dissimilar substrates together, then the applicable substrate category with the least stringent VOC content limit applies.
Figure: 30 TAC §115.473(a)

(1) The owner or operator shall meet the VOC content limits in this subsection by using one of the following options.

(A) The owner or operator shall apply low-VOC adhesives or adhesive primers.

(B) The owner or operator shall apply adhesives or adhesive primers in combination with the operation of a vapor control system.

(2) As an alternative to paragraph (1) of this subsection, the owner or operator may operate a vapor control system capable of achieving an overall control efficiency of 85% of the VOC emissions from adhesives and adhesive primers. Control device and capture efficiency testing must be performed in accordance with the testing requirements in §115.475(3) and (4) of this title (relating to Approved Test Methods and Testing Requirements). If the owner or operator complies with the overall control efficiency option under this paragraph, then the owner or operator is exempt from the application system requirements of subsection (b) of this section.

(3) An owner or operator applying adhesives or adhesive primers in combination with a vapor control system to meet the VOC content limits in paragraph (1) of this subsection, shall use the following equation to determine the minimum overall control efficiency necessary to demonstrate equivalency. Control device and capture efficiency testing must be performed in accordance with the testing requirements in §115.475(3) and (4) of this title.
Figure: 30 TAC §115.473(a)(3)

(b) The owner or operator of any application process subject to this division shall not apply adhesives or adhesive primers unless one of the following application systems is used:

(1) electrostatic spray;

(2) high-volume, low-pressure spray (HVLP);

(3) flow coat;

(4) roll coat or hand application, including non-spray application methods similar to hand or mechanically powered caulking gun, brush, or direct hand application;

(5) dip coat;

(6) airless spray;

(7) air-assisted airless spray; or

(8) other application system capable of achieving a transfer efficiency equivalent to or better than that achieved by HVLP spray. For the purpose of this requirement, the transfer efficiency of HVLP spray is assumed to be 65%.

(c) The following work practices apply to the owner or operator of each application process subject to this division.

(1) For the storage, mixing, and handling of all adhesives, adhesive primers, thinners, and adhesive-related waste materials, the owner or operator shall:

(A) store all VOC-containing adhesives, adhesive primers, and process-related waste materials in closed containers;

(B) ensure that mixing and storage containers used for VOC-containing adhesives, adhesive primers, and process-related waste materials are kept closed at all times;

(C) minimize spills of VOC-containing adhesives, adhesive primers, and process-related waste materials; and

(D) convey VOC-containing adhesives, adhesive primers, and process-related waste materials from one location to another in closed containers or pipes.

(2) For the storage, mixing, and handling of all surface preparation materials and cleaning materials, the owner or operator shall:

(A) store all VOC-containing cleaning materials and used shop towels in closed containers;

(B) ensure that storage containers used for VOC-containing cleaning materials are kept closed at all times except when depositing or removing these materials;

(C) minimize spills of VOC-containing cleaning materials;

(D) convey VOC-containing cleaning materials from one location to another in closed containers or pipes; and

(E) minimize VOC emissions from the cleaning of application, storage, mixing, and conveying equipment by ensuring that equipment cleaning is performed without atomizing the cleaning solvent and all spent solvent is captured in closed containers.

(d) An application process that becomes subject to subsection (a) of this section by exceeding the exemption limits in §115.471(a) of this title (relating to Exemptions) is subject to the provisions in subsection (a) of this section even if throughput or emissions later fall below exemption limits unless emissions are maintained at or below the controlled emissions level achieved while complying with subsection (a) of this section and one of the following conditions is met.

(1) The project that caused a throughput or emission rate to fall below the exemption limits in §115.471(a) of this title must be authorized by a permit, permit amendment, standard permit, or permit by rule required by Chapters 106 or 116 of this title (relating to Permits by Rule; and Control of Air Pollution by Permits for New Construction or Modification, respectively). If a permit by rule is available for the project, the owner or operator shall continue to comply with subsection (a) of this section for 30 days after the filing of documentation of compliance with that permit by rule.

(2) If authorization by permit, permit amendment, standard permit, or permit by rule is not required for the project, the owner or operator shall provide the executive director 30 days notice of the project in writing.

§115.474. Alternate Control Requirements.

For the owner or operator of an application process subject to this division, alternate methods of demonstrating and documenting continuous compliance with the applicable control requirements or exemption criteria in this division may be approved by the executive director in accordance with §115.910 of this title (relating to Availability of Alternate Means of Control) if emission reductions are demonstrated to be substantially equivalent.

§115.475. Approved Test Methods and Testing Requirements.

The owner or operator shall demonstrate compliance with the volatile organic compounds (VOC) content limits in §115.473(a) of this title (relating to Control Requirements) by applying the following test methods, as appropriate. Where a test method also inadvertently measures compounds that are exempt solvent, an owner or operator may exclude the exempt solvent when determining compliance with a VOC content limit. As an alternative to the test methods in this section, the VOC content of an adhesive or adhesive primer may be determined by using analytical data from the material safety data sheet.

(1) Except for reactive adhesives, compliance with the VOC content limits in §115.473(a) of this title must be determined using Method 24 (40 Code of Federal Regulations (CFR) Part 60, Appendix A).

(2) Compliance with the VOC content limits for reactive adhesives in §115.473(a) of this title must be determined using 40 CFR Part 63, Subpart PPPP, Appendix A, (as amended through April 24, 2007 (72 FR 20237)).

(3) The owner or operator of an application process subject to §115.473 of this title shall measure the capture efficiency using the applicable procedures outlined in 40 CFR §52.741, Subpart O, Appendix B (as amended through October 21, 1996 (61 FR 54559)). These procedures are: Procedure T-Criteria for and Verification of a Permanent or Temporary Total Enclosure; Procedure L - VOC Input; Procedure G.2 - Captured VOC Emissions (Dilution Technique); Procedure F.1 - Fugitive VOC Emissions from Temporary Enclosures; and Procedure F.2 - Fugitive VOC Emissions from Building Enclosures.

(A) The following exemptions apply to capture efficiency testing requirements.

(i) If a source installs a permanent total enclosure that meets the specifications of Procedure T and that directs all VOC to a control device, then the capture efficiency is assumed to be 100%, and the source is exempted from capture efficiency testing requirements. This does not exempt the source from performance of any control device efficiency testing that may be required. In addition, a source must demonstrate all criteria for a permanent total enclosure are met during testing for control efficiency.

(ii) If a source uses a vapor control system designed to collect and recover VOC (e.g., carbon adsorption system), an explicit measurement of capture efficiency is not necessary if the following conditions are met. The overall control efficiency of the system can be determined by directly comparing the input liquid VOC to the recovered liquid VOC. The general procedure for use in this situation is given in 40 CFR §60.433 (as amended through October 17, 2000 (65 FR 61761)), with the following additional restrictions.

(I) The source must be able to equate solvent usage with solvent recovery on a 24-hour (daily) basis, rather than a 30-day weighted average. This verification must be done within 72 hours following each 24-hour period of the 30-day period.

(II) The solvent recovery system (i.e., capture and control system) must be dedicated to a single process line (e.g., one process line venting to a carbon adsorber system) or if the solvent recovery system controls multiple process lines, the source must be able to demonstrate that the overall control efficiency (i.e., the total recovered solvent VOC divided by the sum of liquid VOC input to all process lines venting to the control system) meets or exceeds the most stringent standard applicable for any process line venting to the control system.

(B) The capture efficiency must be calculated using one of the following protocols referenced unless a suitable alternative protocol is approved by the executive director and the United States Environmental Protection Agency (EPA).

(i) Gas/gas method using temporary total enclosure (TTE). The EPA specifications to determine whether a temporary enclosure is considered a TTE are given in Procedure T. The capture efficiency equation to be used for this protocol is:
Figure: 30 TAC §115.475(3)(B)(i)

(ii) Liquid/gas method using TTE. The EPA specifications to determine whether a temporary enclosure is considered a TTE are given in Procedure T. The capture efficiency equation to be used for this protocol is:
Figure: 30 TAC §115.475(3)(B)(ii)

(iii) Gas/gas method using the building or room enclosure (BE) in which the affected source is located and in which the mass of VOC captured and delivered to a control device and the mass of fugitive VOC that escapes from BE are measured while operating only the affected facility. All fans and blowers in the BE must be operating as they would under normal production. The capture efficiency equation to be used for this protocol is:
Figure: 30 TAC §115.475(3)(B)(iii)

(iv) Liquid/gas method using a BE in which the mass of liquid VOC input to process and the mass of fugitive VOC that escapes from BE are measured while operating only the affected facility. All fans and blowers in the BE must be operated as they would under normal production. The capture efficiency equation to be used for this protocol is:
Figure: 30 TAC §115.475(3)(B)(iv)

(C) The operating parameters selected for monitoring the capture system for compliance with the requirements in §115.478(a) of this title (relating to Monitoring and Recordkeeping requirements) must be monitored and recorded during the initial capture efficiency testing and thereafter during facility operation. The executive director may require a new capture efficiency test if the operating parameter values change significantly from those recorded during the initial capture efficiency test.

(4) In addition to the requirements of paragraph (3) of this section, the owner or operator shall determine compliance with §115.473(a)(2) of this title by applying the following test methods, as appropriate:

(A) Methods 1 - 4 (40 CFR Part 60, Appendix A) for determining flow rates, as necessary;

(B) Method 25 (40 CFR Part 60, Appendix A) for determining total gaseous nonmethane organic emissions as carbon;

(C) Method 25A or 25B (40 CFR Part 60, Appendix A) for determining total gaseous organic concentrations using flame ionization or nondispersive infrared analysis; and

(D) additional performance test procedures described in 40 CFR §60.444 (as amended through October 18, 1983 (48 FR 48375)).

(5) Minor modifications to the methods in paragraphs (1) - (4) of this section may be approved by the executive director. Methods other than those specified in paragraphs (1) - (4) of this section may be used if approved by the executive director and validated using Method 301 (40 CFR Part 63, Appendix A). For the purposes of this paragraph, substitute "executive director" each place that Method 301 references "administrator."

§115.478. Monitoring and Recordkeeping Requirements.

(a) Monitoring requirements. The following monitoring requirements apply to the owner or operator of an application process subject to this division that uses a vapor control system in accordance with §115.473(a)(2) of this title (relating to Control Requirements). The owner or operator shall install and maintain monitors to accurately measure and record operational parameters of all required control devices, as necessary, to ensure the proper functioning of those devices in accordance with design specifications, including:

(1) continuous monitoring of the exhaust gas temperature immediately downstream of direct-flame incinerators or the gas temperature immediately upstream and downstream of any catalyst bed;

(2) the total amount of volatile organic compounds (VOC) recovered by carbon adsorption or other solvent recovery systems during a calendar month;

(3) continuous monitoring of carbon adsorption bed exhaust; and

(4) appropriate operating parameters for vapor control systems other than those specified in paragraphs (1) - (3) of this subsection.

(b) Recordkeeping requirements. The following recordkeeping requirements apply to the owner or operator of an application process subject to this division.

(1) The owner or operator shall maintain records of the testing data or the material safety data sheet in accordance with the requirements in §115.475(1) of this title (relating to Approved Test Methods and Testing Requirements). Records must be sufficient to demonstrate continuous compliance with the VOC limits in §115.473(a) of this title.

(2) The owner or operator of an application process claiming an exemption in §115.471 of this title (relating to Exemptions) shall maintain records sufficient to demonstrate continuous compliance with the applicable exemption criteria.

(3) The owner or operator shall maintain records of any testing conducted at an affected facility in accordance with the provisions specified in §115.475(3) and (4) of this title.

(4) Records must be maintained a minimum of two years and made available upon request to authorized representatives of the executive director, the United States Environmental Protection Agency, or any local air pollution agency with jurisdiction.

§115.479. Compliance Schedules.

(a) The owner or operator of an application process subject to this division shall comply with the requirements in this division no later than March 1, 2013.

(b) The owner or operator of an application process that becomes subject to this division on or after March 1, 2013, shall comply with the requirements in this division no later than 60 days after becoming subject.

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 December 9, 2011.

TRD-201105434
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: December 29, 2011
Proposal publication date: June 24, 2011
For further information, please call: (512) 239-2548

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 6. TEXAS DEPARTMENT OF CRIMINAL JUSTICE

CHAPTER 159. SPECIAL PROGRAMS

37 TAC §159.17

The Texas Board of Criminal Justice adopts the repeal of §159.17, concerning Employment Referral Services for Offenders--Memorandum of Understanding, without changes to the proposal as published in the October 28, 2011, issue of the *Texas Register* (36 TexReg 7288).

The purpose of the repeal is to rescind the memorandum of understanding between the Texas Department of Criminal Justice, the Texas Workforce Commission, and the Texas Youth Commission as there was no funding appropriated for the Project Reintegration of Offenders (Project RIO) by the 82nd Legislature.

No comments were received regarding the proposed repeal.

The repeal is adopted under the General Appropriations Act.

Cross Reference to Statutes: Texas Labor Code §306.004 and §306.005; Texas Government Code §501.095.

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 December 12, 2011.

TRD-201105483
Melinda Hoyle Bozarth
General Counsel
Texas Department of Criminal Justice
Effective date: January 1, 2012
Proposal publication date: October 28, 2011
For further information, please call: (512) 463-9693

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PART 7. TEXAS COMMISSION ON LAW ENFORCEMENT OFFICER STANDARDS AND EDUCATION

CHAPTER 211. ADMINISTRATION

37 TAC §211.1

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) adopts the repeal of §211.1, concerning Definitions, without changes to the proposal as published in the September 30, 2011, issue of the *Texas Register* (36 TexReg 6456) and will not be republished.

This section is being replaced by a new one which incorporates additional definitions and deletes out-of-date language.

The repeal is necessary to provide clear and concise definitions of the rules.

No comments were received regarding adoption of this repeal.

The repeal is adopted under Texas Occupations Code, Chapter 1701, §1701.151, General Powers of Commission; Rulemaking Authority.

No other code, article or statute is affected by this adoption.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 8, 2011.

TRD-201105406

Kim Vickers
Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
Effective date: January 1, 2012
Proposal publication date: September 30, 2011
For further information, please call: (512) 936-7713

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37 TAC §211.1

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) adopts new §211.1, concerning Definitions, with changes to the proposed text as published in the September 30, 2011, issue of the *Texas Register* (36 TexReg 6456) and will be republished.

The new rule is necessary to provide clear and concise definitions for use throughout the rules.

No comments were received regarding adoption of this new rule.

The new rule is adopted under Texas Occupations Code, Chapter 1701, §1701.151, General Powers of the Commission; Rulemaking Authority, which authorizes the Commission to promulgate rules for administration of this chapter.

No other code, article, or statute is affected by this adoption.

§211.1. Definitions.

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

(1) Academic alternative program--A program for college credit offered by a training provider recognized by the Southern Association of Colleges and Schools and the Higher Texas Education Board, authorized by the commission to conduct preparatory law enforcement training as part of a degree plan program, and consisting of commission-approved curricula.

(2) Academic provider--A school, accredited by the Southern Association of Colleges and Schools and the Texas Higher Education Coordinating Board, which has been approved by the commission to provide basic licensing courses.

(3) Accredited college or university--An institution of higher education that is accredited or authorized by the Southern Association of Colleges and Schools, the Middle States Association of Colleges and Schools, the New England Association of Schools and Colleges, the North Central Association of Colleges and Schools, the Northwest Commission on Colleges and Universities, the Western Association of Schools and Colleges, or an international college or university evaluated and accepted by a United States accredited college or university.

(4) Active--A license issued by the commission that meets the current requirements of licensure and training as determined by the commission.

(5) Administrative Law Judge (ALJ)--An administrative law judge appointed by the chief administrative law judge of the State Office of Administrative Hearings.

(6) Agency--A law enforcement unit or other entity, whether public or private, authorized by Texas law to appoint a person licensed or certified by the commission.

(7) Appointed--Elected or commissioned by an agency as a peace officer, reserve or otherwise selected or assigned to a position governed by the Texas Occupations Code, Chapter 1701, without regard to pay or employment status.

(8) Background investigation--A pre-employment background investigation that meets or exceeds the commission developed questionnaire/history statement.

(9) Basic licensing course--Any current commission developed course that is required before an individual may be licensed by the commission.

(10) Certified copy--A true and correct copy of a document or record certified by the custodian of records of the submitting entity.

(11) Chief administrator--The head or designee of a law enforcement agency.

(12) Commission--The Texas Commission on Law Enforcement Officer Standards and Education.

(13) Commissioned--Has been given the legal power to act as a peace officer or reserve, whether elected, employed, or appointed.

(14) Commissioners--The nine commission members appointed by the governor.

(15) Contract jail--A correctional facility, operated by a county, municipality or private vendor, operating under a contract with a county or municipality, to house inmates convicted of offenses committed against the laws of another state of the United States, as provided by Texas Government Code, §511.0092.

(16) Contractual training provider--A law enforcement agency, a law enforcement association, alternative delivery trainer, or proprietary training contractor that conducts specific education and training under a contract with the commission.

(17) Convicted--Has been adjudged guilty of or has had a judgment of guilt entered in a criminal case that has not been set aside on appeal, regardless of whether:

(A) the sentence is subsequently probated and the person is discharged from probation;

(B) the charging instrument is dismissed and the person is released from all penalties and disabilities resulting from the offense; or

(C) the person is pardoned, unless the pardon is expressly granted for subsequent proof of innocence.

(18) Court-ordered community supervision--Any court-ordered community supervision or probation resulting from a deferred adjudication or conviction by a court of competent jurisdiction. However, this does not include supervision resulting from a pretrial diversion.

(19) Diploma mill--An entity that offers for a fee with little or no coursework, degrees, diplomas, or certificates that may be used to represent to the general public that the individual has successfully completed a program of secondary education or training. This entity also lacks accreditation by an accrediting agency or association that is recognized by state government.

(20) Distance education--Study, at a distance, with an educational provider that conducts organized, formal learning opportunities for students. The instruction is offered wholly or primarily by distance study, through virtually any media. It may include the use of: videotapes, DVD, audio recordings, telephone and email communications, and Web-based delivery systems.

(21) Duty ammunition--Ammunition required or permitted by the agency to be carried on duty.

(22) Executive director--The executive director of the commission or any individual authorized to act on behalf of the executive director.

(23) Experience--Includes each month, or part thereof, served as a peace officer, reserve, jailer, telecommunicator, or federal officer. Credit may, at the discretion of the executive director, be awarded for relevant experience from an out-of-state agency.

(24) Family Violence--In this chapter, has the meaning assigned by Chapter 71, Texas Family Code.

(25) Field training program--A program intended to facilitate a transition from the academic setting to the performance of the general duties of the appointing agency.

(26) Firearms--Any handgun, shotgun, precision rifle, patrol rifle, or fully automatic weapon that is carried by the individual officer in an official capacity.

(27) Firearms proficiency--Successful completion of the annual firearms proficiency requirements.

(28) Fit for duty review--A formal specialized examination of an individual, appointed to a position governed by the Texas Occupations Code, Chapter 1701, without regard to pay or employment status, to determine if the appointee is able to safely and/or effectively perform essential job functions. The basis for these examinations should be based on objective evidence and a reasonable basis that the cause may be attributable to a medical and/or psychological condition or impairment. Objective evidence may include direct observation, credible third party reports; or other reliable evidence. The review should come after other options have been deemed inappropriate in light of the facts of the case. The selected Texas licensed medical doctor or psychologist, who is familiar with the duties of the appointee, conducting an examination should be consulted to ensure that a review is indicated. This review may include psychological and/or medical fitness examinations.

(29) High School Diploma--An earned high school diploma from a United States high school, an accredited secondary school equivalent to that of United States high school, or a passing score on the general education development test indicating a high school graduation level. Documentation from diploma mills is not acceptable. Attainment of an associate or baccalaureate degree from an accredited college or university shall be evidence of having met this standard.

(30) Home School Diploma--An earned diploma from a student who predominately receives instruction in a general elementary or secondary education program that is provided by the parent, or a person in parental authority, in or through the child's home. (Texas Education Code §29.916)

(31) Individual--A human being who has been born and is or was alive.

(32) Jailer--A person employed or appointed as a jailer under the provisions of the Local Government Code, §85.005, or Texas Government Code §511.0092.

(33) Killed in the line of duty--A death that is the directly attributed result of a personal injury sustained in the line of duty.

(34) Law--Including, but not limited to, the constitution or a statute of this state, or the United States; a written opinion of a court of record; a municipal ordinance; an order of a county commissioners' court; or a rule authorized by and lawfully adopted under a statute.

(35) Law enforcement academy--A school operated by a governmental entity that has been licensed by the commission, which may provide basic licensing courses and continuing education.

(36) Law enforcement automobile for training--A vehicle equipped to meet the requirements of an authorized emergency vehicle as identified by Texas Transportation Code §546.003 and §547.702.

(37) Lesson plan--A plan of action consisting of a sequence of logically linked topics that together make positive learning experiences. Elements of a lesson plan include: measurable goals and objectives, content, a description of instructional methods, tests and activities, assessments and evaluations, and technologies utilized.

(38) License--A license required by law or a state agency rule that must be obtained by an individual to engage in a particular business.

(39) Licensee--An individual holding a license issued by the commission.

(40) Line of duty--Any lawful and reasonable action, which an officer identified in Texas Government Code, Chapter 3105 is required or authorized by rule, condition of employment, or law to perform. The term includes an action by the individual at a social, ceremonial, athletic, or other function to which the individual is assigned by the individual's employer.

(41) Moral character--The propensity on the part of a person to serve the public of the state in a fair, honest, and open manner.

(42) Officer--A peace officer or reserve identified under the provisions of the Texas Occupations Code, §1701.001.

(43) Patrol rifle--Any magazine-fed repeating rifle with iron/open sights or with a frame mounted optical enhancing sighting device, 3 power or less, that is carried by the individual officer in an official capacity.

(44) Peace officer--A person elected, employed, or appointed as a peace officer under the provisions of the Texas Occupations Code, §1701.001.

(45) Personal Identification Number (PID)--A unique computer-generated number assigned to individuals for identification in the commission's electronic database.

(46) Placed on probation--Has received an adjudicated or deferred adjudication probation for a criminal offense.

(47) POST--State or federal agency with jurisdiction similar to that of the commission, such as a peace officer standards and training agency.

(48) Precision rifle--Any rifle with a frame mounted optical sighting device greater than 3 power that is carried by the individual officer in an official capacity.

(49) Proprietary training contractor--An approved training contractor who has a proprietary interest in the intellectual property delivered.

(50) Public security officer--A person employed or appointed as an armed security officer identified under the provisions of the Texas Occupations Code, §1701.001.

(51) Reactivate--To make a license issued by the commission active after at least a two-year break in service and the licensee's failure to complete legislatively required training.

(52) Reinstate--To make a license issued by the commission active after disciplinary action or failure to obtain required continuing education.

(53) Reserve--A person appointed as a reserve law enforcement officer under the provisions of the Texas Occupations Code, §1701.001.

(54) Restore--To make a license issued by the commission active after surrender of license.

(55) Self-assessment--Completion of the commission created process, which gathers information about a training or education program.

(56) Separation--An explanation of the circumstances under which the person resigned, retired, or was terminated, reported on the form currently prescribed by the commission, in accordance with Texas Occupations Code, §1701.452.

(57) SOAH--The State Office of Administrative Hearings.

(58) Successful completion--A minimum of:

(A) 70 percent or better; or

(B) C or better; or

(C) pass, if offered as pass/fail.

(59) TCLEDDS--Texas Commission on Law Enforcement Data Distribution System.

(60) Telecommunicator--A person employed as a telecommunicator under the provisions of the Texas Occupations Code, §1701.001.

(61) Training coordinator--An individual, appointed by a commission-recognized training provider, who meets the requirements of §215.9 of this title.

(62) Training cycle--A 48-month period as established by the commission. Each training cycle is composed of two contiguous 24-month units.

(63) Training hours--Classroom or distance education hours reported in one-hour increments.

(64) Training program--An organized collection of various resources recognized by the commission for providing preparatory or continuing training. This program includes, but is not limited to, learning goals and objectives, academic activities and exercises, lesson plans, exams, skills training, skill assessments, instructional and learning tools, and training requirements.

(65) Training provider--A governmental body, law enforcement association, alternative delivery trainer, or proprietary entity credentialed by the commission to provide preparatory or continuing training for licensees or potential licensees.

(66) Verification (verified)--The confirmation of the correctness, truth, or authenticity of a document, report, or information by sworn affidavit, oath, or deposition.

(b) The effective date of this section is January 1, 2012.

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 December 6, 2011.

TRD-201105346

Kim Vickers

Executive Director

Texas Commission on Law Enforcement Officer Standards and Education

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For further information, please call: (512) 936-7713

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37 TAC §211.16

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) adopts an amendment to §211.16, concerning Establishment of an Appointing Entity, with changes to the proposed text as published in the September 30, 2011, issue of the *Texas Register* (36 TexReg 6459) and will be republished.

The amendment adds language to 37 TAC §211.16, Establishment of an Appointing Entity.

No comments were received regarding adoption of this amendment.

The amendment is adopted under Texas Occupations Code, Chapter 1701, §1701.151, General Powers of the Commission; Rulemaking Authority, which authorizes the Commission to promulgate rules for administration of this chapter.

The amendment as adopted is in compliance with Texas Occupations Code, Chapter 1701, §1701.163, Information Provided by Commissioning Entities.

No other code, article, or statute is affected by this adoption.

§211.16. Establishment of an Appointing Entity.

(a) On or after September 1, 2009, an entity authorized by statute or by the constitution to create a law enforcement agency or police department and commission, appoint, or employ peace officers that first creates a law enforcement agency or police department and first begins to commission, appoint, or employ peace officers shall make application to the commission.

(b) On creation of the law enforcement agency or police department, and as part of the application process, the entity shall submit to the commission the current agency number, application form, any associated application fee, and information regarding:

(1) the need for the law enforcement agency or police department in the community;

(2) the funding sources for the law enforcement agency or police department;

(3) the physical resources available to officers;

(4) the physical facilities that the law enforcement agency or police department will operate, including descriptions of the evidence room, dispatch area, and public area;

(5) law enforcement policies of the law enforcement agency or police department, including policies on:

(A) use of force;

(B) vehicle pursuit;

(C) professional conduct of officers;

(D) domestic abuse protocols;

(E) response to missing persons;

(F) supervision of part-time officers;

(G) impartial policing; and

(H) fitness for duty.

(6) the administrative structure of the law enforcement agency or police department;

(7) liability insurance; and

(8) any other information the commission requires by rule.

(c) An entity authorized by Local Government Code, §511.0092 to operate a correctional facility to house inmates, in this state, convicted of offenses committed against the laws of another state of the United States, and appoint jailers requiring licensure by the commission, may make application for an agency number by submitting the current agency number application form, any associated application fee, and a certified copy of the contract under which the facility will operate.

(d) A political subdivision wanting to establish a consolidated emergency telecommunications center and appoint telecommunicators, as required by Texas Occupations Code, §1701.405, may make application for an agency number by submitting the current agency number application form, any associated application fee and a certified copy of the consolidation contract.

(e) The Texas Department of Criminal Justice - Pardon and Parole Division, a community supervision and corrections department, or a juvenile probation department may make application for an agency number if seeking firearms training certificates for parole officers, community supervision and corrections officers, or juvenile probation officers by submitting the current agency number application form and any associated application fee.

(f) The effective date of this section is January 1, 2012.

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 December 6, 2011.

TRD-201105347

Kim Vickers

Executive Director

Texas Commission on Law Enforcement Officer Standards and Education

Effective date: January 1, 2012

Proposal publication date: September 30, 2011

For further information, please call: (512) 936-7713

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37 TAC §211.27

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) adopts an amendment to §211.27, concerning Reporting Responsibilities of Individuals, with changes to the proposed text as published in the September 30, 2011, issue of the *Texas Register* (36 TexReg 6460) and will be republished.

The amendment adds language to 37 TAC §211.27, Reporting Responsibilities of Individuals.

No comments were received regarding adoption of this amendment.

The amendment is adopted under Texas Occupations Code, Chapter 1701, §1701.151, General Powers of the Commission; Rulemaking Authority, which authorizes the Commission to promulgate rules for administration of this chapter.

The rule amendment as adopted is in compliance with Texas Occupations Code, Chapter 1701, §1701.3075, Qualified Applicant Awaiting Appointment.

No other code, article, or statute is affected by this adoption.

§211.27. Reporting Responsibilities of Individuals.

(a) An individual who either is a licensee or meets the requirements of Texas Occupations Code §1701.307(a) must report to the commission, in a format prescribed by the commission, within 30 days:

(1) any name change;

(2) a permanent mailing address other than an agency address;

(3) all subsequent address changes;

(4) an arrest, charge, or indictment for a criminal offense above the grade of Class C misdemeanor, or for any Class C misdemeanor involving the duties and responsibilities of office or family violence, including the name of the arresting agency, the style, court, and cause number of the charge or indictment, if any;

(5) the final disposition of the criminal action; and

(6) any dishonorable or bad conduct discharge.

(b) The effective date of this section is January 1, 2012.

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 December 8, 2011.

TRD-201105403

Kim Vickers

Executive Director

Texas Commission on Law Enforcement Officer Standards and Education

Effective date: January 1, 2012

Proposal publication date: September 30, 2011

For further information, please call: (512) 936-7713

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37 TAC §211.29

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) adopts the repeal of §211.29, concerning Responsibilities of Agency Chief Administrators, without changes to the proposal as published in the September 30, 2011, issue of the *Texas Register* (36 TexReg 6460) and will not be republished.

This section is being replaced by a new one which will clarify and enhance the efficiency of the Commission's operations.

The repeal is necessary to include an obligation for chief administrators to determine fitness for duty and provide training requirements.

No comments were received regarding adoption of this repeal.

The repeal is adopted under Texas Occupations Code, Chapter 1701, §1701.151, General Powers of Commission; Rulemaking Authority.

No other code, article, or statute is affected by this adoption.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 8, 2011.

TRD-201105407

Kim Vickers

Executive Director

Texas Commission on Law Enforcement Officer Standards and Education

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Proposal publication date: September 30, 2011

For further information, please call: (512) 936-7713

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37 TAC §211.29

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) adopts new §211.29, concerning Responsibilities of Agency Chief Administrators, with changes to the proposed text as published in the September 30, 2011, issue of the *Texas Register* (36 TexReg 6461) and will be republished.

The new rule is necessary to ensure that officers are trained and their safety and well being is considered.

No comments were received regarding adoption of this new rule.

The new rule is adopted under Texas Occupations Code, Chapter 1701, §1701.151, General Powers of the Commission; Rulemaking Authority, which authorizes the Commission to promulgate rules for administration of this chapter.

The new rule as adopted is in compliance with Texas Occupations Code, Chapter 1701, §1701.164, Collection of Certain Incident-Based Data Submitted by Law Enforcement Agencies, §1701.351, Continuing Education Required for Peace Officers, §1701.352, Continuing Education Programs, §1701.402, Proficiency Certificates, §1701.451, Preemployment Request for Employment Termination Report and Submission of Background Check Confirmation Form, and §1701.452, Employment Termination Report.

No other code, article, or statute is affected by this adoption.

§211.29. Responsibilities of Agency Chief Administrators.

(a) An agency chief administrator is responsible for making any and all reports and submitting any and all documents required of that agency by the commission.

(b) An individual who is appointed or elected to the position of the chief administrator of a law enforcement agency shall notify the Commission of the date of appointment and title, through a form prescribed by the Commission within 30 days of such appointment.

(c) An agency chief administrator must comply with the appointment and/or retention requirements under Subchapter L of the Texas Occupations Code, Chapter 1701.

(d) An agency chief administrator must report to the commission within 30 days, any change in the agency's name, physical location, mailing address, electronic mail address, or telephone number.

(e) An agency chief administrator must report, in a standard format, incident-based data compiled in accordance with Texas Occupations Code §1701.164.

(f) Line of duty deaths shall be reported to the commission in current peace officers' memorial reporting formats.

(g) An agency chief administrator has an obligation to determine that all appointees are able to safely and effectively perform the essential job functions. An agency chief administrator may require a fit for duty review upon identifying factors that indicate an appointee may no longer be able to perform job-related functions safely and effectively. These factors should be based on objective evidence and a reasonable basis that the cause may be attributable to a medical or psychological condition or impairment.

(h) An agency must provide training on employment issues identified in Texas Occupations Code §1701.402 and field training.

(i) An agency must provide continuing education training required in Texas Occupations Code §1701.351 and §1701.352.

(j) Before an agency appoints any licensee to a position requiring a commission license it shall complete the reporting requirements of Texas Occupations Code §1701.451.

(k) An agency appointing a person who does not hold a commission license must file an application for the appropriate license with the commission.

(l) An agency must notify the commission electronically following the requirements of Texas Occupations Code §1701.452, when a person under appointment with that agency resigns or is terminated.

(m) An agency chief administrator must comply with orders from the commission regarding the correction of a report of resignation/termination or request a hearing from SOAH.

(n) An agency shall notify the commission electronically within 30 days, when it receives information that a person under appointment with that agency has been arrested, charged, indicted, or convicted for any offense above a Class C misdemeanor, or for any Class C misdemeanor involving the duties and responsibilities of office or family violence.

(o) Except in the case of a commission error, an agency that wishes to report a change to any information within commission files about a licensee shall do so in a request to the commission, containing:

(1) the licensees name, date of birth, last four digits of the social security number, or PID;

(2) the requested change; and

(3) the reason for the change.

(p) The effective date of this section is January 1, 2012.

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 December 6, 2011.

TRD-201105348

Kim Vickers
Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
Effective date: January 1, 2012
Proposal publication date: September 30, 2011
For further information, please call: (512) 936-7713

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CHAPTER 215. TRAINING AND EDUCATIONAL PROVIDERS AND RELATED MATTERS

37 TAC §215.3

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) adopts an amendment to §215.3, concerning Academy Licensing, with changes to the proposed text as published in the September 30, 2011, issue of the *Texas Register* (36 TexReg 6462) and will be republished.

The amendment adds language to 37 TAC §215.3, Academy Licensing.

No comments were received regarding adoption of this amendment.

The amendment is adopted under Texas Occupations Code, Chapter 1701, §1701.151, General Powers of the Commission; Rulemaking Authority, which authorizes the Commission to promulgate rules for administration of this chapter.

The amendment as adopted is in compliance with Texas Occupations Code, Chapter 1701, §1701.353, Continuing Education Procedures.

No other code, article, or statute is affected by this adoption.

§215.3. Academy Licensing.

(a) A state or any political subdivision of the state may make application to provide law enforcement, corrections, telecommunications, and/or other law enforcement related training. The entity must be based on at least one of the following sponsoring organizations:

(1) a law enforcement agency with a minimum of 75 full-time paid peace officers, county jailers, and/or telecommunicators under current appointment;

(2) an institution recognized by the Texas Higher Education Coordinating Board (THECB); or

(3) a regional planning commission or councils of governments' (COG) board. The commission will issue only one academy license within each regional planning commission or councils of governments' area at any one time.

(b) As part of the electronic application process, the following documents shall be submitted:

(1) the proposed formal name of the academy, which must not misrepresent the status of the academy or be confusing to law enforcement or to the public;

(2) a proposed course schedule to show that training will be conducted on a continuing basis;

(3) a schedule of tuition and fees that will be charged, if any;

(4) documentation of compliance with the electronic reporting requirements of §1701.1523 of the Texas Occupations Code;

(5) documentation that an advisory board has already been appointed as required by §215.7 of this chapter and §1701.252 of the Texas Occupations Code;

(6) advisory board minutes that show the advisory board has complied with the requirements of §215.7 of this chapter;

(7) the name and PID of the proposed training coordinator;

(8) documentation that the training coordinator is in compliance with the responsibilities required by law, or rule, to include but not limited to §215.9 of this chapter;

(9) the physical location and a description of the proposed training facility and any satellite sites;

(10) documentation of any contract an academy may have as cosponsor with law enforcement agencies and other entities to conduct continuing education classes or basic county corrections training; and

(11) at the request of the executive director the applicant must forward for approval resumes for each board member.

(c) A training needs assessment must be completed and submitted for commission approval and shall include:

(1) a description of whom the academy will serve, including the identity of each law enforcement agency the academy expects to serve, the number of officers the academy expects to train annually from each agency, and the basis for the academy's expectations;

(2) the number and types of courses that will be offered; and

(3) proof of notification by e-mail to all licensed academies within the regional planning commission or councils of governments' area of their intent to apply for an academy license and what specific training needs the applicant intends to meet.

(d) Upon approval of the application the proposed academy must pass an inspection of its facilities and instructional materials. The inspection shall be conducted by commission staff or by a team of academy coordinators as appointed by the executive director. An academy must have and maintain:

(1) qualified instructors and staff to conduct successful training;

(2) instructional resources to conduct successful training, to include, but not limited to, convenient access to a law enforcement reference library or sufficient number of computers for student and staff use;

(3) access to current and appropriate teaching tools and electronic equipment, including video players, projection equipment, computer hardware, software, and the Internet;

(4) a proprietary interest in or a written contract providing for a firing range suitable for the course of fire required in the current basic peace officer course, with safety rules clearly posted, secure storage and first aid equipment while on the premises; and

(5) a proprietary interest in or a written contract providing for at least one facility to conduct police driving training, to include at least one law enforcement automobile for training.

(e) The chief administrator of the sponsoring organization and the proposed training coordinator must appear before the commissioners to respond to questions prior to action being taken on the application.

(f) Once an academy license is issued, the chief administrator of the sponsoring organization, or the training coordinator, must report in writing to the commission within 30 days:

(1) any change in the chief administrator or training coordinator;

(2) any failure to meet commission rules and standards by the academy, training coordinator, instructors, or advisory board;

(3) when non-compliance with federal or state requirements is discovered; or

(4) any change in academy name, physical location, mailing address, electronic mail address, or telephone number.

(g) The commission will award training credit for any course conducted by a licensed academy as provided by commission rules unless the:

(1) course is not conducted as required by commission rules;

(2) training is not related to a commission license;

(3) advisory board, the academy, the training coordinator, the course coordinator, or the instructor failed to discharge any responsibility required by commission rule;

(4) credit was claimed by deceitful means; or

(5) distance education courses of a proprietary nature, equivalency, or the distance education portion of a basic licensing course was not submitted and approved under commission distance education guidelines.

(h) The commission may suspend an academy license, or the executive director or his designee may issue a written reprimand to the sponsoring organization, if the:

(1) academy or the sponsoring organization fails to comply with commission rules or any law; or

(2) academy has been classified as at risk under §215.13 of this chapter.

(i) The commission may cancel an academy license if it was issued in error or based on false or incorrect information.

(j) The commission may revoke an academy license if the:

(1) academy has been classified as at risk under §215.13 of this chapter for a 12-month period without complying with commission rules;

(2) training coordinator intentionally or knowingly submits a falsified document or a false written statement or representation to the commission; or

(3) academy has not met the needs of the communities and/or agencies that it serves.

(k) An academy may surrender its license at any time or for any reason. To surrender the license, the chief administrator of the sponsoring organization must send written notice, accompanied by the license, to the executive director. The surrender is effective immediately upon receipt by the executive director.

(l) The effective date of this section is January 1, 2012.

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 December 6, 2011.

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Kim Vickers
Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
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For further information, please call: (512) 936-7713

37 TAC §215.5

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) adopts an amendment to §215.5, concerning Contractual Training, with changes to the proposed text as published in the September 30, 2011, issue of the *Texas Register* (36 TexReg 6463) and will be republished.

The amendment adds language to 37 TAC §215.5, Contractual Training.

No comments were received regarding adoption of this amendment.

The amendment is adopted under Texas Occupations Code, Chapter 1701, §1701.151, General Powers of the Commission; Rulemaking Authority, which authorizes the Commission to promulgate rules for administration of this chapter.

The amendment as adopted is in compliance with Texas Occupations Code, Chapter 1701, §1701.353, Continuing Education Procedures.

No other code, article, or statute is affected by this adoption.

§215.5. Contractual Training.

(a) A law enforcement agency, a law enforcement association, distance education provider, or proprietary training contractor may make application to conduct training for licensees.

(b) As part of the electronic application process, the following documentation shall be submitted:

(1) documentation that an advisory board has been appointed as provided by §215.7 of this chapter and §1701.252 of the Texas Occupations Code;

(2) advisory board minutes that show the advisory board has complied with the requirements of §215.7 of this chapter;

(3) documentation of compliance with the electronic reporting requirements of §1701.1523 of the Texas Occupations Code.

(4) the name and PID of the proposed training coordinator;

(5) documentation that the training coordinator is in compliance with the responsibilities required by contract, law, or rule, to include but not limited to §215.9 of this chapter;

(6) a schedule of tuition and fees that will be charged, if any;

(7) selection of a training facility and instructional materials that meets inspection requirements identified in §215.3(d) of this chapter, as determined by the commission; and

(8) at the request of the executive director the applicant must forward for approval:

(A) resumes for each board member; and/or

(B) at least one copy of the learning objectives of each course covered by the contract.

(c) A training needs assessment must be completed and submitted for commission approval and shall include:

(1) what specific training needs are to be addressed by the proposed contract; and

(2) the number and types of courses that will be offered during the first quarter of the executed contract.

(d) The chief administrator of the sponsoring organization and the proposed training coordinator must appear before the commissioners to respond to questions prior to action being taken on the application.

(e) Once a contract is issued, the chief administrator of the sponsoring organization, or training coordinator, must report in writing to the commission within 30 days:

(1) any change in chief administrator or training coordinator;

(2) any failure to meet commission rules and standards by the provider, training coordinator, instructors, or advisory board;

(3) any change in provider name, physical location, mailing address, electronic mail address, or telephone number; or

(4) when non-compliance with federal or state requirements is discovered.

(f) A contract is limited to those terms expressly included in the contract or incorporated by reference and is:

(1) in the currently prescribed commission format;

(2) signed by the executive director;

(3) signed by the chief administrator or head of the sponsoring organization; and

(4) signed by the training coordinator responsible for the administration of that training.

(g) A contract may approve the courses and the number of times they will be offered. These contracts are for a stated period of time but may be terminated within 10 days by written notice on the part of either party to the contract. A contract may incorporate by reference a law, rule, or any other document; however, any waiver, exception, or deletion must be expressed.

(h) The commission will award training credit for any course conducted by a contract training provider as provided by commission rules unless:

(1) the training was not conducted in compliance with the contract;

(2) the advisory board, training coordinator or instructor failed to discharge any responsibility required by commission rule;

(3) the credit was claimed by deceitful means; or

(4) distance education courses of a proprietary nature, equivalency, or the distance education portion of a basic licensing course was not submitted and approved under commission distance education guidelines.

(i) The executive director may suspend a contract for any violation of its terms or of any commission rule or law.

(j) The executive director may terminate a contract if no training is conducted within a calendar year unless the chief administrator has petitioned the executive director for a waiver and the waiver has been granted. Any party may terminate, upon written notice to all other parties, received by the executive director, or the coordinator, or any other named person or office.

(k) Notwithstanding any other provision of this chapter, the commission may revoke a contract if the:

(1) contractual provider has been classified as at risk under §215.13 of this chapter for a 12-month period without complying with commission rules; or

(2) training coordinator intentionally or knowingly submits a falsified document or a false written statement or representation to the commission.

(l) The effective date of this section is January 1, 2012.

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 December 6, 2011.

TRD-201105350

Kim Vickers

Executive Director

Texas Commission on Law Enforcement Officer Standards and Education

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Proposal publication date: September 30, 2011

For further information, please call: (512) 936-7713

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37 TAC §215.6

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) adopts an amendment to §215.6, concerning Academic Alternative Licensing, with changes to the proposed text as published in the September 30, 2011, issue of the *Texas Register* (36 TexReg 6465) and will be republished.

The amendment adds language to 37 TAC §215.6, Academic Alternative Licensing.

No comments were received regarding adoption of this amendment.

The amendment is adopted under Texas Occupations Code, Chapter 1701, §1701.151, General Powers of the Commission; Rulemaking Authority, which authorizes the Commission to promulgate rules for administration of this chapter.

The amendment as adopted is in compliance with Texas Occupations Code, Chapter 1701, §1701.251, Training Programs; Instructors.

No other code, article, or statute is affected by this adoption.

§215.6. Academic Alternative Licensing.

(a) A Texas college or university that is accredited by the Southern Association of Colleges and Schools (SACS) and which

has a criminal justice or law enforcement program approved by the Texas Higher Education Coordinating Board (THECB) may make application to conduct training for licensees.

(b) As part of the electronic application process:

(1) documentation of approval from THECB for a criminal justice or law enforcement program;

(2) documentation that an advisory board has been appointed as provided by §215.7 of this chapter and §1701.252 of the Texas Occupations Code;

(3) advisory board minutes that show the advisory board has complied with the requirements of §215.7 of this chapter;

(4) documentation of compliance with the electronic reporting requirements of §1701.1523 of the Texas Occupations Code;

(5) the name and PID of the proposed training coordinator;

(6) documentation that the training coordinator has met the responsibilities required by contract, law, or rule, to include but not limited to §215.9 of this chapter;

(7) a proposed course schedule to show that training will be conducted;

(8) selection of a training facility and instructional materials that meet the inspection requirements identified in §215.3(d) of this chapter, as determined by the commission;

(9) documentation of any contractual provision the applicant may have with a licensed academy to provide the sequence courses;

(10) provisions for the Registrar to approve all students qualified for the state basic licensing exam in a timely manner; and

(11) at the request of the executive director the applicant must forward for approval:

(A) resumes for each board member; and/or

(B) at least one copy of the learning objectives of each alternative course provided.

(c) A training needs assessment must be submitted to the commission for approval and must include:

(1) a description of whom the alternative academic provider will serve and the number of students they expect to train annually;

(2) the basis for these expectations; and

(3) proof of notification by e-mail to all licensed academies within the area of the applicant's intent to apply for an academic alternative provider license.

(d) The dean or chair of the academic program and the proposed training coordinator must appear before the commissioners to respond to questions prior to action being taken on the application.

(e) Once a license is issued, the chief administrator or training coordinator of the academic alternative provider must report in writing to the commission within 30 days:

(1) any change in the dean of the department;

(2) any change in training coordinator;

(3) any failure to meet commission rules and standards by the training coordinator, instructors, or advisory board;

(4) any change in status with SACS and/or THECB;

(5) when non-compliance with federal or state requirements is discovered; or

(6) any change in provider name, physical location, mailing address, electronic mail address, or telephone number.

(f) The commission will award training credit for the academic alternative program when provided by licensed academic alternative providers, unless the:

(1) courses were not conducted in compliance with commission rules;

(2) courses were not conducted in compliance with THECB guidelines;

(3) advisory board, training coordinator, or instructor failed to discharge any responsibility required by rule; or

(4) credit was obtained by deceitful means.

(g) The commission may cancel an academic alternative license if it was issued in error or based on false or incorrect information.

(h) The commission may suspend an academic alternative license, or the executive director or his designee may issue a written reprimand to the dean of the department, if:

(1) the academic alternative provider fails to comply with commission rules or any law; or

(2) the academic alternative provider has been classified as at risk under §215.13 of this chapter.

(i) The commission may revoke an academic alternative license if:

(1) the academic alternative provider has been classified as at risk under §215.13 of this chapter for a 12-month period without complying with commission rules;

(2) the academic alternative provider has lost either SACS accreditation or THECB approval; or

(3) the training coordinator intentionally or knowingly submits a falsified document or a false written statement or representation to the commission.

(j) An academic alternative provider may surrender its license at any time for any reason. To surrender the license, the dean of the department must send written notice, accompanied by the license, to the executive director. The surrender is effective immediately upon receipt by the executive director.

(k) The effective date of this section is January 1, 2012.

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 December 6, 2011.

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Kim Vickers
Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
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For further information, please call: (512) 936-7713

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37 TAC §215.9

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) adopts an amendment to §215.9, concerning Training Coordinator, with changes to the proposed text as published in the September 30, 2011, issue of the *Texas Register* (36 TexReg 6466) and will be republished.

The amendment adds language to 37 TAC §215.9, Training Coordinator.

No comments were received regarding adoption of this amendment.

The amendment is adopted under Texas Occupations Code, Chapter 1701, §1701.151, General Powers of the Commission; Rulemaking Authority, which authorizes the Commission to promulgate rules for administration of this chapter.

The amendment as adopted is in compliance with Texas Occupations Code, Chapter 1701, §1701.254, Risk Assessment and Inspections, and §1701.353, Continuing Education Procedures.

No other code, article, or statute is affected by this adoption.

§215.9. Training Coordinator.

(a) A training coordinator must hold a valid instructor license or certificate and must be a full-time paid employee.

(b) The training coordinator must:

(1) ensure compliance with commission rules and guidelines:

(2) prepare, maintain, and submit the following reports within the time frame specified:

(A) reports of training:

(i) basic licensing course shall be submitted prior to students attempting a licensing exam; and

(ii) within 30 days of completion of continuing education course;

(B) self-assessment reports as required by the commission;

(C) a copy of advisory board minutes during an on-site evaluation;

(D) training calendars-schedules must be available for review or posted on the internet no later than 30 days prior to the beginning of each calendar quarter or academic semester;

(E) any other reports or records as requested by the commission;

(3) be responsible for the administration and conduct of each course, including those conducted at ancillary sites, and specifically:

(A) appointing and supervising qualified instructors;

(B) maintaining course schedules and course files, including lesson plans;

(C) enforcing all admission, attendance, retention, and other standards set by the commission and the training provider;

(D) securing and maintaining all facilities necessary to meet the inspection standards of this section;

(E) controlling the discipline and demeanor of each student and instructor during class;

(F) distributing a current version of the Texas Occupations Code, Chapter 1701 and commission rules to all students at the time of admission to any course that may result in the issuance of a license;

(G) distributing learning objectives to all students at the beginning of each course;

(H) ensuring that all learning objectives are taught and evaluated;

(I) proctoring or supervising all examinations to ensure fair, honest results; and

(J) maintaining records of tests and other evaluation instruments for a period of five years.

(4) receive all commission notices on behalf of the training provider and forward each notice to the appointing authority; and

(5) attend or have a designee attend each academy coordinator's workshop conducted by the commission.

(c) If the position of training coordinator becomes vacant, upon written request from the chief administrator of the training provider the commission may, at the discretion of the executive director, waive the requirements for a period not to exceed six months.

(d) Upon written request from the chief administrator of a training provider that does not have a full-time paid staff, the commission may, at the discretion of the executive director, waive the requirements in subsection (a) of this section.

(e) The effective date of this section is January 1, 2012.

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 December 6, 2011.

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Kim Vickers
Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
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For further information, please call: (512) 936-7713

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37 TAC §215.15

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) adopts the repeal of §215.15, concerning Basic Licensing Enrollment Standards, without changes to the proposal as published in the September 30, 2011, issue of the *Texas Register* (36 TexReg 6467) and will not be republished.

This section is being replaced by a new one which will incorporate changes from the legislature and new psychological examination procedures.

The repeal is necessary to incorporate changes from Senate Bill 542 of the 82nd Legislative Session and the new psychological examination procedures.

No comments were received regarding adoption of this repeal.

The repeal is adopted under Texas Occupations Code, Chapter 1701, §1701.151, General Powers of Commission; Rulemaking Authority.

No other code, article, or statute is affected by this adoption.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 8, 2011.

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Kim Vickers
Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
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For further information, please call: (512) 936-7713

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37 TAC §215.15

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) adopts new §215.15, concerning Basic Licensing Enrollment Standards, with changes to the proposed text as published in the September 30, 2011, issue of the *Texas Register* (36 TexReg 6468) and will be republished.

The new rule is necessary to include changes from Senate Bill 542 of the 82nd Legislative Session and the new psychological examination procedures.

No comments were received regarding adoption of this new rule.

The new rule is adopted under Texas Occupations Code, Chapter 1701, §1701.151, General Powers of the Commission; Rulemaking Authority, which authorizes the Commission to promulgate rules for administration of this chapter.

The new rule as adopted is in compliance with Texas Occupations Code, Chapter 1701, §1701.255, Enrollment Qualifications.

No other code, article, or statute is affected by this adoption.

§215.15. Basic Licensing Enrollment Standards.

(a) In order for an individual to enroll in any basic licensing course the provider must have on file documentation that the individual meets the following standards:

(1) minimum educational requirements:

(A) a high school diploma;

(B) a high school equivalency certificate; or

(C) for the basic peace officer training course, an honorable discharge from the armed forces of the United States after at least 24 months of active duty service.

(2) the individual has been subjected to a search of local, state and national records to disclose any criminal record;

(A) is not currently charged with any criminal offense for which conviction would be a bar to licensure;

(B) community supervision history:

(i) has never been on court-ordered community supervision or probation for any criminal offense above the grade of a Class B misdemeanor or a Class B misdemeanor within the last ten years from the date of the court order; but

(ii) the commission may approve the application of an individual who received probation or court-ordered community supervision for a Class B misdemeanor at least five (5) years prior to enrollment if an agency administrator sufficiently demonstrates in writing with supporting documentation that mitigating circumstances exist with the case and with the individual applying for licensure, and that the public interest would be served by reducing the waiting period;

(C) conviction history:

(i) has never been convicted of an offense above the grade of a Class B misdemeanor or a Class B misdemeanor within the last ten years; but

(ii) the commission may approve the application of an individual who was convicted of a Class B misdemeanor at least five (5) years prior to enrollment if an agency administrator sufficiently demonstrates in writing with supporting documentation that mitigating circumstances exist with the case and with the individual applying for licensure, and that the public interest would be served by reducing the waiting period.

(D) For purposes of this section, the commission will construe any court ordered community supervision, probation, or conviction for a criminal offense to be its closest equivalent under the Texas Penal Code classification of offenses if the offense arose from:

(i) another penal provision of Texas law; or

(ii) a penal provision of any other state, federal, military or foreign jurisdiction.

(E) A classification of an offense as a felony at the time of conviction will never be changed because Texas law has changed or because the offense would not be a felony under current Texas law.

(3) has never been convicted of any family violence offense;

(4) has not had a dishonorable or bad conduct discharge;

(5) is not prohibited by state or federal law from operating a motor vehicle;

(6) is not prohibited by state or federal law from possessing firearms or ammunition; and

(7) is a U.S. citizen.

(b) In evaluating whether mitigating circumstances exist, the commission will consider the following factors:

(1) the applicant's history of compliance with the terms of community supervision;

(2) the applicant's continuing rehabilitative efforts not required by the terms of community supervision;

(3) the applicant's employment record;

(4) whether the disposition offense contains an element of actual or threatened bodily injury or coercion against another person under the Texas Penal Code or the law of the jurisdiction where the offense occurred;

(5) the required mental state of the disposition offense;

(6) whether the conduct resulting in the arrest resulted in the loss of or damage to property or bodily injury;

(7) the type and amount of restitution made by the applicant;

(8) the applicant's prior community service;

(9) the applicant's present value to the community;

(10) the applicant's post-arrest accomplishments;

(11) the applicant's age at the time of arrest; and

(12) the applicant's prior military history.

(c) psychological and physical examination requirements:

(1) the individual has been examined by a physician, selected by the appointing, employing agency, or the academy, who is licensed by the Texas Medical Board. The physician must be familiar with the duties appropriate to the type of license sought. The individual must be declared by that professional, on a form prescribed by the commission, to be:

(A) physically sound and free from any defect which may adversely affect the performance of duty appropriate to the type of license sought; and

(B) show no trace of drug dependency or illegal drug use after a blood test or other medical test; and

(2) the individual has been examined by a psychologist, selected by the appointing, employing agency, or the academy, who is licensed by the Texas State Board of Examiners of Psychologists. This examination may also be conducted by a psychiatrist licensed by the Texas Medical Board. The psychologist or psychiatrist must be familiar with the duties appropriate to the type of license sought. The individual must be declared by that professional, on a form prescribed by the commission, to be in satisfactory psychological and emotional health to serve as the type of officer for which the license is sought. The examination must be conducted pursuant to professionally recognized standards and methods. The examination process must consist of a review of a job description for the position sought; review of any personal history statements; review of any background documents; at least two instruments, one which measures personality traits and one which measures psychopathology; and a face to face interview conducted after the instruments have been scored.

(A) the commission may allow for exceptional circumstances where a licensed physician performs the evaluation of psychological and emotional health. This requires the appointing agency to request in writing and receive approval from the commission, prior to the evaluation being completed; or

(B) the examination may be conducted by qualified persons identified by §501.004, Occupations Code. This requires the appointing agency to request in writing and receive approval from the commission, prior to the evaluation being completed.

(d) The enrollment standards established in this section do not preclude the provider from establishing additional requirements or standards for enrollment.

(e) The effective date of this section is January 1, 2012.

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 December 6, 2011.

TRD-201105353

Kim Vickers

Executive Director

Texas Commission on Law Enforcement Officer Standards and Education

Effective date: January 1, 2012

Proposal publication date: September 30, 2011

For further information, please call: (512) 936-7713

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37 TAC §215.16

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) adopts new §215.16, concerning Basic Telecommunicator Enrollment Standards, with changes to the proposed text as published in the September 30, 2011, issue of the *Texas Register* (36 TexReg 6469) and will be republished.

The new rule is necessary to include changes from House Bill 3823 of the 82nd Legislative Session.

No comments were received regarding adoption of this new rule.

The new rule is adopted under Texas Occupations Code, Chapter 1701, §1701.151, General Powers of the Commission; Rulemaking Authority, which authorizes the Commission to promulgate rules for administration of this chapter.

The new rule as adopted is in compliance with Texas Occupations Code, Chapter 1701, §1701.255, Enrollment Qualifications.

No other code, article, or statute is affected by this adoption.

§215.16. Basic Telecommunicator Enrollment Standards.

(a) In order for an individual to enroll in any basic telecommunicator course the provider must have on file documentation that the individual meets the following standards:

(1) minimum educational requirements:

(A) a high school diploma; or

(B) a high school equivalency certificate.

(2) the individual has been subjected to a search of local, state and national records to disclose any criminal record;

(A) is not currently charged with any criminal offense for which conviction would be a bar to certification;

(B) community supervision history:

(i) has never been on court-ordered community supervision or probation for any criminal offense above the grade of a Class B misdemeanor or a Class B misdemeanor within the last ten years from the date of the court order; but

(ii) the commission may approve the application of an individual who received probation or court-ordered community supervision for a Class B misdemeanor at least five (5) years prior to enrollment if an agency administrator sufficiently demonstrates in writing with supporting documentation that mitigating circumstances exist with the case and with the individual applying for certification, and that the public interest would be served by reducing the waiting period;

(C) conviction history:

(i) has never been convicted of an offense above the grade of a Class B misdemeanor or a Class B misdemeanor within the last ten years; but

(ii) the commission may approve the application of an individual who was convicted of a Class B misdemeanor at least

five (5) years prior to enrollment if an agency administrator sufficiently demonstrates in writing with supporting documentation that mitigating circumstances exist with the case and with the individual applying for certification, and that the public interest would be served by reducing the waiting period.

(D) For purposes of this section, the commission will construe any court ordered community supervision, probation, or conviction for a criminal offense to be its closest equivalent under the Texas Penal Code classification of offenses if the offense arose from:

(i) another penal provision of Texas law; or

(ii) a penal provision of any other state, federal, military or foreign jurisdiction.

(E) A classification of an offense as a felony at the time of conviction will never be changed because Texas law has changed or because the offense would not be a felony under current Texas law.

(3) has never been convicted of any family violence offense;

(4) has not had a dishonorable or bad conduct discharge; and

(5) is a U.S. citizen.

(b) In evaluating whether mitigating circumstances exist, the commission will consider the following factors:

(1) the applicant's history of compliance with the terms of community supervision;

(2) the applicant's continuing rehabilitative efforts not required by the terms of community supervision;

(3) the applicant's employment record;

(4) whether the disposition offense contains an element of actual or threatened bodily injury or coercion against another person under the Texas Penal Code or the law of the jurisdiction where the offense occurred;

(5) the required mental state of the disposition offense;

(6) whether the conduct resulting in the arrest resulted in the loss of or damage to property or bodily injury;

(7) the type and amount of restitution made by the applicant;

(8) the applicant's prior community service;

(9) the applicant's present value to the community;

(10) the applicant's post-arrest accomplishments;

(11) the applicant's age at the time of arrest; and

(12) the applicant's prior military history.

(c) The enrollment standards established in this section do not preclude the provider from establishing additional requirements or standards for enrollment.

(d) The effective date of this section is January 1, 2012.

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 December 8, 2011.

TRD-201105404

Kim Vickers

Executive Director

Texas Commission on Law Enforcement Officer Standards and Education

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Proposal publication date: September 30, 2011

For further information, please call: (512) 936-7713

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CHAPTER 217. LICENSING REQUIREMENTS

37 TAC §217.1

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) adopts the repeal of §217.1, concerning Minimum Standards for Initial Licensure, without changes to the proposal as published in the September 30, 2011, issue of the *Texas Register* (36 TexReg 6470) and will not be republished.

This section is being replaced by a new one which incorporates new psychological procedures and changes from House Bill 542 of the 82nd Legislative Session.

The repeal is necessary to incorporate new psychological procedures and changes from House Bill 542 of the 82nd Legislative Session.

No comments were received regarding adoption of this repeal.

The repeal is adopted under Texas Occupations Code, Chapter 1701, §1701.151, General Powers of the Commission, Rulemaking Authority.

No other code, article, or statute is affected by this adoption.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 8, 2011.

TRD-201105410

Kim Vickers

Executive Director

Texas Commission on Law Enforcement Officer Standards and Education

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Proposal publication date: September 30, 2011

For further information, please call: (512) 936-7713

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37 TAC §217.1

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) adopts new §217.1, concerning Minimum Standards for Initial Licensure, with changes to the proposed text as published in the September 30, 2011, issue of the *Texas Register* (36 TexReg 6471) and will be republished.

The new rule is necessary to incorporate new psychological procedures and changes from House Bill 542 of the 82nd Legislative Session.

No comments were received regarding adoption of this new rule.

The new rule is adopted under Texas Occupations Code, Chapter 1701, §1701.151, General Powers of the Commission; Rule-

making Authority, which authorizes the Commission to promulgate rules for administration of this chapter.

The new rule as adopted is in compliance with Texas Occupations Code, Chapter 1701, §1701.253, School Curriculum, §1701.256, Instruction in Weapons Proficiency Required, §1701.301, License Required, §1701.302, Certain Elected Law Enforcement Officers; License Required, §1701.306, Psychological and Physical Examination, §1701.307, Issuance of License, §1701.309, Age Requirement, §1701.310, Appointment of County Jailer; Training Required, and §1701.311, Provisional License for Workforce Shortage.

No other code, article, or statute is affected by this adoption.

§217.1. Minimum Standards for Initial Licensure.

(a) The commission shall issue a license to an applicant who meets the following standards:

(1) age requirement:

(A) for peace officers and public security officers, is 21 years of age; or 18 years of age if the applicant has received:

(i) an associate's degree; or 60 semester hours of credit from an accredited college or university; or

(ii) has received an honorable discharge from the armed forces of the United States after at least two years of active service.

(B) for jailers is 18 years of age;

(2) minimum educational requirements:

(A) has passed a general educational development (GED) test indicating high school graduation level; or

(B) holds a high school diploma.

(3) is fingerprinted and is subjected to a search of local, state and U.S. national records and fingerprint files to disclose any criminal record;

(4) community supervision history:

(A) has not ever been on court-ordered community supervision or probation for any criminal offense above the grade of Class B misdemeanor or a Class B misdemeanor within the last ten years from the date of the court order; but

(B) the commission may approve the application of a person who received probation or court-ordered community supervision for a Class B misdemeanor at least five (5) years prior to application if an agency administrator sufficiently demonstrates in writing with supporting documentation that mitigating circumstances exist with the case and with the individual applying for licensure, and that the public interest would be served by reducing the waiting period;

(5) is not currently charged with any criminal offense for which conviction would be a bar to licensure;

(6) conviction history:

(A) has not ever been convicted of an offense above the grade of a Class B misdemeanor or a Class B misdemeanor within the last ten years; but

(B) the commission may approve the application of a person who was convicted for a Class B misdemeanor at least five (5) years prior to application if an agency administrator sufficiently demonstrates in writing with supporting documentation that mitigating circumstances exist with the case and with the individual applying for licensure, and that the public interest would be served by reducing the waiting period;

(7) has never been convicted of any family violence offense;

(8) is not prohibited by state or federal law from operating a motor vehicle;

(9) is not prohibited by state or federal law from possessing firearms or ammunition;

(10) has been subjected to a background investigation and has been interviewed prior to appointment by representatives of the appointing authority;

(11) examined by a physician, selected by the appointing or employing agency, who is licensed by the Texas Medical Board. The physician must be familiar with the duties appropriate to the type of license sought and appointment to be made. The appointee must be declared by that professional, on a form prescribed by the commission, within 180 days before the date of appointment by the agency to be:

(A) physically sound and free from any defect which may adversely affect the performance of duty appropriate to the type of license sought;

(B) show no trace of drug dependency or illegal drug use after a blood test or other medical test; and

(C) for the purpose of meeting the requirements for initial licensure, an individual's satisfactory medical exam that is conducted as a requirement of a basic licensing course may remain valid for 180 days from the individual's date of graduation from that academy, if accepted by the appointing agency;

(12) examined by a psychologist, selected by the appointing, employing agency, or the academy, who is licensed by the Texas State Board of Examiners of Psychologists. This examination may also be conducted by a psychiatrist licensed by the Texas Medical Board. The psychologist or psychiatrist must be familiar with the duties appropriate to the type of license sought. The individual must be declared by that professional, on a form prescribed by the commission, to be in satisfactory psychological and emotional health to serve as the type of officer for which the license is sought. The examination must be conducted pursuant to professionally recognized standards and methods. The examination process must consist of a review of a job description for the position sought; review of any personal history statements; review of any background documents; at least two instruments, one which measures personality traits and one which measures psychopathology; and a face to face interview conducted after the instruments have been scored.

(A) the commission may allow for exceptional circumstances where a licensed physician performs the evaluation of psychological and emotional health. This requires the appointing agency to request in writing and receive approval from the commission, prior to the evaluation being completed; or

(B) the examination may be conducted by qualified persons identified by §501.004, Texas Occupations Code. This requires the appointing agency to request in writing and receive approval from the commission, prior to the evaluation being completed; and

(C) for the purpose of meeting the requirements for initial licensure, an individual's satisfactory psychological exam that is conducted as a requirement of a basic licensing course may remain valid for 180 days from the individual's date of graduation from that academy, if accepted by the appointing agency;

(13) has not had a dishonorable or bad conduct discharge;

(14) has not had a commission license denied by final order or revoked;

(15) is not currently on suspension, or does not have a surrender of license currently in effect;

(16) meets the minimum training standards and passes the commission licensing examination for each license sought;

(17) has not violated any commission rule or provision of the Texas Occupations Code, Chapter 1701; and

(18) is a U.S. citizen.

(b) For the purposes of this section, the commission will construe any court-ordered community supervision, probation or conviction for a criminal offense to be its closest equivalent under the Texas Penal Code classification of offenses if the offense arose from:

(1) another penal provision of Texas law; or

(2) a penal provision of any other state, federal, military or foreign jurisdiction.

(c) A classification of an offense as a felony at the time of conviction will never be changed because Texas law has changed or because the offense would not be a felony under current Texas laws.

(d) In evaluating whether mitigating circumstances exist, the commission will consider the following factors:

(1) the applicant's history of compliance with the terms of community supervision;

(2) the applicant's continuing rehabilitative efforts not required by the terms of community supervision;

(3) the applicant's employment record;

(4) whether the disposition offense contains an element of actual or threatened bodily injury or coercion against another person under the Texas Penal Code or the law of the jurisdiction where the offense occurred;

(5) the required mental state of the disposition offense;

(6) whether the conduct resulting in the arrest resulted in the loss of or damage to property or bodily injury;

(7) the type and amount of restitution made by the applicant;

(8) the applicant's prior community service;

(9) the applicant's present value to the community;

(10) the applicant's post-arrest accomplishments;

(11) the applicant's age at the time of arrest; and

(12) the applicant's prior military history.

(e) A person must meet the training and examination requirements:

(1) training for the peace officer license consists of:

(A) the current basic peace officer course(s);

(B) a commission recognized, POST developed, basic law enforcement training course, to include:

(i) out of state licensure or certification; and

(ii) submission of the current eligibility application and fee; or

(C) a commission approved academic alternative program, taken through a licensed academic alternative provider and at least an associate's degree.

(2) training for the jailer license consists of the current basic county corrections course(s) or training recognized under §1701.310 of the Texas Occupations Code;

(3) training for the public security officer license consists of the current basic peace officer course(s); and

(4) passing any examination required for the license sought while the exam approval remains valid.

(f) The commission shall issue a license to any person who is otherwise qualified for that license, even if that person is not subject to the licensing law or rules by virtue of election or appointment to office under the Texas Constitution.

(g) A sheriff who first took office on or after January 1, 1994, must meet the licensing requirements of §1701.302 of the Texas Occupations Code.

(h) A constable taking office after August 30, 1999, must meet the licensing requirements of §86.0021 of the Texas Local Government Code.

(i) The commission may issue a provisional license, consistent with §1701.311 of the Texas Occupations Code, to an agency for a person to be appointed by that agency. An agency must submit all required applications currently prescribed by the commission and all required fees before the individual is appointed. Upon the approval of the application, the commission will issue a provisional license. A provisional license is issued in the name of the applicant; however, it is issued to and shall remain in the possession of the agency. Such a license may neither be transferred by the applicant to another agency, nor transferred by the agency to another applicant. A provisional license may not be reissued and expires:

(1) 12 months from the original appointment date;

(2) on leaving the appointing agency;

(3) on the date the holder fails the peace officer licensing examination for the third time; or

(4) on failure to comply with the terms stipulated in the provisional license approval.

(j) The commission may issue a temporary jailer license, consistent with §1701.310 of the Texas Occupations Code. An agency must submit all required applications currently prescribed by the commission and all required fees before the individual is appointed. Upon the approval of the application, the commission will issue a temporary jailer license. A temporary jailer license expires:

(1) 12 months from the original appointment date;

(2) on completion of training and passing of the jailer licensing examination; or

(3) on the date the holder fails the jailer licensing examination for the third time.

(k) A person who fails to comply with the standards set forth in this section shall not accept the issuance of a license and shall not accept any appointment. If an application for licensure is found to be false or untrue, it is subject to cancellation or recall.

(l) The effective date of this section is January 1, 2012.

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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Kim Vickers
Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
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For further information, please call: (512) 936-7713

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37 TAC §217.2

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) adopts new §217.2, concerning Minimum Standards for Telecommunicators, with changes to the proposed text as published in the September 30, 2011, issue of the *Texas Register* (36 TexReg 6473) and will be republished.

The new rule is necessary to incorporate changes from House Bill 3823 of the 82nd Legislative Session.

No comments were received regarding adoption of this new rule.

The new rule is adopted under Texas Occupations Code, Chapter 1701, §1701.151, General Powers of the Commission; Rulemaking Authority, which authorizes the Commission to promulgate rules for administration of this chapter.

No other code, article, or statute is affected by this adoption.

§217.2. Minimum Standards for Telecommunicators.

(a) The commission shall issue a certificate to a telecommunicator who meets the following standards:

(1) minimum educational requirements:

(A) has passed a general educational development (GED) test indicating high school graduation level; or

(B) holds a high school diploma;

(2) is at least 18 years of age;

(3) is fingerprinted and is subjected to a search of local, state and U.S. national records and fingerprint files to disclose any criminal record;

(4) community supervision history:

(A) has not ever been on court-ordered community supervision or probation for any criminal offense above the grade of Class B misdemeanor or a Class B misdemeanor within the last ten years from the date of the court order; but

(B) the commission may approve the application of a person who received probation or court-ordered community supervision for a Class B misdemeanor at least five (5) years prior to application if an agency administrator sufficiently demonstrates in writing with supporting documentation that mitigating circumstances exist with the case and with the individual applying for certification, and that the public interest would be served by reducing the waiting period;

(5) is not currently charged with any criminal offense for which conviction would be a bar to licensure;

(6) conviction history:

(A) has not ever been convicted of an offense above the grade of a Class B misdemeanor or a Class B misdemeanor within the last ten years; but

(B) the commission may approve the application of a person who was convicted for a Class B misdemeanor at least five (5) years prior to application if an agency administrator sufficiently demonstrates in writing with supporting documentation that mitigating circumstances exist with the case and with the individual applying for certification, and that the public interest would be served by reducing the waiting period;

(7) has never been convicted of any family violence offense;

(8) has been subjected to a background investigation and has been interviewed prior to appointment by representatives of the appointing authority;

(9) has not had a dishonorable or bad conduct discharge;

(10) has not had a commission license denied by final order or revoked;

(11) is not currently on suspension, or does not have a surrender of license currently in effect;

(12) meets the minimum training standards;

(13) has not violated any commission rule or provision of the Texas Occupations Code, Chapter 1701; and

(14) is a U.S. citizen.

(b) For the purposes of this section, the commission will construe any court-ordered community supervision, probation or conviction for a criminal offense to be its closest equivalent under the Texas Penal Code classification of offenses if the offense arose from:

(1) another penal provision of Texas law; or

(2) a penal provision of any other state, federal, military or foreign jurisdiction.

(c) A classification of an offense as a felony at the time of conviction will never be changed because Texas law has changed or because the offense would not be a felony under current Texas laws.

(d) In evaluating whether mitigating circumstances exist, the commission will consider the following factors:

(1) the applicant's history of compliance with the terms of community supervision;

(2) the applicant's continuing rehabilitative efforts not required by the terms of community supervision;

(3) the applicant's employment record;

(4) whether the disposition offense contains an element of actual or threatened bodily injury or coercion against another person under the Texas Penal Code or the law of the jurisdiction where the offense occurred;

(5) the required mental state of the disposition offense;

(6) whether the conduct resulting in the arrest resulted in the loss of or damage to property or bodily injury;

(7) the type and amount of restitution made by the applicant;

(8) the applicant's prior community service;

(9) the applicant's present value to the community;

(10) the applicant's post-arrest accomplishments;

(11) the applicant's age at the time of arrest; and

(12) the applicant's prior military history.

(e) A person must successfully complete the current basic telecommunicator course.

(f) The commission may issue a temporary telecommunicator certificate, consistent with Texas Occupations Code §1701.405. An agency must submit all required applications currently prescribed by the commission and all required fees before the individual is appointed. Upon the approval of the application, the commission will issue a temporary telecommunicator certificate. A temporary telecommunicator certificate expires 12 months from the original appointment date.

(g) A person who fails to comply with the standards set forth in this section shall not accept the issuance of a certificate and shall not accept any appointment. If an application for certification is found to be false or untrue, it is subject to cancellation or recall.

(h) The effective date of this section is January 1, 2012.

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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Kim Vickers
Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
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For further information, please call: (512) 936-7713

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37 TAC §217.3

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) adopts an amendment to §217.3, concerning Application for License and Initial Report of Appointment, with changes to the proposed text as published in the September 30, 2011, issue of the *Texas Register* (36 TexReg 6475) and will be republished.

The amendment adds language to 37 TAC §217.3, Application for License and Initial Report of Appointment.

No comments were received regarding adoption of this amendment.

The amendment is adopted under Texas Occupations Code, Chapter 1701, §1701.151, General Powers of the Commission; Rulemaking Authority, which authorizes the Commission to promulgate rules for administration of this chapter.

The rule amendment as adopted is in compliance with Texas Occupations Code, Chapter 1701, §1701.303, License Application; Duties of Appointing Entity.

No other code, article, or statute is affected by this adoption.

§217.3. Application for License and Initial Report of Appointment.

(a) An agency appointing an individual who does not hold a commission license must file an application for the appropriate license with the commission. The application must be approved with a license issuance date before the individual is appointed or commissioned. The application must be completed, signed, and filed with the commission by the agency's chief administrator or designee.

(b) An application for a license or initial report of appointment must be submitted in an application format currently accepted by the commission.

(c) An agency that files an application for licensing must keep on file and in a format readily accessible to the commission a copy of the documentation necessary to show each licensee appointed by that agency met the minimum standards for licensing, including weapons proficiency for peace officers.

(d) An agency must retain records required under subsection (c) of this section for a minimum of five years after the licensee's termination date with that agency. The records must be maintained in a format readily accessible to the commission.

(e) An agency which submits an application for an individual must report to the commission any failure to appoint that individual in the reported capacity within 30 days of the reported date of appointment. Such report must be made in a currently accepted commission format that reports termination.

(f) The effective date of this section is January 1, 2012.

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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Kim Vickers
Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
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For further information, please call: (512) 936-7713

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37 TAC §217.7

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) adopts an amendment to §217.7, concerning Reporting Appointment and Separation, with changes to the proposed text as published in the September 30, 2011, issue of the *Texas Register* (36 TexReg 6475) and will be republished.

The amendment adds language to 37 TAC §217.7, Reporting Appointment and Separation.

No comments were received regarding adoption of this amendment.

The amendment is adopted under Texas Occupations Code, Chapter 1701, §1701.151, General Powers of the Commission; Rulemaking Authority, which authorizes the Commission to promulgate rules for administration of this chapter.

The rule amendment as adopted is in compliance with Texas Occupations Code, Chapter 1701, §1701.452, Employment Ter-

mination Report, and §1701.4525, Request for Correction of Report; Administrative Penalty; Hearing; Appeal.

No other code, article, or statute is affected by this adoption.

§217.7. Reporting Appointment and Separation.

(a) Before a law enforcement agency may hire a person licensed under Chapter 1701, Texas Occupations Code, the agency head or the agency head's designee must:

(1) make a request to the commission for any employment termination report(s) regarding the person maintained by the commission under this chapter; and

(2) submit to the commission in a manner prescribed by the commission confirmation that the agency:

(A) conducted in the manner prescribed by the commission a criminal background check regarding the person;

(B) obtained the person's written consent on a form prescribed by the commission for the agency to view the person's employment records;

(C) obtained from the commission any service or education records regarding the person maintained by the commission; and

(D) contacted each of the person's previous law enforcement employers.

(b) A request submitted electronically under this section must contain identifying information, acceptable to the commission, for verification.

(c) A law enforcement agency that obtains a consent form described by subsection (a)(2)(B) of this section shall make the person's employment records available to a hiring law enforcement agency on request.

(d) An agency that appoints an individual who already holds a valid, active license appropriate to that position must notify the commission of such appointment not later than 30 days after the date of appointment. The appointing agency must have on file documentation that a peace officer licensee is compliant with weapons qualification according to §217.21 of this chapter within the last 12 months.

(e) If the appointment is made after a 180-day break in service, the agency must have the following on file and readily accessible to the commission:

(1) a new criminal history check by name, sex, race and date of birth from both TCIC and NCIC;

(2) a new declaration of psychological and emotional health;

(3) a new declaration of lack of any drug dependency or illegal drug use;

(4) one completed applicant fingerprint card or, pending receipt of such card, an original sworn, notarized affidavit by the applicant of their complete criminal history; such affidavit to be maintained by the agency while awaiting the return of completed applicant fingerprint card; and

(5) for peace officers, weapons qualification according to §217.21 of this chapter within the last 12 months.

(f) When an individual licensed by the commission separates from appointment with an agency, the agency shall submit a report to the commission and to the licensee in the currently prescribed commission format that reports the separation. The report shall be submitted no later than the seventh business day after the licensee resigns, retires, is terminated, or separates from the agency and if applicable, exhausts all administrative appeals available to the licensee.

(g) Agencies must report the employment and separation of telecommunicators on a form prescribed by the commission. The reports must be submitted under the following guidelines:

(1) within 30 days of employment; or

(2) no later than the seventh business day after separation and if applicable, after all administrative appeals are exhausted.

(h) An agency must retain records kept under this section for a minimum of five years after the licensee's termination date with that agency. The records must be maintained in a format readily accessible to the commission.

(i) All information submitted under subsection (f) of this section is exempt from disclosure under the Public Information Act, Chapter 552, Texas Government Code, unless the individual resigned or was terminated due to substantiated incidents of excessive force or violations of the law other than traffic offenses, and is subject to subpoena only in a judicial proceeding.

(j) The effective date of this section is January 1, 2012.

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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Kim Vickers
Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
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For further information, please call: (512) 936-7713

37 TAC §217.8

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) adopts an amendment to §217.8, concerning Contesting an Employment Termination Report, with changes to the proposed text as published in the September 30, 2011, issue of the *Texas Register* (36 TexReg 6477) and will be republished.

The amendment adds language to 37 TAC §217.8, Contesting an Employment Termination Report.

No comments were received regarding adoption of this amendment.

The amendment is adopted under Texas Occupations Code, Chapter 1701, §1701.151, General Powers of the Commission; Rulemaking Authority, which authorizes the Commission to promulgate rules for administration of this chapter.

The rule amendment as adopted is in compliance with Texas Occupations Code, Chapter 1701, §1701.4525, Request for Correction of Report; Administrative Penalty; Hearing; Appeal.

No other code, article, or statute is affected by this adoption.

§217.8. Contesting an Employment Termination Report.

(a) A person who is the subject of an employment termination report described in §217.7 of this chapter is entitled to file a petition contesting information included in the employment termination report. The written petition for correction of the report must be filed with the executive director on a form currently prescribed by the commission and a copy must be served on the law enforcement agency.

(b) A petition described in subsection (a) of this section must be received by the executive director not later than the 30th day after the person receives a copy of the report of separation.

(c) Upon receipt of the petition the executive director will refer the dispute to SOAH.

(d) A proceeding conducted pursuant to subsection (c) of this section is a contested case under Chapter 2001, Texas Government Code. The parties to the proceeding shall be the person contesting the employment termination and the chief administrative officer of the law enforcement agency. The Commission is not considered a party in a proceeding conducted by SOAH. The chief administrative officer of the law enforcement agency shall have the burden of proof by a preponderance of the evidence. Following the contested case hearing, the administrative law judge shall issue a final order on the petition.

(e) Any party to a proceeding described in subsection (d) of this section may file exceptions to the administrative law judge's final order in accordance with SOAH rules and procedures.

(f) The results of a hearing described in subsection (d) of this section are enforceable by the commission pursuant to Chapter 1701, Texas Occupations Code and Chapter 2001, Texas Government Code.

(g) The results of a hearing described in subsection (d) of this section are appealable in accordance with Chapter 2001, Texas Government Code.

(h) A chief administrative officer of a law enforcement agency who fails to comply with the results of a hearing after all appeals available to the agency have been exhausted is subject to disciplinary action pursuant to Chapter 1701, Texas Occupations Code, and Chapter 223 of this title.

(i) All information submitted under subsection (d) of this section is exempt from disclosure under the Public Information Act, Chapter 552, Texas Government Code, unless the individual resigned or was terminated due to substantiated incidents of excessive force or violations of law other than traffic offenses, and is subject to subpoena only in a judicial proceeding.

(j) The effective date of this section is January 1, 2012.

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 December 6, 2011.

TRD-201105360
Kim Vickers
Executive Director
Texas Commission on Law Enforcement Officers Standards and Education
Effective date: January 1, 2012
Proposal publication date: September 30, 2011
For further information, please call: (512) 936-7713

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37 TAC §217.9

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) adopts an amendment to §217.9, concerning Continuing Education Credit for Licensees, with changes to the proposed text as published in the September 30, 2011, issue of the *Texas Register* (36 TexReg 6477) and will be republished.

The amendment adds language to 37 TAC §217.9, Continuing Education Credit for Licensees.

No comments were received regarding adoption of this amendment.

The amendment is adopted under Texas Occupations Code, Chapter 1701, §1701.151, General Powers of the Commission; Rulemaking Authority, which authorizes the Commission to promulgate rules for administration of this chapter.

The rule amendment as adopted is in compliance with Texas Occupations Code, Chapter 1701, §1701.353, Continuing Education Procedures.

No other code, article, or statute is affected by this adoption.

§217.9. Continuing Education Credit for Licensees.

(a) A continuing education course is any training course that is recognized by the commission, specifically:

(1) legislatively required continuing education curricula and learning objectives developed by the commission;

(2) training in excess of basic licensing course requirements;

(3) training courses consistent with assigned duties; or

(4) training not included in a basic licensing course.

(b) A law enforcement agency submitting continuing education courses under the chief administrator's approval through a departmental report of training, must have the following on file and readily accessible to the commission:

(1) lesson plans; or

(2) certificate of completion with hours indicated on the certificate;

(3) attendees' critique of the course that includes:

(A) written evaluation of the instructor; and

(B) an assessment of how this training was applicable to their assigned duties;

(4) number of students attending from the agency;

(5) copy of course outline (if available); and

(6) copy of available handouts.

(c) The commission may refuse credit for:

(1) a course that does not contain a final examination or other skills test, if appropriate, as determined by the training provider;

(2) annual firearms proficiency;

(3) an out-of-state course not approved by that state's POST;

(4) training that fails to meet any commission established length and published learning objectives;

(5) an instructor claiming credit for a basic licensing course or more than one presentation of a non-licensing course by an instructor, per 24 month unit of a training cycle;

(6) course(s) claimed by deceitful means;

(7) courses provided by the same training provider and taken more than two times within one training unit; or

(8) legislatively mandated or certification courses reported by unlicensed or non-contractual training providers.

(d) The training provider or agency must report to the commission and keep on file in a format readily accessible to the commission, a copy of all continuing education course training reports.

(e) The effective date of this section is January 1, 2012.

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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Kim Vickers
Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
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For further information, please call: (512) 936-7713

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37 TAC §217.11

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) adopts an amendment to §217.11, concerning Legislatively Required Continuing Education for Licensees, with changes to the proposed text as published in the September 30, 2011, issue of the *Texas Register* (36 TexReg 6478) and will be republished.

The amendment adds language to 37 TAC §217.11, Legislatively Required Continuing Education for Licensees.

No comments were received regarding adoption of this amendment.

The amendment is adopted under Texas Occupations Code, Chapter 1701, §1701.151, General Powers of the Commission; Rulemaking Authority, which authorizes the Commission to promulgate rules for administration of this chapter.

The rule amendment as adopted is in compliance with Texas Occupations Code, Chapter 1701, §1701.353, Continuing Education Procedures.

No other code, article, or statute is affected by this adoption.

§217.11. Legislatively Required Continuing Education for Licensees.

(a) Individuals appointed as peace officers shall complete at least 40 hours of continuing education training and must complete a training and education program that covers recent changes to the laws of this state and of the United States pertaining to peace officers every 24-month unit of a training cycle.

(b) Each agency that appoints or employs peace officers, reserve law enforcement officers, jailers, or public security officers shall provide each peace officer, reserve law enforcement officer, jailer, or public security officer whom it appoints or employs with a continuing education program at least once every 48-month training cycle. Part of this training program consists of topics selected by the agency. This rule does not limit the number of hours of continuing education an agency may provide.

(c) Part of the legislatively required peace officer training in every 48-month training cycle must include the curricula and learning objectives developed by the commission, to include:

(1) for an officer holding a basic proficiency certificate or less, not more than 20 hours of education and training that contain curricula incorporating the learning objectives developed by the commission regarding:

(A) civil rights, racial sensitivity, and cultural diversity;

(B) de-escalation and crisis intervention techniques to facilitate interaction with persons with mental impairments; and

(C) unless determined by the agency head to be inconsistent with the officer's assigned duties:

(i) the recognition and documentation of cases that involve child abuse or neglect, family violence, and sexual assault; and

(ii) issues concerning sex offender characteristics; and

(2) supervision issues for each peace officer appointed to their first supervisory position, this training must be completed within 24 months following the date of appointment as a supervisor.

(d) Individuals licensed as reserve law enforcement officers, jailers, or public security officers shall meet the training requirements for civil rights, racial sensitivity, and cultural diversity in every 48-month training cycle.

(e) Telecommunicators receiving certificates after December 1, 2011, shall be required to complete 24 hours of crisis communications instruction approved by the commission. The initial instruction must be provided on or before the first anniversary of the telecommunicator's first day of employment.

(f) A peace officer first licensed on or after January 1, 2011, must complete a basic training program on the trafficking of persons within one year of licensure.

(g) For appointed or elected constables:

(1) An individual appointed or elected to that individual's first position as constable must complete at least 40 hours of initial training for new constables in accordance with §1701.3545(c), Texas Occupations Code.

(2) Each constable must complete at least 40 hours of continuing education in accordance with §1701.3545(b), Texas Occupations Code, each 48-month cycle.

(h) Each deputy constable shall also complete a 20 hour course of training in civil process during each current training cycle.

(i) In accordance with §1701.358, Texas Occupations Code, individuals appointed as "chief" or "police chief" of a police department:

(1) A newly appointed or elected police chief shall complete the initial training program for new chiefs not later than the second anniversary of that individual's appointment or election as chief.

(2) Each police chief must receive at least 40 hours of continuing education provided by the Bill Blackwood Law Enforcement Management Institute each 24-month unit.

(j) The commission shall provide adequate notice to agencies and licensees of impending non-compliance with the legislatively required continuing education.

(k) The chief administrator of an agency that has licensees who are in non-compliance shall, within 30 days of receipt of notice of non-compliance, submit a report to the commission explaining the reasons for such non-compliance.

(l) The commission may take disciplinary action against a licensee for failure to complete the legislatively required continuing education program at least once every training unit.

(m) The commission may take disciplinary action against a licensee for failure to complete the appropriate training within a training cycle.

(n) Individuals licensed as peace officers shall complete the legislatively required continuing education program required under this section beginning in the first complete 24-month unit immediately following the date of licensing.

(o) Individuals licensed as county jailers shall complete the legislatively required continuing education program required under this section beginning in the first complete 48-month cycle immediately following the date of licensing.

(p) All peace officers must meet all continuing education requirements except where exempt by law.

(q) The effective date of this section is January 1, 2012.

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 December 6, 2011.

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Kim Vickers
Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
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For further information, please call: (512) 936-7713

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37 TAC §217.15

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) adopts an amendment to §217.15, concerning Waiver of Legislatively Required Continuing Education, with changes to the proposed text as published in the September 30, 2011, issue of the *Texas Register* (36 TexReg 6480) and will be republished.

The amendment adds language to 37 TAC §217.15, Waiver of Legislatively Required Continuing Education.

No comments were received regarding adoption of this amendment.

The amendment is adopted under Texas Occupations Code, Chapter 1701, §1701.151, General Powers of the Commission; Rulemaking Authority, which authorizes the Commission to promulgate rules for administration of this chapter.

The rule amendment as adopted is in compliance with Texas Occupations Code, Chapter 1701, §1701.354, Continuing Education for Deputy Constables.

No other code, article, or statute is affected by this adoption.

§217.15. Waiver of Legislatively Required Continuing Education.

(a) The executive director may waive the legislatively required continuing education for a licensee, as required by the Texas Occupations Code, Chapter 1701, if the licensee demonstrates the existence of mitigating circumstances justifying the licensee's failure to obtain the legislatively required continuing education.

(b) Mitigating circumstances are defined as:

(1) catastrophic illness or injury that prevents the licensee from performing active duty for longer than 12 months; or

(2) active duty with the armed forces of the United States, or a reserve component of the armed forces of the United States for a time period in excess of 12 months.

(c) A request for a waiver of the legislatively required continuing education due to mitigating circumstances shall be in writing, accompanied by verifying documentation, and shall be submitted to the executive director with a copy to the chief administrator of the licensee's appointing agency not less than 30 days prior to the end of the training unit.

(d) Absent mitigating circumstances, a request for a waiver under this section shall be submitted to the executive director not less than 90 days prior to the end of the training unit.

(e) The commission may waive the requirement for civil process training if not less than 90 days prior to the end of the training cycle:

(1) the constable requests a waiver for the deputy constable based on a representation that the deputy constable's duty assignment does not involve civil process responsibilities; or

(2) the constable or deputy constable requests a waiver because of hardship and the commission determines that a hardship exists.

(f) Within 20 days of receiving a request for a waiver under this section, the executive director shall notify the licensee and the chief administrator of the licensee's appointing agency, whether the request has been granted or denied.

(g) A licensee, whose request for a waiver under this section is denied, is entitled to a hearing in accordance with Texas Government Code, Chapter 2001. The licensee must request a hearing within 20 days of the waiver being denied. In a hearing pursuant to this subsection, the licensee is the petitioner and the executive director is the respondent. The burden of proof shall be on the licensee to show why he or she is entitled to a waiver of the legislatively required continuing education requirement.

(h) The effective date of this section is January 1, 2012.

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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Kim Vickers
Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
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For further information, please call: (512) 936-7713

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37 TAC §217.19

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) adopts an amendment to §217.19, concerning Reactivation of a License, with changes to the proposed text as published in the September 30, 2011, issue of the *Texas Register* (36 TexReg 6480) and will be republished.

The amendment adds language to 37 TAC §217.19, Reactivation of a License.

No comments were received regarding adoption of this amendment.

The amendment is adopted under Texas Occupations Code, Chapter 1701, §1701.151, General Powers of the Commission; Rulemaking Authority, which authorizes the Commission to promulgate rules for administration of this chapter.

The rule amendment as adopted is in compliance with Texas Occupations Code, Chapter 1701, §1701.316, Reactivation of Peace Officer License.

No other code, article, or statute is affected by this adoption.

§217.19. Reactivation of a License.

(a) The commission will place all licenses in an inactive status when the licensee has not been reported to the commission as appointed for more than two years unless the licensee has met and continues to meet the continuing education required by §217.11 of this chapter.

(b) The holder of an inactive license is unlicensed for purposes of these sections and the Texas Occupations Code, Chapter 1701.

(c) This section includes any permanent peace officer qualification certificate with an effective date before September 1, 1981.

(d) In order to reactivate a license, an individual must:

(1) meet the current licensing standards;

(2) successfully complete the legislatively required continuing education in accordance with §217.11 of this chapter;

(3) make application and submit any required fee(s) in the format currently prescribed by the commission to receive approval for the licensing exam; and

(4) pass the licensing examination for the license to be reactivated. After three failures the individual must re-qualify by repeating the entire training course for the license sought.

(e) The effective date of this section is January 1, 2012.

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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Kim Vickers
Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
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For further information, please call: (512) 936-7713

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CHAPTER 219. PRELICENSING AND REACTIVATION COURSES, TESTS, AND ENDORSEMENTS

37 TAC §219.1

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) adopts the repeal of §219.1, concerning Eligibility to Take State Examinations, without changes to the proposal as published in the September 30, 2011, issue of the *Texas Register* (36 TexReg 6481) and will not be republished.

This section is being replaced by a new one which includes officers with training from other states, federal, and military as well as deleting out-of-date language.

The repeal is necessary to establish consistency for the electronic examination process.

No comments were received regarding adoption of this repeal.

The repeal is adopted under Texas Occupations Code, Chapter 1701, §1701.151, General Powers of the Commission, Rulemaking Authority.

No other code, article, or statute is affected by this adoption.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-201105411
Kim Vickers
Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
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Proposal publication date: September 30, 2011
For further information, please call: (512) 936-7713

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37 TAC §219.1

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) adopts new §219.1, concerning Eligibility to Take State Examinations, with changes to the proposed text as published in the September 30, 2011, issue of the *Texas Register* (36 TexReg 6482) and will be republished.

The new rule is necessary to establish consistency for the electronic examination process.

No comments were received regarding adoption of this new rule.

The new rule is adopted under Texas Occupations Code, Chapter 1701, §1701.151, General Powers of the Commission; Rulemaking Authority, which authorizes the Commission to promulgate rules for administration of this chapter.

The new rule as adopted is in compliance with Texas Occupations Code, Chapter 1701, §1701.304, Examination.

No other code, article, or statute is affected by this adoption.

§219.1. Eligibility to Take State Examinations.

(a) An examination may not be taken by an individual who already holds an active license.

(b) Eligibility to take a state licensing exam is based on:

(1) a previously completed commission-approved basic licensing course or academic alternative program;

(2) an examination result over two years when the individual has not been appointed;

(3) qualification to reactivate a Texas license identified by §217.19 of this title;

(4) out of state or federal training, licensing, or certification accepted by the commission; or

(5) county corrections training identified by Texas Occupations Code, Chapter 1701, §1701.310.

(c) To maintain eligibility to attempt a licensing exam the applicant must meet the basic licensing enrollment standards identified by §215.15 of this title; or if previously licensed, meet the minimum initial licensing standards identified by §217.1 of this title.

(d) An eligible examinee will be allowed three opportunities to pass the examination. If an individual is dismissed from an exam for cheating, any remaining attempts are invalidated and the basic licensing course must be repeated.

(e) After three failures, the examinee must repeat the basic licensing course for the license sought. The academic alternative program may not be repeated.

(f) If an attempt is invalidated for any reason, except for a commission error, that attempt will count as one of the three opportunities.

(g) The effective date of this section is January 1, 2012.

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 December 6, 2011.

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Kim Vickers
Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
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For further information, please call: (512) 936-7713

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37 TAC §219.2

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) adopts an amendment to §219.2, concerning Reciprocity for Out-of-State Peace Officers, Federal Criminal Investigators, and Military Police, with changes to the proposed text as published in the September 30, 2011, issue of the *Texas Register* (36 TexReg 6482) and will be republished.

The amendment adds language to 37 TAC §219.2, Reciprocity for Out-of-State Peace Officers, Federal Criminal Investigators, and Military Police.

One comment was received regarding adoption of the proposal. The comment related to National Guard training and duty assignments. Staff has reviewed the issues presented and disagrees with the comments due to the inclusion of academic achievement to military experience and will move forward with the rule as published.

The amendment is adopted under Texas Occupations Code, Chapter 1701, §1701.151, General Powers of the Commission; Rulemaking Authority, which authorizes the Commission to promulgate rules for administration of this chapter.

The rule amendment as adopted is in compliance with Texas Occupations Code, Chapter 1701, §1701.305, Examination Results, and §1701.316, Reactivation of Peace Officer License.

No other code, article, or statute is affected by this adoption.

§219.2. Reciprocity for Out-of-State Peace Officers, Federal Criminal Investigators, and Military Police.

(a) To be eligible to take a state licensing examination, an out of state, federal criminal investigator, or military police must comply with all provisions of §219.1 of this title and this section.

(b) Prospective out-of-state peace officer, federal criminal investigator, and military police applicants for peace officer licensing in Texas must:

(1) meet all statutory licensing requirements of the state of Texas and the rules of the Commission;

(2) successfully complete a supplementary peace officer training course, the curriculum of which is developed by the Commission; and

(3) successfully pass the Texas Peace Officer Licensing Examination.

(c) Requirements (Peace Officers): applicants who are peace officers from other U.S. states must meet the following requirements:

(1) provide proof of successful completion of a state POST-approved (or state licensing authority) basic police officer training academy;

(2) have honorably served (employed, benefits eligible) as a sworn peace officer for twelve consecutive months, following initial basic training;

(3) be subject to continued employment or eligible for rehire (excluding retirement); and

(4) the applicant's license or certificate must never have been, nor currently be in the process of being, surrendered, suspended, or revoked.

(d) Requirements (Federal): The Texas Code of Criminal Procedures Section 2.122 recognizes certain named criminal investigators of the United States as having the authority to enforce selected state laws by virtue of their authority. These individuals are deemed to have the equivalent training for licensure consideration.

(e) Qualifying Federal Officers must:

(1) have successfully completed an approved federal agency law enforcement training course (equivalent course topics and hours) at the time of initial certification or appointment;

(2) have honorably served (employed, benefits eligible) in one of the aforementioned federal capacities for twelve consecutive months, following initial basic training; and

(3) be subject to continued employment or eligible for rehire (excluding retirement).

(f) Requirements (Military): must have a military police military occupation specialty (MOS) or air force specialty code (AFSC) classification in one of the following:

(1) United States Army 95B or 31B;

(2) United States Marine Corps 5811;

(3) United States Air Force 3PO51, 3PO71, or 3PO91; or

(4) United States Navy Master at Arms or NEC 9545 and successfully completed NAVEDTRA 14137.

(g) Qualifying military personnel must provide proof of:

(1) successfully completed basic military police course for branch of military served; and

(2) served at least 24 months active duty in the designated career field.

(h) Procedures for receiving approval to take the state licensing examination:

(1) complete the Commission application and have it notarized;

(2) attach a certified check or money order for any required fee; and

(3) submit the application and fee with all required documents to the Commission.

(i) Required documents must accompany the application:

(1) a certified or notarized copy of the basic training certificate for a peace officer, a certified or notarized copy of a federal agent's license or credentials, or a certified or notarized copy of the peace officer license or certificate issued by the state POST or proof of military training;

(2) a notarized statement from the state POST, current employing agency or federal employing agency revealing any disciplinary action(s) that may have been taken against any license or certificate issued by that agency or any pending action;

(3) a notarized statement from each applicant's employing agency confirming time in service as a peace officer or federal office or agent;

(4) a certified or notarized copy of the applicant's valid state-issued driver's license;

(5) a certified copy of the applicant's military discharge (DD-214), if applicable; and

(6) for applicants without a valid Texas drivers license, a passport-sized color photograph (frontal, shoulders and face), signed with the applicant's full signature on the back of the photograph.

(j) The Commission may request that applicants submit a copy of the basic and advanced training curricula for equivalency evaluation and final approval.

(k) All out-of-state, federal, and military applicants will be subject to a search of the National Decertification Database (NDD), NCIC/TCIC, and National Criminal History Databases to establish eligibility.

(l) All documents must bear original certification seals or stamps.

(m) The effective date of this section is January 1, 2012.

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 December 6, 2011.

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Kim Vickers
Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
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For further information, please call: (512) 936-7713

37 TAC §219.3

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) adopts an amendment to §219.3, concerning Examination Administration, with changes to the proposed text as published in the September 30, 2011, issue of the *Texas Register* (36 TexReg 6484) and will be republished.

The amendment adds language to 37 TAC §219.3, Examination Administration.

No comments were received regarding adoption of this amendment.

The amendment is adopted under Texas Occupations Code, Chapter 1701, §1701.151, General Powers of the Commission; Rulemaking Authority, which authorizes the Commission to promulgate rules for administration of this chapter.

The rule amendment as adopted is in compliance with Texas Occupations Code, Chapter 1701, §1701.304, Examination.

No other code, article, or statute is affected by this adoption.

§219.3. Examination Administration.

(a) Each examination may be given by a test administrator or by one or more proctors under the direction of the test administrator. Each administrator or proctor shall be either:

(1) a member of the commission staff; or

(2) another person designated by the executive director.

(b) A member of the commission staff, a test administrator, or a proctor shall:

(1) comply with testing agreements;

(2) set the date, time, and location of the examination;

(3) control entrance to and exit from the examination site;

(4) verify photo identification;

(5) bar admission to or dismiss any examinee who is not eligible to sit for the examination;

(6) prohibit written material or electronic devices into the examination room

(7) ensure that the examination remains secure and is conducted under conditions warranting honest results;

(8) not communicate any of the content of an examination to another at any time;

(9) not copy, or in any way reproduce any part of the examination;

(10) not assist examinees with the exam;

(11) monitor the examination while in progress; and

(12) dismiss any examinee suspected of cheating and immediately report the dismissal for cheating to the commission.

(c) The effective date of this section is January 1, 2012.

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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Kim Vickers
Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
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Proposal publication date: September 30, 2011
For further information, please call: (512) 936-7713

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37 TAC §219.5

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) adopts the repeal of §219.5, concerning Examinee Requirements, without changes to the proposal as published in the September 30, 2011, issue of the *Texas Register* (36 TexReg 6485) and will not be republished.

This section is being replaced by a new one which establishes a consistent methodology for attempting the licensing examination, including changes from Senate Bill 867 of the 82nd Legislative Session, and reflecting the electronic examination process.

The repeal is necessary to establish a consistent methodology for attempting the licensing examination and requirements from Senate Bill 867 of the 82nd Legislative Session.

No comments were received regarding adoption of this repeal.

The repeal is adopted under Texas Occupations Code, Chapter 1701, §1701.151, General Powers of Commission; Rulemaking Authority.

No other code, article, or statute is affected by this adoption.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Kim Vickers
Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
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For further information, please call: (512) 936-7713

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37 TAC §219.5

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) adopts new §219.5, concerning Examinee Requirements, with changes to the proposed text as published in the September 30, 2011, issue of the *Texas Register* (36 TexReg 6485) and will be republished.

The new rule is necessary to establish a consistent methodology for attempting the licensing examination and requirements from Senate Bill 867 of the 82nd Legislative Session.

No comments were received regarding adoption of this new rule.

The new rule is adopted under Texas Occupations Code, Chapter 1701, §1701.151, General Powers of the Commission; Rulemaking Authority, which authorizes the Commission to promulgate rules for administration of this chapter.

The new rule as adopted is in compliance with Texas Occupations Code, Chapter 1701, §1701.305, Examination Results.

No other code, article, or statute is affected by this adoption.

§219.5. Examinee Requirements.

(a) In order to attempt an examination, an examinee must:

(1) present PID;

(2) present a valid photo ID;

(3) report on time;

(4) not disrupt the examination;

(5) comply with all the written and verbal instructions of the proctor; and

(6) shall not:

(A) bring any written material into the examination room;

(B) bring any electronic devices into the examination room;

(C) share, copy, or in any way reproduce any part of the examination;

(D) engage in any deceptive or fraudulent act to gain admission; or

(E) solicit, encourage, direct, assist or aid another person to violate any provision of this section or to compromise the integrity of the examination.

(b) Requests for accommodation shall be made in a written, notarized format, 90 days prior to the scheduling a licensing examination.

(c) The commission may deny or revoke any license or certificate held by a person who violates any of the provisions of this section. The commission may file a criminal complaint against any individual

who steals or attempts to steal any portion of the examination, reproduces without permission any part of the examination, or who engages in any fraudulent act relating to the examination process.

(d) The effective date of this section is January 1, 2012.

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 December 6, 2011.

TRD-201105371
Kim Vickers
Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
Effective date: January 1, 2012
Proposal publication date: September 30, 2011
For further information, please call: (512) 936-7713

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CHAPTER 221. PROFICIENCY CERTIFICATES

37 TAC §221.13

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) adopts an amendment to §221.13, concerning Emergency Telecommunications Proficiency, with changes to the proposed text as published in the September 30, 2011, issue of the *Texas Register* (36 TexReg 6486) and will be republished.

The amendment adds language to 37 TAC §221.13, Emergency Telecommunications Proficiency.

No comments were received regarding adoption of this amendment.

The amendment is adopted under Texas Occupations Code, Chapter 1701, §1701.151, General Powers of the Commission; Rulemaking Authority, which authorizes the Commission to promulgate rules for administration of this chapter.

The rule amendment as adopted is in compliance with Texas Occupations Code, Chapter 1701, §1701.402, Proficiency Certificates.

No other code, article, or statute is affected by this adoption.

§221.13. Emergency Telecommunications Proficiency.

(a) To qualify for a basic telecommunications proficiency certificate, an applicant must meet all proficiency requirements including:

(1) one year of experience in public safety telecommunications; and

(2) successful completion of courses currently required by Texas Occupations Code §1701.402 and the commission.

(b) To qualify for an intermediate telecommunications proficiency certificate, an applicant must meet all proficiency requirements including:

(1) basic telecommunications certification;

(2) at least two years experience in public safety telecommunications;

(3) 120 hours of training; and

(4) successful completion of courses currently required by Texas Occupations Code §1701.402 and the commission.

(c) To qualify for an advanced telecommunications proficiency certificate, an applicant must meet all proficiency requirements including:

(1) intermediate telecommunications certificate;

(2) at least four years experience in public safety telecommunications; and

(3) successful completion of courses currently required by Texas Occupations Code §1701.402 and the commission.

(d) The effective date of this section is January 1, 2012.

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 December 6, 2011.

TRD-201105372
Kim Vickers
Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
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Proposal publication date: September 30, 2011
For further information, please call: (512) 936-7713

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CHAPTER 223. ENFORCEMENT

37 TAC §223.2

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) adopts the repeal of §223.2, concerning Administrative Penalties, without changes to the proposal as published in the September 30, 2011, issue of the *Texas Register* (36 TexReg 6487) and will not be republished.

This section is being replaced by a new one which clarifies the types of violations and corresponding penalties imposed on law enforcement agencies and governmental entities.

This repeal is necessary to establish consistency and adequate remedial sanctions ordered by the Commission.

No comments were received regarding adoption of this repeal.

The repeal is adopted under Texas Occupations Code, Chapter 1701, §1701.151, General Powers of Commission; Rulemaking Authority.

No other code, article, or statute is affected by this adoption.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 8, 2011.

TRD-201105413

Kim Vickers

Executive Director

Texas Commission on Law Enforcement Officer Standards and Education

Effective date: January 1, 2012

Proposal publication date: September 30, 2011

For further information, please call: (512) 936-7713

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37 TAC §223.2

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) adopts new §223.2, concerning Administrative Penalties, with changes to the proposed text as published in the September 30, 2011, issue of the *Texas Register* (36 TexReg 6487) and will be republished.

The new rule is adopted to establish consistency and adequate remedial sanctions ordered by the Commission.

No comments were received regarding adoption of this new rule.

The new rule is adopted under Texas Occupations Code, Chapter 1701, §1701.151, General Powers of the Commission; Rulemaking Authority, which authorizes the Commission to promulgate rules for administration of this chapter.

The new rule as adopted is in compliance with Texas Occupations Code, Chapter 1701, §1701.507, Administrative Penalties.

No other code, article, or statute is affected by this adoption.

§223.2. Administrative Penalties.

(a) In addition to other penalties imposed by law, a law enforcement agency or governmental entity that violates this chapter or a rule adopted under this chapter is subject to an administrative penalty in an amount set by the commission not to exceed $1,000 per day per violation. The administrative penalty shall be assessed in a proceeding conducted in accordance with Chapter 2001, Texas Government Code.

(b) The commission shall publish an Administrative Penalty Schedule identifying the types of violations subject to administrative penalties and the corresponding penalty range.

(c) The amount of the penalty shall be based on:

(1) the seriousness of the violation;

(2) the respondent's history of violations;

(3) the amount necessary to deter future violations;

(4) efforts made by the respondent to correct the violation; and

(5) any other matter that justice may require.

(d) The commission will provide written notice to a law enforcement agency or governmental entity of a pending violation. The law enforcement agency or governmental entity must report to the commission in writing within 30 days the steps being taken to correct the violation and on what date the violation will be corrected.

(e) Failure to respond to the written notice or to correct violations identified in subsection (d) of this section may result in the imposition of administrative penalties identified in subsection (b) of this section.

(f) The effective date of this section is January 1, 2012.

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 December 6, 2011.

TRD-201105373

Kim Vickers

Executive Director

Texas Commission on Law Enforcement Officer Standards and Education

Effective date: January 1, 2012

Proposal publication date: September 30, 2011

For further information, please call: (512) 936-7713

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37 TAC §223.15

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) adopts the repeal of §223.15, concerning Suspension of License, without changes to the proposal as published in the September 30, 2011, issue of the *Texas Register* (36 TexReg 6488) and will not be republished.

This section is being replaced by a new one which clarifies categories of offenses and administrative violations that lead to license suspension, institutes mandatory minimum terms of suspension, and deletes out-of-date language.

The repeal is necessary to establish consistency and adequate remedial sanctions ordered by the Commission.

No comments were received regarding adoption of this repeal.

The repeal is adopted under Texas Occupations Code, Chapter 1701, §1701.151, General Powers of Commission; Rulemaking Authority.

No other code, article, or statute is affected by this adoption.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 8, 2011.

TRD-201105414

Kim Vickers

Executive Director

Texas Commission on Law Enforcement Officer Standards and Education

Effective date: January 1, 2012

Proposal publication date: September 30, 2011

For further information, please call: (512) 936-7713

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37 TAC §223.15

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) adopts new §223.15, concerning Suspension of License, with changes to the proposed text as published in the September 30, 2011, issue of the *Texas Register* (36 TexReg 6488) and will be republished.

The new rule is adopted to establish consistency and adequate remedial sanctions ordered by the Commission.

No comments were received regarding adoption of this new rule.

The new rule is adopted under Texas Occupations Code, Chapter 1701, §1701.151, General Powers of the Commission; Rulemaking Authority, which authorizes the Commission to promulgate rules for administration of this chapter.

The new rule as adopted is in compliance with Texas Occupations Code, Chapter 1701, §1701.501, Disciplinary Action.

No other code, article, or statute is affected by this adoption.

§223.15. Suspension of License.

(a) Unless revocation is explicitly authorized by law, the commission may suspend any license issued by the commission if the licensee:

(1) violates any provision of these sections;

(2) violates any provision of the Texas Occupations Code, Chapter 1701;

(3) is convicted of or placed on court ordered community supervision resulting from deferred adjudication for any offense above the grade of Class C misdemeanor;

(4) is placed on deferred adjudication for an offense involving family violence; or

(5) has previously received two written reprimands from the commission.

(b) If a licensee is charged with the commission of a felony, adjudication is deferred, and the licensee is placed on community supervision, the commission shall immediately suspend any license held for a period of 30 years. The suspension of any license under this subsection is effective immediately when the commission receives a certified copy of a court's judgment and issues notice to the licensee via certified mail that any license held is suspended.

(c) If convicted or if adjudication is deferred and the licensee is placed on court ordered community supervision for any misdemeanor offense above the grade of Class C misdemeanor, the term of suspension may be for a period not to exceed 10 years.

(d) If a licensee is charged with the commission of a misdemeanor offense involving family violence and an adjudication of guilt is deferred, the term of suspension may be for a period not to exceed 10 years.

(e) If a license can be suspended under subsection (c) or (d) of this section for a Class A misdemeanor, the minimum term of suspension shall be 120 days. If a license can be suspended under subsection (c) or (d) of this section for a Class B or C misdemeanor, the minimum term of suspension shall be 30 days.

(f) If a license can be suspended for a misdemeanor conviction or deferred adjudication, the commissioners may, in their discretion and upon proof of mitigating factors as defined in subsection (i) of this section, probate all or part of a suspension term after the mandatory minimum suspension.

(g) If a license can be suspended for violation of legislatively required continuing education for licensees as defined in §217.11 of this title and if mitigating circumstances as defined in §217.15 of this title do not apply, the commission may:

(1) for first time offenders suspend a license(s) for up to 90 days;

(2) for second time offenders suspend a license(s) for up to 180 days; and

(3) for third time offenders suspend a license(s) for up to one (1) year.

(h) If a license can be suspended for any other reason, the commission, through its executive director may, in its discretion and upon proof of the mitigating factors as defined in subsection (i) of this section, either:

(1) probate all or part of the suspension term; or

(2) issue a written reprimand in lieu of suspension.

(i) In evaluating whether mitigating circumstances exist, the commission will consider the following factors:

(1) the licensee's history of compliance with the terms of court-ordered community supervision;

(2) the licensee's post-arrest continuing rehabilitative efforts not required by the terms of community supervision;

(3) the licensee's post-arrest employment record;

(4) whether the disposition offense contains an element of actual or threatened bodily injury or coercion against another person under the Texas Penal Code or the law of the jurisdiction where the offense occurred;

(5) the type and amount of any post-arrest, non-court ordered restitution made by the licensee; and

(6) any non-contested disciplinary action, either completed or ongoing, imposed by the appointing agency.

(j) A suspension or probation may be ordered to run concurrently or consecutively with any other suspension or probation. The beginning date of a probated suspension shall be:

(1) any date agreed to by both parties, which is no earlier than the date of the rule violation;

(2) the date the licensee notifies the commission in writing of the rule violation if the commission later receives a signed waiver of suspension from the licensee that was postmarked within 30 days of its receipt; or

(3) the date the commission final order is entered in a contested case or the date it becomes effective, if that order is appealed.

(k) The executive director shall inform the commissioners of any reprimand no later than at their next regular meeting.

(l) The commission may impose reasonable terms of probation, such as:

(1) continued employment requirements;

(2) special reporting conditions;

(3) special document submission conditions;

(4) voluntary duty requirements;

(5) no further rule or law violations; or

(6) any other reasonable term of probation.

(m) A probated license remains probated until:

(1) the term of suspension has expired;

(2) all other terms of probation have been fulfilled; and

(3) a written request for reinstatement has been received and accepted by the commission from the licensee unless the probation has been revoked by the commission for violation of probation; or

(4) revoked.

(n) Twelve months may be added to the term of a new suspension for each separate previous violation that has resulted in either a

license suspension, a probated suspension, or a written reprimand before the beginning date of the new suspension.

(o) Before reinstatement, the probation of a suspended license may be revoked before the expiration date of the probation upon violation of the terms of probation. Upon revocation, the full term of suspension shall be imposed with credit for any time already served on that suspension.

(p) Once a license has been suspended, the suspension probated, the probation revoked, or the licensee reprimanded, the commission shall send, by regular mail, notice of the action to the chief administrator of any agency shown to have the licensee under either current or latest appointment.

(q) A suspended license remains suspended until:

(1) the term of suspension has expired and the term of court-ordered community supervision has been completed; and

(2) a written request for reinstatement has been received from the licensee and accepted by the commission; or

(3) the remainder of the suspension is probated and the license is reinstated.

(r) The effective date of this section is January 1, 2012.

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 December 6, 2011.

TRD-201105375
Kim Vickers
Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
Effective date: January 1, 2012
Proposal publication date: September 30, 2011
For further information, please call: (512) 936-7713

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37 TAC §223.16

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) adopts the repeal of §223.16, concerning Suspension of License for Constitutionally Elected Officials, without changes to the proposal as published in the September 30, 2011, issue of the *Texas Register* (36 TexReg 6490) and will not be republished.

This section is being replaced by a new one which clarifies categories of offenses and administrative violations that lead to license suspension, institutes mandatory minimum terms of suspension, and deletes out-of-date language.

The repeal is necessary to establish consistency and adequate remedial sanctions ordered by the Commission.

No comments were received regarding adoption of this repeal.

The repeal is adopted under Texas Occupations Code, Chapter 1701, §1701.151, General Powers of Commission; Rulemaking Authority.

No other code, article, or statute is affected by this adoption.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 8, 2011.

TRD-201105415
Kim Vickers
Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
Effective date: January 1, 2012
Proposal publication date: September 30, 2011
For further information, please call: (512) 936-7713

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37 TAC §223.16

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) adopts new §223.16, concerning Suspension of License for Constitutionally Elected Officials, with changes to the proposed text as published in the September 30, 2011, issue of the *Texas Register* (36 TexReg 6490) and will be republished.

The new rule is adopted to establish consistency and adequate remedial sanctions ordered by the Commission.

No comments were received regarding adoption of this new rule.

The new rule is adopted under Texas Occupations Code, Chapter 1701, §1701.151, General Powers of the Commission; Rulemaking Authority, which authorizes the Commission to promulgate rules for administration of this chapter.

The new rule as adopted is in compliance with Texas Occupations Code, Chapter 1701, §1701.501, Disciplinary Action.

No other code, article, or statute is affected by this adoption.

§223.16. Suspension of License for Constitutionally Elected Officials.

(a) Unless revocation is explicitly authorized by law, the commission may suspend any license issued by the commission if the licensee:

(1) violates any provision of these sections;

(2) violates any provision of the Texas Occupations Code, Chapter 1701;

(3) is convicted of or placed on court ordered community supervision resulting from deferred adjudication for any offense above the grade of Class C misdemeanor;

(4) is placed on deferred adjudication for an offense involving family violence; or

(5) has previously received two written reprimands from the commission.

(b) If a licensee is charged with the commission of a felony, adjudication is deferred, and the licensee is placed on community supervision, the commission shall immediately suspend any license held for a period of 20 years. The suspension of any license under this subsection is effective immediately when the commission receives a certified copy of a court's judgment and issues notice to the licensee via certified mail that any license held is suspended.

(c) If convicted or if adjudication is deferred and the licensee is placed on court ordered community supervision for any misdemeanor offense above the grade of Class C misdemeanor, the term of suspension may be for a period not to exceed 10 years.

(d) If a licensee is charged with the commission of a misdemeanor offense involving family violence and an adjudication of guilt is deferred, the term of suspension may be for a period not to exceed 10 years.

(e) If a license can be suspended under subsection (c) or (d) of this section for a Class A misdemeanor, the minimum term of suspension shall be 120 days. If a license can be suspended under subsection (c) or (d) of this section for a Class B or C misdemeanor, the minimum term of suspension shall be 30 days.

(f) If a license can be suspended for a misdemeanor conviction or deferred adjudication, the commissioners may, in their discretion and upon proof of mitigating factors as defined in subsection (i) of this section, probate all or part of a suspension term after the mandatory minimum suspension.

(g) If a license can be suspended for violation of legislatively required continuing education for licensees as defined in §217.11 of this title and if mitigating circumstances as defined in §217.15 of this title do not apply, the commission may:

(1) for first time offenders suspend a license(s) for up to 90 days;

(2) for second time offenders suspend a license(s) for up to 180 days; and

(3) for third time offenders suspend a license(s) for up to one (1) year.

(h) If a license can be suspended for any other reason, the commission, through its executive director may, in its discretion and upon proof of the same mitigating factors, either:

(1) probate all or part of the suspension term during a probation term of up to twice the maximum suspension term; or

(2) issue a written reprimand in lieu of suspension.

(i) In evaluating whether mitigating circumstances exist, the commission will consider the following factors:

(1) the licensee's history of compliance with the terms of court-ordered community supervision;

(2) the licensee's post-arrest continuing rehabilitative efforts not required by the terms of community supervision;

(3) the licensee's post-arrest employment record;

(4) whether the disposition offense contains an element of actual or threatened bodily injury or coercion against another person under the Texas Penal Code or the law of the jurisdiction where the offense occurred;

(5) the type and amount of any post-arrest, non-court ordered restitution made by the licensee; and

(6) any non-contested disciplinary action, either completed or ongoing, imposed by the appointing agency.

(j) A suspension or probation may be ordered to run concurrently or consecutively with any other suspension or probation. The beginning date of a probated suspension shall be:

(1) any date agreed to by both parties, which is no earlier than the date of the rule violation;

(2) the date the licensee notifies the commission in writing of the rule violation if the commission later receives a signed waiver of suspension from the licensee that was postmarked within 30 days of its receipt; or

(3) the date the commission final order is entered in a contested case or the date it becomes effective, if that order is appealed.

(k) The executive director shall inform the commissioners of any reprimand no later than at their next regular meeting.

(l) The commission may impose reasonable terms of probation, such as:

(1) continued employment requirements;

(2) special reporting conditions;

(3) special document submission conditions;

(4) voluntary duty requirements;

(5) no further rule or law violations; or

(6) any other reasonable term of probation.

(m) A probated license remains probated until:

(1) the term of suspension has expired;

(2) all other terms of probation have been fulfilled; and

(3) a written request for reinstatement has been received and accepted by the commission from the licensee unless the probation has been revoked by the commission for violation of probation; or

(4) until revoked.

(n) Twelve months may be added to the term of a new suspension for each separate previous violation that has resulted in either a license suspension, a probated suspension, or a written reprimand before the beginning date of the new suspension.

(o) Before reinstatement, the probation of a suspended license may be revoked upon a showing that any of its terms have been violated before the expiration date of the probation regardless of when the petition is filed. Upon revocation, the full term of suspension shall be imposed with credit for any time already served on that suspension.

(p) Once a license has been suspended, the suspension probated, the probation revoked, or the licensee reprimanded, the commission shall send, by regular mail, notice of the action to the chief administrator of any agency shown to have the licensee under either current or latest appointment.

(q) A suspended license remains suspended until:

(1) the term of suspension has expired and the term of court-ordered community supervision has been completed; and

(2) a written request for reinstatement has been received from the licensee and accepted by the commission; or

(3) the remainder of the suspension is probated and the license is reinstated.

(r) The effective date of this section is January 1, 2012.

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 December 7, 2011.

TRD-201105377

Kim Vickers
Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
Effective date: January 1, 2012
Proposal publication date: September 30, 2011
For further information, please call: (512) 936-7713

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37 TAC §223.17

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) adopts an amendment to §223.17, concerning Reinstatement of a License, with changes to the proposed text as published in the September 30, 2011, issue of the *Texas Register* (36 TexReg 6492) and will be republished.

The amendment adds language to 37 TAC §223.17, Reinstatement of a License.

No comments were received regarding adoption of this amendment.

The amendment is adopted under Texas Occupations Code, Chapter 1701, §1701.151, General Powers of the Commission; Rulemaking Authority, which authorizes the Commission to promulgate rules for administration of this chapter.

The rule amendment as adopted is in compliance with Texas Occupations Code, Chapter 1701, §1701.304, Examination, and §1701.316, Reactivation of Peace Officer License.

No other code, article, or statute is affected by this adoption.

§223.17. Reinstatement of a License.

(a) In order to reinstate a suspended or probated license, a licensee must complete the following requirements:

(1) make application, in the format currently prescribed by the commission;

(2) submit the reinstatement fee; and

(3) meet the current continuing education requirements.

(b) If a licensee fails to meet the legislative required continuing education, a licensee must meet the requirements of subsection (a) of this section in order to reinstate.

(c) If the suspension results in a break in service of over two years, then the reinstatement procedure also includes the following requirements for attempting the licensing exam:

(1) make application, in the format currently prescribed by the commission;

(2) submit any required fee(s); and

(3) upon approval of the application, the commission grants the holder of a suspended license approval to take the required licensing examination. If failed three times individuals will be required to complete the basic licensing course for the license sought.

(d) The effective date of this section is January 1, 2012.

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 December 6, 2011.

TRD-201105374
Kim Vickers
Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
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Proposal publication date: September 30, 2011
For further information, please call: (512) 936-7713

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37 TAC §223.19

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) adopts an amendment to §223.19, concerning Revocation of License, with changes to the proposed text as published in the September 30, 2011, issue of the *Texas Register* (36 TexReg 6492) and will be republished.

The amendment adds language to 37 TAC §223.19, Revocation of License.

No comments were received regarding adoption of this amendment.

The amendment is adopted under Texas Occupations Code, Chapter 1701, §1701.151, General Powers of the Commission; Rulemaking Authority, which authorizes the Commission to promulgate rules for administration of this chapter.

The rule amendment as adopted is in compliance with Texas Occupations Code, Chapter 1701, §1701.501, Disciplinary Action.

No other code, article, or statute is affected by this adoption.

§223.19. Revocation of License.

(a) The commission shall immediately revoke any license issued by the commission if the licensee is or has been convicted of a felony offense as provided in subsections (b), (c) and (d) of this section. The revocation of any license held is effective immediately when the commission receives a certified copy of a court's judgment and issues notice to the licensee that any license held is revoked. Notice of revocation shall be sent via certified U.S. Mail to the address shown on the Texas driver's license record of the licensee and to the address of the agency showing the licensee under current or last appointment.

(b) A person is convicted of a felony when an adjudication of guilt on a felony offense is entered against that person by a court of competent jurisdiction whether or not:

(1) the sentence is subsequently probated and the person is discharged from community supervision;

(2) the accusation, complaint, information, or indictment against the person is dismissed and the person is released from all penalties and disabilities resulting from the offense; or

(3) the person is pardoned for the offense, unless the pardon is expressly granted for subsequent proof of innocence.

(c) The commission will construe any disposition for a criminal offense to be its closest equivalent under the Texas Penal Code classification of offenses if the offense arose from:

(1) another provision of the Texas law; or

(2) a provision of any other state, federal, military, tribal, or foreign jurisdiction.

(d) The commission may revoke the license of a person who is either convicted of a misdemeanor offense or placed on deferred adjudication community supervision for a misdemeanor or felony offense,

if the offense directly relates to the duties and responsibilities of any related office held by that person. In determining whether a criminal offense directly relates to such office, the commission shall, under this subsection, consider:

(1) the nature and seriousness of the crime;

(2) the relationship of the crime to the purpose for requiring a license for such office;

(3) the extent to which a license might offer an opportunity to engage in further criminal activity of the same type as that in which the person previously had been involved; and

(4) the relationship of the crime to the ability, capacity, or fitness required to perform the duties and discharge the responsibilities of such office.

(e) The commission shall revoke any license issued by the commission if the licensee:

(1) has a dishonorable or bad conduct discharge;

(2) has made, submitted, caused to be submitted, or filed a false or untruthful report to the commission;

(3) has been found to be in unauthorized possession of any commission licensing examination or portion of a commission licensing examination, or a reasonable facsimile thereof;

(4) is convicted in any court of an offense that has, as an element of the offense, family violence, as defined under Chapter 71, Texas Family Code;

(5) is a fourth time offender in failing to obtain legislatively required continuing education as described in §217.11 of this title; or

(6) violates any section where revocation is the penalty noted.

(f) Revocation of a license shall permanently disqualify a person from licensing and a license may not be reinstated except when the licensee proves the facts supporting the revocation have been negated, such as:

(1) the felony conviction has been reversed or set aside on direct or collateral appeal, or a pardon based on subsequent proof of innocence has been issued;

(2) the dishonorable or bad conduct discharge has been upgraded to above dishonorable or bad conduct conditions;

(3) the report alleged to be false or untruthful was found to be truthful; or

(4) the section was not violated.

(g) During the direct appeal of any appropriate conviction, a license may be revoked pending resolution of the mandatory direct appeal. The license will remain revoked unless and until the holder proves that the conviction has been set aside on appeal.

(h) The holder of any revoked license may informally petition the executive director for reinstatement of that license based upon proof by the licensee that the facts supporting the revocation have been negated.

(i) If granted, the executive director shall inform the commissioners of such action no later than at their next regular meeting.

(j) If denied, the holder of a revoked license may petition the commission for a hearing to determine reinstatement based upon the same proof.

(k) Once a license has been revoked, the commission shall search its files and send, by regular mail, notice of the action to the chief administrator of any agency shown to have the licensee under either current or latest appointment.

(l) The date of revocation will be the earliest date that:

(1) a waiver was signed by the holder; or

(2) a final order of revocation was signed by the commissioners.

(m) The effective date of this section is January 1, 2012.

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 December 8, 2011.

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Kim Vickers
Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
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Proposal publication date: September 30, 2011
For further information, please call: (512) 936-7713

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 1. DEPARTMENT OF AGING AND DISABILITY SERVICES

CHAPTER 95. MEDICATION AIDES--PROGRAM REQUIREMENTS

40 TAC §§95.101, 95.103, 95.105, 95.107, 95.109, 95.113, 95.115, 95.117, 95.119, 95.123, 95.125, 95.127

The Texas Health and Human Services Commission (HHSC), on behalf of the Department of Aging and Disability Services (DADS), adopts amendments to §95.101, concerning introduction; §95.103, concerning requirements for administering medications; §95.105, concerning allowable and prohibited practices of a permit holder; §95.107, concerning training requirements, nursing graduates, reciprocity; §95.109, concerning application procedures; §95.113, concerning determination of eligibility; §95.115, concerning permit renewal; §95.117, concerning changes; §95.119, concerning training program requirements; §95.123, concerning violations, complaints, and disciplinary actions; §95.125, concerning requirements for corrections medication aides; and §95.127, concerning application processing, in Chapter 95, Medication Aides--Program Requirements. The amendments to §95.101 and §95.125 are adopted with changes to the proposed text as published in the October 28, 2011, issue of the *Texas Register* (36 TexReg 7289). The amendments to §§95.103, 95.105, 95.107, 95.109, 95.113, 95.115, 95.117, 95.119, 95.123, and 95.127 are adopted without changes to the proposed text.

The purpose of the adoption is to implement portions of Senate Bill (SB) 1, 82nd Legislature, First Called Session, 2011.

SB 1 added Texas Human Resources Code §161.083 to require the executive commissioner of the Health and Human Services Commission to establish: 1) minimum requirements for the issuance, denial, renewal, suspension, and revocation of a permit for a corrections medication aide; 2) the acts and practices that are within the scope of a corrections medication aide permit; and 3) minimum standards and procedures for the approval of corrections medication aide training programs developed under Texas Government Code, §501.1485, Corrections Medication Aides, which was also added by SB 1.

Texas Government Code §501.1485 requires the Texas Department of Criminal Justice (TDCJ), in cooperation with the University of Texas Medical Branch at Galveston and the Texas Tech University Health Sciences Center, to develop and implement a training program for corrections medication aides that uses a curriculum specific to administering medication in a correctional setting and to submit to DADS an application for approval of the training program. Within 90 days after DADS receives the application, DADS must approve the training program or notify TDCJ of how the training program may be modified for approval.

DADS received no comments regarding adoption of the amendments.

The agency revised §95.101(c)(6) to remove the words "mental retardation". The agency also revised §95.125(g) to ensure that corrections medication aides have a similar opportunity as medication aides currently holding a permit under the Texas Health and Safety Code, Chapter 242, Subchapter N, to re-take an examination after failing the initial examination.

The amendments are adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; Texas Health and Safety Code, Chapter 242, Subchapter N, consisting of §§242.601 to 242.614, which authorizes DADS to regulate the administration of medication in nursing facilities, including the regulation of medication aides in nursing facilities; and Texas Human Resources Code, §161.083, which authorizes the establishment of standards for corrections medication aide training programs, requirements for corrections medication aide permits, and the acts and practices within the scope of a corrections medication aide permit.

§95.101. Introduction.

(a) Purpose. The purpose of this chapter is to implement the provisions of the:

(1) Health and Safety Code, Chapter 242, Subchapter N, concerning the administration of medications to facility residents;

(2) Health and Safety Code, Chapter 142, Subchapter B, concerning the administration of medication by a home and community support services agency; and

(3) Human Resource Code, §161.083, concerning the administration of medication to an inmate in a correctional facility.

(b) Corrections medication aide permit requirements. Section 95.125 of this chapter (relating to Requirements for Corrections Medication Aides) applies to a corrections medication aide or an applicant for a corrections medication aide permit.

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

(1) Abuse--The willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain, or mental anguish.

(2) BON--Texas Board of Nursing.

(3) Correctional facility--a facility operated by or under contract with the Texas Department of Criminal Justice.

(4) DADS--Department of Aging and Disability Services.

(5) Examination--A written competency evaluation for medication aides administered by DADS.

(6) Facility--An institution licensed under the Health and Safety Code, Chapter 242; a state supported living center as defined in the Health and Safety Code, §531.002(17); an intermediate care facility for persons with an intellectual disability operated by a community center established under Health and Safety Code, Chapter 534; or an assisted living facility licensed under the Health and Safety Code, Chapter 247.

(7) Licensed nurse--A licensed vocational nurse or a licensed registered nurse.

(8) Licensed vocational nurse--A person licensed by the BON, or who holds a license from another state recognized by the BON, to practice vocational nursing in Texas.

(9) Medication aide--A person permitted by DADS to administer medications to facility residents, correctional facility inmates, or to persons served by home and community support services agencies.

(10) Misappropriation of resident property--The deliberate misplacement, exploitation, or wrongful temporary or permanent use of a resident's belongings or money without the resident's consent.

(11) Neglect--The failure to provide goods and services necessary to avoid physical harm, mental anguish, or mental illness.

(12) Non-licensed direct care staff--Employees of facilities other than Medicare-skilled nursing facilities or Medicaid nursing facilities who are primarily involved in the delivery of services to assist with residents' activities of daily living or active treatment programs.

(13) Nurse aide--An individual who has completed a nurse aide training and competency evaluation program (NATCEP) approved by the state as meeting the requirements of 42 Code of Federal Regulations (CFR), §§483.151-483.154, or has been determined competent as provided in 42 CFR, §483.150(a) and (b), and is listed as certified on DADS nurse aide registry.

(14) Registered nurse (RN)--A person licensed by the BON, or who holds a license from another state recognized by the BON, to practice professional nursing in Texas.

(15) Registered pharmacist--An individual currently licensed by the Texas Board of Pharmacy to practice pharmacy.

(16) TDCJ--Texas Department of Criminal Justice.

(17) Training program--A program approved by DADS to instruct individuals to act as medication aides.

§95.125. Requirements for Corrections Medication Aides.

(a) Purpose. The purpose of this section is to provide the qualifications, conduct, and practice activities of a medication aide em-

ployed in a correctional facility or employed by a medical services contractor for a correctional facility.

(b) Supervision and applicable law and rules. A permit holder must function under the direct supervision of a licensed nurse on duty or on call by the correctional facility using the permit holder. A permit holder must:

(1) function in accordance with applicable law and rules relating to administration of medication and operation of a correctional facility; and

(2) comply with TDCJ rules applicable to personnel used in a correctional institution.

(c) Allowable and prohibited practices of a permit holder.

(1) A permit holder may:

(A) observe and report to the correctional facility's charge nurse reactions and side effects to medication shown by an inmate;

(B) take and record vital signs prior to the administration of medication which could affect or change the vital signs;

(C) administer regularly prescribed medication which the permit holder has been trained to administer only after personally preparing (setting up) the medication to be administered. The medication aide must document the administered medication in the inmate's clinical record;

(D) administer oxygen per nasal canula or a non-sealing face mask only in an emergency. Immediately after the emergency, the permit holder must verbally notify the licensed nurse on duty or on call and appropriately document the action and notifications;

(E) apply specifically ordered ophthalmic, otic, nasal, vaginal, and rectal medication;

(F) administer previously ordered pro re nata (PRN) medication. A permit holder must document in the inmate's records, symptoms indicating the need for the medication, and the time the symptoms occurred;

(G) administer the initial dose of a medication; and

(H) order an inmate's medications from the correctional institution's pharmacy.

(2) A permit holder may not:

(A) administer medication by the injection route including:

(i) intramuscular;

(ii) intravenous;

(iii) subcutaneous;

(iv) intradermal; and

(v) hypodermoclysis;

(B) administer medication used for intermittent positive pressure breathing (IPPB) treatments or any form of medication inhalation treatments;

(C) calculate an inmate's medication dose for administration except that the permit holder may:

(i) measure a prescribed amount of a liquid medication to be administered; and

(ii) break a tablet for administration to an inmate provided the licensed nurse on duty or on call has calculated the dosage. The inmate's medication card or its equivalent must accurately document how the tablet must be altered prior to administration;

(D) crush medication unless authorization is obtained from the licensed nurse on duty or on call. The authorization to crush the specific medication must be documented on the inmate's medication card or its equivalent;

(E) administer medications or feedings by way of a tube inserted in a cavity of the body;

(F) receive or assume responsibility for reducing to writing a verbal or telephone order from a physician, dentist, or podiatrist;

(G) apply topical medications that involve the treatment of skin that is broken or blistered or when a specified aseptic technique is ordered by the attending licensed practitioner;

(H) steal, divert, or otherwise misuse medications;

(I) violate any provision of Human Resources Code, §161.083, or this chapter;

(J) fraudulently procure or attempt to procure a permit;

(K) neglect to administer appropriate medications, as prescribed, in a responsible manner; or

(L) administer medications if the person is unable to do so with reasonable skill and safety to residents by reason of drunkenness and/or excessive use of drugs, narcotics, chemicals, or any other type of material.

(d) Background and education requirements. Prior to applying for a corrections medication aide permit under Human Resources Code, §161.083, an applicant must be:

(1) able to read, write, speak, and understand English;

(2) at least 18 years of age;

(3) free of communicable diseases and in suitable physical and emotional health to safely administer medications;

(4) a graduate of a high school or have a general equivalency diploma; and

(5) employed in a correctional facility or by a medical service contractor for a correctional facility on the first day of an applicant's medication aide training program.

(e) Application. An applicant for a corrections medication aide permit under Human Resources Code, §161.083 must submit an official Corrections Medication Aide application form to DADS.

(1) An applicant must submit the general statement enrollment form that contains:

(A) specific information regarding personal data, certain misdemeanor and felony convictions, work experience, education, and training;

(B) a statement that all the requirements in subsection (d) of this section were met prior to the start of the program;

(C) a statement that the applicant understands that application fees submitted in the permit process are nonrefundable;

(D) a statement that the applicant understands material submitted in the application process are nonreturnable;

(E) a statement that the applicant understands that it is a misdemeanor to falsify any information submitted to DADS; and

(F) the applicant's dated and notarized signature.

(2) An applicant must submit a certified copy or a photocopy that has been notarized as a true and exact copy of an unaltered original of the applicant's high school graduation diploma or transcript.

(3) DADS considers a corrections medication aide permit application as officially submitted when DADS receives the permit application.

(4) DADS sends a notice listing the additional materials required to an applicant who does not complete the application. An application not completed by the day of the medication aide final exam is void.

(5) DADS sends notice of application acceptance or ineligibility, disapproval, or deficiency in accordance with §95.127 of this chapter (relating to Application Processing).

(f) Fees. The permit application and permit renewal fees for a corrections medication aide permit must be submitted by cashier's check or money order made payable to the Department of Aging and Disability Services. All fees are nonrefundable, except as provided by Government Code, Chapter 2005. The fee schedule is as follows:

(1) permit application fee--$15;

(2) renewal fee--$15;

(3) late renewal fees for permit renewals made after the permit expires:

(A) $22.50 for an expired permit renewed from one to 90 days after expiration;

(B) $30 for an expired permit renewed from 91 days to one year after expiration; and

(4) permit replacement fee--$5.

(g) Examination procedures. TDCJ gives a written examination to each applicant at a site determined by TDCJ. An applicant with a disability, including an applicant with dyslexia as defined in Texas Education Code, §51.970 (relating to Instructional Material for Blind and Visually Impaired Students and Students with Dyslexia), may request a reasonable accommodation for the examination under the Americans with Disabilities Act.

(1) The applicant must meet the requirements of the TDCJ training program described in §95.119 of this chapter (relating to Training Program Requirements) before taking the written examination.

(2) The applicant must be tested on the subjects taught in the TDCJ training program curriculum and correctional facility clinical experience. The examination must test an applicant's knowledge of accurate and safe drug therapy administered to a correctional facility inmate.

(3) The examination must be taken after the applicant has successfully completed the TDCJ training program.

(4) TDCJ administers the examination and determines the passing grade.

(5) TDCJ must inform DADS, on the DADS class roster form, of the final exam results for each applicant within 15 days after completion of the exam.

(6) An applicant who is unable to attend the applicant's scheduled examination due to unforeseen circumstances must contact TDCJ to reschedule.

(7) If an applicant fails the examination, TDCJ notifies DADS and the applicant in writing of the failure to pass the examination. The applicant may take one subsequent examination without having to re-enroll in the training program described in §95.119 of this chapter.

(8) An applicant whose application for a permit is denied under §95.113 of this chapter (relating to Determination of Eligibility) is ineligible to take the examination.

(h) Determination of eligibility. DADS determines eligibility for a corrections medication aide permit applicant according to §95.113 of this chapter and subsections (d), (e), (f), and (g) of this section.

(i) Renewal. A permit must be renewed in accordance with §95.115 of this chapter (relating to Permit Renewal).

(j) Changes. Permit holders must report changes in accordance with §95.117 of this chapter (relating to Changes).

(k) Violations, complaints, and disciplinary actions.

(1) Complaints. Any person may complain to DADS alleging that a person or program has violated Human Resources Code, §161.083, or this chapter. DADS handles complaints in the manner set forth in §95.123 of this chapter (relating to Violations, Complaints, and Disciplinary Actions).

(2) Investigations of abuse and neglect complaints. Allegations of abuse and neglect of inmates by corrections medication aides are investigated by the TDCJ Office of Inspector General. After an investigation, the TDCJ Office of Inspector General issues a report to DADS with findings of abuse or neglect against the corrections medication aide. After reviewing the report and findings, DADS determines whether to initiate a formal proceeding to revoke, suspend, or refuse to renew a corrections medication aide permit. If DADS determines a formal proceeding to revoke, suspend, or refuse to renew a corrections medication aide permit should be initiated, §95.123(c) and (d) of this chapter apply. If DADS determines that no formal proceeding to revoke, suspend, or refuse to renew a corrections medication aide permit should be initiated, DADS dismisses the complaint against the corrections medication aide and gives written notice of the dismissal to the corrections medication aide.

(l) Section 95.121 of this chapter (relating to Permitting of Persons with Criminal Backgrounds) applies to corrections medication aide permit holders under this chapter.

(m) Verification of corrections medication aide training.

(1) A person employed as a medication aide in a correctional facility under a permit issued by DADS under Health and Safety Code, Chapter 242, Subchapter N, must submit to DADS a verification document issued by TDCJ. The verification document must certify that the person is employed as a medication aide in a correctional facility in good standing and received training equivalent to the TDCJ training described in §95.119 of this chapter. If the person fails to submit the verification by the person's first permit renewal date after January 1, 2012, the person must:

(A) comply with subsections (e), (f), and (g) of this section to obtain a corrections medication aide permit; or

(B) comply with this chapter to obtain a nursing facility permit under Health and Safety Code, Chapter 242, Subchapter N.

(2) A medication aide who submits the verification described in paragraph (l) of this subsection must comply with the permit renewal procedures of §95.115 of this chapter and report any changes to his name and address as required by §95.117 of this chapter.

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 December 7, 2011.

TRD-201105399
Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Effective date: January 1, 2012
Proposal publication date: October 28, 2011
For further information, please call: (512) 438-3734

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TITLE 43. TRANSPORTATION

PART 10. TEXAS DEPARTMENT OF MOTOR VEHICLES

CHAPTER 208. EMPLOYMENT PRACTICES
SUBCHAPTER C. EMPLOYEE TRAINING AND EDUCATION

The Texas Department of Motor Vehicles (department) adopts the repeal of §208.42 and §208.44, concerning Definitions and Particular Programs, respectively, and amendments to §208.43, concerning General Standards. All sections concern Subchapter C, Employee Training and Education. The amendments and repeals are adopted without changes to the proposed text as published in the September 23, 2011, issue of the *Texas Register* (36 TexReg 6249) and will not be republished.

EXPLANATION OF ADOPTED REPEALS AND AMENDMENTS

The repeals and amendments are necessary to simplify the department's training and education program. House Bill 3097, 81st Legislature, Regular Session, 2009, created the Texas Department of Motor Vehicles (department) from the motor carrier, motor vehicle, vehicle titles and registration, and automobile burglary and theft prevention authority divisions of the Texas Department of Transportation (TxDOT). The current rules were adapted from the TxDOT program. The department employs approximately 600 employees, compared to TxDOT's approximately 12,000 employees, and has fewer types of classifications. The repeals and amendments streamline the employee education program.

The repeal of §208.42 removes the definitions. The defined terms are no longer used in amended §208.43.

Section 208.44 provided for a job-related degree program and a non-job-related degree program. The repeal of §208.44 removes particular programs. The department will not limit the types of courses that can be taken as long as the courses fit within the statutory authority of Government Code, Chapter 656.

Amendments to §208.43 add that the employee must be employed for one year at the time of application. The current verbiage states that an employee must be in good standing. This wording is replaced with the clarification that the employee must not have any disciplinary actions during the six months prior to application or during the program. The amendments also add a requirement that the employee sign a commitment to employment for six months, to begin the month following reimbursement.

Requirements regarding the type of educational institution attended are removed. However, the department may limit reimbursement to mandatory fees and tuition in an amount equal to the latest average semester hour cost for Texas public colleges and universities, as reported by the Texas Higher Education Coordinating Board in order to allow the department to create and maintain a sustainable program within its budget.

Conditions of reimbursement include the program participants must provide the department with grade reports or a transcript, and an itemized statement of tuition and fees in order to be reimbursed. If the employee does not complete the employment commitment, the department may require the employee to reimburse the department for tuition. The Executive Director is required to adopt policies related to education and training for employees.

The requirements regarding repayment are deleted because the program has been changed to a reimbursement program. Since the program participant will not receive reimbursement until after the course has been passed, there is no need for repayment.

COMMENTS

No comments on the proposed repeals and amendments were received.

43 TAC §208.42, §208.44

STATUTORY AUTHORITY

The repeals are adopted under Transportation Code, §1002.001, which provides the board of the Texas Department of Motor Vehicles with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE

Transportation Code, §1002.001, and Government Code, Chapter 656, Subchapter C.

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 December 12, 2011.

TRD-201105485
Brett Bray
General Counsel
Texas Department of Motor Vehicles
Effective date: January 1, 2012
Proposal publication date: September 23, 2011
For further information, please call: (512) 467-3853

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43 TAC §208.43

STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §1002.001, which provides the board of the Texas Department of Motor Vehicles with the authority to establish rules for the conduct of the work of the department.

CROSS REFERENCE TO STATUTE

Transportation Code, §1002.001, and Government Code, Chapter 656, Subchapter C.

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 December 12, 2011.

TRD-201105484

Brett Bray
General Counsel
Texas Department of Motor Vehicles
Effective date: January 1, 2012
Proposal publication date: September 23, 2011
For further information, please call: (512) 467-3853

TRANSFERRED RULES

The Government Code, §2002.058, authorizes the Secretary of State to remove or transfer rules within the Texas Administrative Code when the agency that promulgated the rules is abolished. The Secretary of State will publish notice of rule transfer or removal in this section of the *Texas Register*. The effective date of a rule transfer is the date set by the legislature, not the date of publication of notice. Proposed or emergency rules are not subject to administrative transfer.

Texas Department of Rural Affairs

Rule Transfer

Title 10, Part 6

Senate Bill 1, 82nd First Called Special Legislative Session, 2011, effective September 1, 2011, abolishes the Texas Department of Rural Affairs (TDRA) and transfers its respective powers, duties, functions, programs and activities to the Texas Department of Agriculture (the Department). Under the bill, rules of the TDRA continue in effect as the rules of the Department until superseded by an act of the Department.

TDRA's rules currently found in *Texas Administrative Code* (TAC), Title 10, Part 6, Chapters 255 and Chapter 257 will be transferred and reorganized under TAC, Title 4, Part 1, Chapter 30. This transfer does not contain any substantive changes, such as program or policy amendments.

10 TAC Chapter 256, concerning Administration, will not be transferred and will be repealed by the Department at a later date.

The transfer took effect on October 1, 2011.

Please refer to Figure: 10 TAC Part 6 to see the complete conversion chart.

[Figure]

TRD-201105521

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Texas Department of Agriculture

Rule Transfer

Title 4, Part 1

Senate Bill 1, 82nd First Called Special Legislative Session, 2011, effective September 1, 2011, abolishes the Texas Department of Rural Affairs (TDRA) and transfers its respective powers, duties, functions, programs and activities to the Texas Department of Agriculture (the Department). Under the bill, rules of the TDRA continue in effect as the rules of the Department until superseded by an act of the Department.

TDRA's rules currently found in *Texas Administrative Code* (TAC), Title 10, Part 6 will be transferred and reorganized under TAC, Title 4, Part 1, Chapter 30. This transfer does not contain any substantive changes, such as program or policy amendments.

10 TAC Chapter 256, concerning Administration, will not be transferred and will be repealed by the Department at a later date.

The transfer took effect on October 1, 2011.

Please refer to Figure: 10 TAC Part 6 to see the complete conversion chart.

[Figure]

TRD-201105522

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Figure: 10 TAC Part 6

Current Rules from Title 10, Part 6 Texas Department of Rural Affairs				Transferred to Title 4, Part 1 Texas Department of Agriculture Chapter 30, Community Development			
Chapter	**Subchapter**	**Section**	**Heading**	**Subchapter**	**Division**	**Section**	**Heading**
255			**Texas Community Development Program**	**A**			**Texas Community Development Program**
	A		**Allocation of Program Funds**		**1**		**Allocation of Program Funds**
		§255.1	General Provisions			§30.1	General Provisions
		§255.2	Community Development Fund			§30.2	Community Development Fund
		§255.4	Planning/Capacity Building Fund			§30.3	Planning/Capacity Building Fund
		§255.5	Disaster Relief Fund			§30.4	Disaster Relief Fund
		§255.6	Urgent Need Fund			§30.5	Urgent Need Fund
		§255.7	Texas Capital Fund			§30.6	Texas Capital Fund
		§255.8	Regional Review Committees			§30.7	Regional Review Committees
		§255.9	Colonia Fund			§30.8	Colonia Fund
		§255.11	Small Towns Environment Program Fund			§30.9	Small Towns Environment Program Fund
		§255.17	Renewable Energy Demonstration Pilot Program			§30.10	Renewable Energy Demonstration Pilot Program
		§255.18	Community Facilities Fund			§30.11	Community Facilities Fund
	B		**Contract Administration**		**2**		**Contract Administration**
		§255.41	Uniform Administration Requirements			§30.41	Uniform Administration Requirements
257			**State Office of Rural Health**	**B**			**State Office of Rural Health**
	B		**Texas Outstanding Rural Scholar Recognition Program**		**1**		**Texas Outstanding Rural Scholar Recognition Program**
		§257.21	Purpose, Administration and Delegation of Powers and Duties			§30.50	Purpose, Administration and Delegation of Powers and Duties
		§257.22	Definitions			§30.51	Definitions
		§257.23	Selection Committee			§30.52	Selection Committee
		§257.24	Requirements for Recognition			§30.53	Requirements for Recognition
		§257.25	Requirements for Forgiveness Loan			§30.54	Requirements for Forgiveness Loan
		§257.26	Breach of Contract			§30.55	Breach of Contract
		§257.27	Repayment			§30.56	Repayment
		§257.28	Enforcement of Collection			§30.57	Enforcement of Collection
		§257.29	Cancellations and Postponements			§30.58	Cancellations and Postponements

		§257.30	Dissemination of Program Information, Tracking and Reports			§30.59	Dissemination of Program Information, Tracking and Reports
	D		**Texas Rural Physician Assistant Loan Reimbursement Program**		**2**		**Texas Rural Physician Assistant Loan Reimbursement Program**
		§257.101	Purpose, Administration and Delegation of Powers and Duties			§30.70	Purpose, Administration and Delegation of Powers and Duties
		§257.103	Definitions			§30.71	Definitions
		§257.105	Dissemination of Information			§30.72	Dissemination of Information
		§257.107	Requirements for an Eligible Educational Loan, an Eligible Lender or Holder, and an Eligible Physician Assistant			§30.73	Requirements for an Eligible Educational Loan, an Eligible Lender or Holder, and an Eligible Physician Assistant
		§257.109	Application Process, Recipient Selection and Reimbursement of Educational Loans			§30.74	Application Process, Recipient Selection and Reimbursement of Educational Loans
	E		**Texas Health Service Corps Program**		**3**		**Texas Health Service Corps Program**
		§257.201	Purpose, Administration, and Delegation of Powers and Duties			§30.80	Purpose, Administration, and Delegation of Powers and Duties
		§257.203	Definitions			§30.81	Definitions
		§257.205	Dissemination of Information, Research, Data Collection, and Reports			§30.82	Dissemination of Information, Research, Data Collection, and Reports
		§257.207	Requirements for Registering Medically Underserved Communities			§30.83	Requirements for Registering Medically Underserved Communities
		§257.209	Requirements for Registering Eligible Resident Physicians			§30.84	Requirements for Registering Eligible Resident Physicians
		§257.211	Matching Eligible Communities with Eligible Resident Physicians			§30.85	Matching Eligible Communities with Eligible Resident Physicians
		§257.213	Contractual Requirements for Matched Communities and Resident Physicians			§30.86	Contractual Requirements for Matched Communities and Resident Physicians
		§257.215	Awarded Stipends			§30.87	Awarded Stipends

		§257.217	Provision for Effective and Efficient Administration of the Program			§30.88	Provision for Effective and Efficient Administration of the Program
	F		**Medically Underserved Community-State Matching Incentive Program**		4		**Medically Underserved Community-State Matching Incentive Program**
		§257.301	Introduction			§30.90	Introduction
		§257.303	Definitions			§30.91	Definitions
		§257.305	Eligibility Criteria for a Contributing Community			§30.92	Eligibility Criteria for a Contributing Community
		§257.307	Physician Eligibility Criteria			§30.93	Physician Eligibility Criteria
		§257.309	Procedures to Apply for Funds			§30.94	Procedures to Apply for Funds
		§257.311	Application Requirements			§30.95	Applications Requirements
		§257.313	Evaluation of Applications			§30.96	Evaluation of Applications
		§257.315	Contract Award			§30.97	Contract Award
		§257.317	Methodology for Prioritizing Neediest Communities			§30.98	Methodology for Prioritizing Neediest Communities
		§257.319	Contribution Procedures			§30.99	Contribution Procedures
		§257.321	Contract			§30.100	Contract
		§257.323	Funding Allocation Procedure			§30.101	Funding Allocation Procedure
		§257.325	Breach of Contract			§30.102	Breach of Contract
		§257.327	Reporting and Monitoring			§30.103	Reporting and Monitoring
	G		**Permanent Fund For Rural Health Facility Capital Improvement**		5		**Permanent Fund For Rural Health Facility Capital Improvement**
		§257.401	Purpose			§30.110	Purpose
		§257.402	Definitions			§30.111	Definitions
		§257.403	Sources and Allocation of Funds			§30.112	Sources and Allocation of Funds
		§257.404	Eligibility for Grants, Loans and Loan Guarantees			§30.113	Eligibility for Grants, Loans and Loan Guarantees
		§257.405	Requirements for Grants, Loans and Loan Guarantees			§30.114	Requirements for Grants, Loans and Loan Guarantees
		§257.406	Procedures for Grant, Loan and Loan Guarantee Announcements			§30.115	Procedures for Grant, Loan and Loan Guarantee Announcements
		§257.407	Procedures for Grant, Loan and Loan Guarantee Applications			§30.116	Procedures for Grant, Loan and Loan Guarantee Applications
		§257.408	Competitive Review Process			§30.117	Competitive Review Process

		§257.409	Selection Criteria			§30.118	Selection Criteria
		§257.410	Project Approval			§30.119	Project Approval
		§257.411	Continuation Funding			§30.120	Continuation Funding
	H		**Rural Technology Center Grant Program**		**6**		**Rural Technology Center Grant Program**
		§257.501	Definitions			§30.130	Definitions
		§257.502	Purpose and Goal			§30.131	Purpose and Goal
		§257.503	Administration of the Program			§30.132	Administration of the Program
		§257.504	Eligibility Criteria for Grant Applicants			§30.133	Eligibility Criteria for Grant Applicants
		§257.505	Grant Application Procedures			§30.134	Grant Application Procedures
		§257.506	Guidelines Relating to Grant Amounts			§30.135	Guidelines Relating to Grant Amounts
		§257.507	Contract			§30.136	Contract
		§257.508	Monitoring, Reporting, and Compliance			§30.137	Monitoring, Reporting, and Compliance
	J		**Designation of a Hospital as a Rural Hospital**		**7**		**Designation of a Hospital as a Rural Hospital**
		§257.701	Purpose			§30.140	Purpose
		§257.703	Definitions			§30.141	Definitions
		§257.705	Designation Criteria			§30.142	Designation Criteria
		§257.707	Procedures for Designation			§30.143	Procedures for Designation
	K		**Rural Communities Health Care Investment Program**		**8**		**Rural Communities Health Care Investment Program**
		§257.801	Definition of Terms			§30.150	Definition of Terms
		§257.803	The Purpose, Administration, and Duties of the Rural Communities Health Care Investment Program			§30.151	The Purpose, Administration, and Duties of the Rural Communities Health Care Investment Program
		§257.805	Administration and Use of Funds			§30.152	Administration and Use of Funds
		§257.807	Contracts			§30.153	Contracts
		§257.809	Advisory Committee			§30.154	Advisory Committee
	L		**Rural Physician Relief Program**		**9**		**Rural Physician Relief Program**
		§257.901	Purpose, Administration and Delegation of Powers and Duties			§30.160	Purpose, Administration and Delegation of Powers and Duties
		§257.902	Definitions			§30.161	Definitions
		§257.903	Administration and Use of Funds			§30.162	Administration and Use of Funds
		§257.904	Prioritizing Assignment of Relief Physicians			§30.163	Prioritizing Assignment of Relief Physicians
		§257.905	Relief Physician Recruitment			§30.164	Relief Physician Recruitment
		§257.906	Advisory Committee			§30.165	Advisory Committee

		§257.907	Requirements for Providers Requesting Relief Services			§30.166	Requirements for Providers Requesting Relief Services
	M		**Critical Access Hospital Board of Trustee Continuing Education Program**		**10**		**Critical Access Hospital Board of Trustee Continuing Education Program**
		§257.951	Purpose, Administration, and Delegation of Powers and Duties			§30.170	Purpose, Administration, and Delegation of Powers and Duties
		§257.952	Definitions			§30.171	Definitions
		§257.953	Recommendations for Critical Access Hospital Board of Trustee Members			§30.172	Recommendations for Critical Access Hospital Board of Trustee Members
	N		**Rural Health Information Technology Program**		**11**		**Rural Health Information Technology Program**
		§257.961	Definitions			§30.180	Definitions
		§257.962	Purpose and Goal			§30.181	Purpose and Goal
		§257.963	Administration of the Program			§30.182	Administration of the Program
		§257.964	Eligibility Criteria for Grant Applicants			§30.183	Eligibility Criteria for Grant Applicants
		§257.965	Application Procedures			§30.184	Application Procedures
		§257.966	Monitoring, Reporting and Compliance			§30.185	Monitoring, Reporting and Compliance

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 Department of Criminal Justice

Title 37, Part 6

The Texas Board of Criminal Justice files this notice of intent to review Chapter 152, Subchapter A, Mission and Admissions in the Correctional Institutions Division of the Texas Department of Criminal Justice (TDCJ). This review is conducted pursuant to Texas Government Code §2001.039, which requires rule review every four years.

Comments should be directed to Melinda Hoyle Bozarth, General Counsel, Texas Department of Criminal Justice, P.O. Box 13084, Austin, Texas 78711, Melinda.Bozarth@tdcj.state.tx.us. Written comments from the general public should be received within 30 days of the publication of this proposed rule review.

TRD-201105487
Melinda Hoyle Bozarth
General Counsel
Texas Department of Criminal Justice
Filed: December 12, 2011

♦ ♦ ♦

The Texas Board of Criminal Justice files this notice of intent to review and proposes amendments to Chapter 152, Subchapter B, Correctional Capacity in the Correctional Institutions Division of the Texas Department of Criminal Justice (TDCJ). This review is conducted pursuant to Texas Government Code §2001.039, which requires rule review every four years.

Comments should be directed to Melinda Hoyle Bozarth, General Counsel, Texas Department of Criminal Justice, P.O. Box 13084, Austin, Texas 78711, Melinda.Bozarth@tdcj.state.tx.us. Written comments from the general public should be received within 30 days of the publication of this proposed rule review.

TRD-201105488
Melinda Hoyle Bozarth
General Counsel
Texas Department of Criminal Justice
Filed: December 12, 2011

♦ ♦ ♦

The Texas Board of Criminal Justice (TBCJ) files this notice of intent to review §159.13, Educational Services to Released Offenders/Memorandum of Understanding. This review is conducted pursuant to Texas Government Code §2001.039, which requires rule review every four years

Comments should be directed to Melinda Hoyle Bozarth, General Counsel, Texas Department of Criminal Justice, P.O. Box 13084, Austin, Texas 78711, Melinda.Bozarth@tdcj.state.tx.us. Written comments from the general public should be received within 30 days of the publication of this proposed rule review.

TRD-201105486
Melinda Hoyle Bozarth
General Counsel
Texas Department of Criminal Justice
Filed: December 12, 2011

♦ ♦ ♦

The Texas Board of Criminal Justice files this notice of intent to review §195.81, Temporary Housing Assistance, for offenders under supervision of the Texas Department of Criminal Justice (TDCJ) Parole Division. This review is conducted pursuant to Texas Government Code §2001.039, which requires rule review every four years.

Comments should be directed to Melinda Hoyle Bozarth, General Counsel, Texas Department of Criminal Justice, P.O. Box 13084, Austin, Texas 78711, Melinda.Bozarth@tdcj.state.tx.us. Written comments from the general public should be received within 30 days of the publication of this proposed rule review.

TRD-201105490
Melinda Hoyle Bozarth
General Counsel
Texas Department of Criminal Justice
Filed: December 12, 2011

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Texas Department of Savings and Mortgage Lending

Title 7, Part 4

The Finance Commission of Texas files this notice of intention to review and consider for re-adoption, revision or repeal Texas Administrative Code, Title 7, Part 4, Chapter 80, relating to Texas Residential Mortgage Loan Originator Regulations, Subchapter B (§§80.8 - 80.11), relating to Professional Conduct; Subchapter C (§§80.12 - 80.14), relating to Administration and Records; Subchapter D (§80.15), relating to Complaints and Investigations; Subchapter E (§80.16), relating to Hearings and Appeals; Subchapter F (§80.17), relating to Interpretations; Subchapter G (§80.18), relating to Enforcement of Liens; Subchapter H (§80.19), relating to Savings Clause; Subchapter I (§80.20 and §80.21), relating to Inspections and Investigations; Subchapter J (§80.22), relating to Forms; Subchapter K (§80.23), relating to Mortgage Call Reports; and Subchapter L (§§80.301 - 80.307), relating to Licensing; Mortgage Banker Registration; and Chapter 81, relating to

Residential Mortgage Loan Officer Licensing, Subchapter A (§§81.1 - 81.6), relating to Licensing; Subchapter B (§§81.7 - 81.9), relating to Professional Conduct; Subchapter C (§81.10), relating to Administration and Records; Subchapter D (§81.11), relating to Complaints and Investigations; Subchapter E (§81.12 and §81.13), relating to Examinations and Investigations; Subchapter F (§81.14), relating to Hearings and Appeals; Subchapter G (§81.15), relating to Mortgage Call Reports; Subchapter H (§81.16), relating to Recovery Fund; Subchapter I (§81.17), relating to Interpretations; Subchapter J (§81.18), relating to Enforcement of Liens; Subchapter K (§81.19), relating to Savings Clause; and Subchapter L (§81.20), relating to Sponsorship and Termination Thereof. The Commission will accept comments for 30 days following publication of this notice in the *Texas Register* as to whether the reasons for adoption of these chapters continue to exist.

The Texas Department of Savings and Mortgage Lending, which administers these chapters, believes that the reasons for adopting the rules contained in these chapters continue to exist. Any questions or written comments pertaining to this notice of intention to review should be directed to Caroline C. Jones, Deputy Commissioner/General Counsel, Texas Department of Savings and Mortgage Lending, 2601 N. Lamar Boulevard, Suite 201, Austin, Texas 78705-4207 or by email to cjones@sml.texas.gov. Any proposed changes to the rules as a result of the review will be published in the Proposed Rules section of the *Texas Register* and will be open for an additional 30-day public comment period prior to final adoption or repeal by the Commission.

TRD-201105439
Caroline C. Jones
General Counsel
Texas Department of Savings and Mortgage Lending
Filed: December 9, 2011

♦ ♦ ♦

Adopted Rule Reviews

Texas Department of Insurance, Division of Workers' Compensation

Title 28, Part 2

The Texas Department of Insurance (Department), Division of Workers' Compensation (Division) has completed its review required by the Texas Government Code §2001.039 of the following chapter of the Texas Administrative Code, Title 28, Part 2: Chapter 132, Benefits--Death and Burial Benefits. The reviewed sections in these chapters are subsequently referred to collectively in this Notice of Adopted Review as "the sections."

The notice of proposed rule review was published in the August 26, 2011, issue of the *Texas Register* (36 TexReg 5416). As provided in this notice, the Division reviewed and considered the sections for readoption, revision, or repeal.

The Division considered whether the reasons for adoption of the sections continue to exist. The Division received no written comments regarding the review of the sections.

The Division has determined that the reasons for adopting the sections continue to exist and the sections are retained in their present form. Any revisions in the future will be accomplished in accordance with the Administrative Procedure Act.

This concludes and completes the Division's review of Chapter 132; the chapter will be reviewed again in the future in accordance with Government Code §2001.039.

TRD-201105462
Dirk Johnson
General Counsel
Texas Department of Insurance, Division of Workers' Compensation
Filed: December 12, 2011

♦ ♦ ♦

The Texas Department of Insurance (Department), Division of Workers' Compensation (Division) has completed its review required by the Texas Government Code §2001.039 of the following chapters of the Texas Administrative Code, Title 28, Part 2: Chapter 140, Dispute Resolution--General Provisions. The reviewed sections in these chapters are subsequently referred to collectively in this Notice of Adopted Review as "the sections."

The notice of proposed rule review was published in the July 29, 2011, issue of the *Texas Register* (36 TexReg 4818). As provided in this notice, the Division reviewed and considered the sections for readoption, revision, or repeal.

The Division considered whether the reasons for adoption of the sections continue to exist. The Division received no written comments regarding the review of the sections.

The Division has determined that the reasons for adopting the sections continue to exist and the sections are retained in their present form. Any revisions in the future will be accomplished in accordance with the Administrative Procedure Act.

This concludes and completes the Division's review of Chapter 140; the chapter will be reviewed again in the future in accordance with Government Code §2001.039.

TRD-201105463
Dirk Johnson
General Counsel
Texas Department of Insurance, Division of Workers' Compensation
Filed: December 12, 2011

♦ ♦ ♦

The Texas Department of Insurance (Department), Division of Workers' Compensation (Division) has completed its review required by the Texas Government Code §2001.039 of the following chapter of the Texas Administrative Code, Title 28, Part 2: Chapter 143, Dispute Resolution Review by the Appeals Panel. The reviewed sections in these chapters are subsequently referred to collectively in this Notice of Adopted Review as "the sections."

The notice of proposed rule review was published in the September 2, 2011, issue of the *Texas Register* (36 TexReg 5702). As provided in this notice, the Division reviewed and considered the sections for readoption, revision, or repeal.

The Division considered whether the reasons for adoption of the sections continue to exist. The Division received no written comments regarding the review of the sections.

After the Notice of the Intent to Review Chapter 143 was published, a formal proposal for amendments to §143.2 was published in the September 2, 2011, issue of the *Texas Register* (36 TexReg 5628). These amendments are necessary to implement changes in House Bill (HB) 2605 (82nd Legislature, Regular Session, 2011), which amended Labor Code §410.204(b) to allow for written appeals panel decisions on some affirmed cases. That rulemaking was a separate and distinct process from the rule review process. Those amendments were adopted on October 31, 2011. The adoption of that amendment was published in the November 18, 2011, issue of the *Texas Register* (36 TexReg 7876).

The Division has determined that the reasons for adopting the sections continue to exist and the sections are retained. Any revisions in the future will be accomplished in accordance with the Administrative Procedure Act.

This concludes and completes the Division's review of Chapter 143; the chapter will be reviewed again in the future in accordance with Government Code §2001.039.

TRD-201105464
Dirk Johnson
General Counsel
Texas Department of Insurance, Division of Workers' Compensation
Filed: December 12, 2011

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Texas Board of Nursing

Title 22, Part 11

The Texas Board of Nursing (Board) filed a notice of intent to review and consider for readoption, revision, or repeal 22 Texas Administrative Code Chapter 220, relating to Nurse Licensure Compact. The Notice of Intent to Review was published in the October 28, 2011, issue of the *Texas Register* (36 TexReg 7369).

The Government Code §2001.039 requires each state agency to review its rules every four years to determine if the reasons for initially adopting the rules continue to exist. The rules in Chapter 220 were scheduled for this four-year review. No comments were received concerning the Board's proposed rule review.

The Board has completed its review of the rules in Chapter 220 and has determined that the reasons for originally adopting these rules continue to exist. The rules were also reviewed to determine whether they were obsolete, whether they reflected current legal and policy considerations and current procedures and practices of the Board, and whether they were in compliance with the Government Code Chapter 2001 (Administrative Procedure Act).

The Board re-adopts the rules in Chapter 220 without changes, pursuant to the Government Code §2001.039 and Occupations Code §301.151, which authorizes the Board to adopt, enforce, and repeal rules consistent with its legislative authority under the Nursing Practice Act. This concludes the rule review of Chapter 220 under the implementation of the Board's rule review plan for 2011-2013 that is published on the Secretary of State's website.

TRD-201105420
Lance Brenton
Assistant General Counsel
Texas Board of Nursing
Filed: December 8, 2011

♦ ♦ ♦

The Texas Board of Nursing (Board) filed a notice of intent to review and consider for readoption, revision, or repeal 22 Texas Administrative Code Chapter 224, relating to Delegation of Nursing Tasks by Registered Professional Nurses to Unlicensed Personnel for Clients with Acute Conditions or in Acute Care Environments. The Notice of Intent to Review was published in the October 28, 2011, issue of the *Texas Register* (36 TexReg 7369).

The Government Code §2001.039 requires each state agency to review its rules every four years to determine if the reasons for initially adopting the rules continue to exist. The rules in Chapter 224 were scheduled for this four-year review. No comments were received concerning the Board's proposed rule review.

The Board has completed its review of the rules in Chapter 224 and has determined that the reasons for originally adopting these rules continue to exist. The rules were also reviewed to determine whether they were obsolete, whether they reflected current legal and policy considerations and current procedures and practices of the Board, and whether they were in compliance with the Government Code Chapter 2001 (Administrative Procedure Act).

The Board re-adopts the rules in Chapter 224 without changes, pursuant to the Government Code §2001.039 and the Occupations Code §301.151, which authorizes the Board to adopt, enforce, and repeal rules consistent with its legislative authority under the Nursing Practice Act. This concludes the rule review of Chapter 224 under the implementation of the Board's rule review plan for 2011-2013 that is published on the Secretary of State's website.

TRD-201105421
Lance Brenton
Assistant General Counsel
Texas Board of Nursing
Filed: December 8, 2011

♦ ♦ ♦

The Texas Board of Nursing (Board) filed a notice of intent to review and consider for readoption, revision, or repeal 22 Texas Administrative Code Chapter 225, relating to RN Delegation to Unlicensed Personnel and Tasks Not Requiring Delegation in Independent Living Environments for Clients with Stable and Predictable Conditions. The Notice of Intent to Review was published in the October 28, 2011, issue of the *Texas Register* (36 TexReg 7369).

The Government Code §2001.039 requires each state agency to review its rules every four years to determine if the reasons for initially adopting the rules continue to exist. The rules in Chapter 225 were scheduled for this four-year review. No comments were received concerning the Board's proposed rule review.

The Board has completed its review of the rules in Chapter 225 and has determined that the reasons for originally adopting these rules continue to exist. The rules were also reviewed to determine whether they were obsolete, whether they reflected current legal and policy considerations and current procedures and practices of the Board, and whether they were in compliance with the Government Code Chapter 2001 (Administrative Procedure Act).

The Board re-adopts the rules in Chapter 225 without changes, pursuant to the Government Code §2001.039 and the Occupations Code §301.151, which authorizes the Board to adopt, enforce, and repeal rules consistent with its legislative authority under the Nursing Practice Act. This concludes the rule review of Chapter 225 under the implementation of the Board's rule review plan for 2011-2013 that is published on the Secretary of State's website.

TRD-201105422
Lance Brenton
Assistant General Counsel
Texas Board of Nursing
Filed: December 8, 2011

♦ ♦ ♦

State Pension Review Board

Title 40, Part 17

The State Pension Review Board (PRB) has completed the review of Chapter 604, §604.1 relating to Historically Underutilized Businesses.

Notice of the review of Chapter 604, §604.1 was published in the October 14, 2011, issue of the *Texas Register* (36 TexReg 6973). No comments were received in response to the notice.

Accordingly, the PRB finds that the reasons for initially adopting the rule continue to exit and readopts Chapter 604 in accordance with Texas Government Code, §2001.039.

This concludes the review of 40 TAC Chapter 604, §604.1 of Texas Administrative Code.

TRD-201105492
Lynda Baker
Staff Services Officer
State Pension Review Board
Filed: December 12, 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: 1 TAC Chapter 353--Preamble

Provider Type	Year 1 Impact	Year 2 Impact
Advanced Practice Nurse	$257,242	$491,739
Ambulance	$5,673,119	$10,844,630
Ambulatory Surgical Center	$3,119,219	$5,962,642
Audiologist / Hearing Aid	$2,858,159	$5,463,606
Case Management	$1,515,841	$2,897,654
Comprehensive Care Program (CCP) - Personal Care Services (PCS)	$1,131,043	$2,162,082
CCP Provider	$3,013,738	$5,761,006
CCP Social Worker	$22,881	$43,740
Certified Registered Nurse Anesthetist	$521,154	$996,228
Chemical Dependency Treatment Facility	$45,531	$87,036
Chiropractor	$33,744	$64,504
Comprehensive Health Center (CHC)	$535	$1,024
County Indigent Health Care Program	$6,393	$12,221
Dentist	$49,222,748	$94,093,310
DME / Medical Supply Company	$18,605,201	$35,565,363
Early Childhood Intervention	$1,309,983	$2,504,140
Family Planning Clinic	$1,334	$2,551
Genetics	$62,862	$120,165
Home Health Agency	$19,227,075	$36,754,127
Hospital	$128,889,547	$246,382,913
Independent Lab/Privately Owned Lab	$3,610,791	$6,902,323
Indian Health Services	$264	$506
Licensed Professional Counselor	$972,749	$1,859,488
Maternity Service Clinic	$6,856	$13,105
MH Rehabilitation	$3,038,962	$5,809,225
Nephrology or Renal Dialysis Facility	$4,025,323	$7,694,735
Nursing Home	$749,758	$1,433,223
Optometrist Optician or Dispensing Optical Company	$1,560,022	$2,982,109
Physical Therapist / Occupational Therapist	$1,079,732	$2,063,997
Physician	$50,913,117	$97,324,588
Podiatrist	$343,153	$655,965
Portable X-Ray Supplier, Radiological Lab, Physiological Lab	$795,069	$1,519,839
Psychologist	$470,798	$899,969
Radiation Treatment Centers	$115,974	$221,693
Registered Nurse/Nurse Midwife	$4,068	$7,776
Rehabilitation Centers	$9,814,292	$18,760,822
Rural Health Clinic	$2,676,143	$5,115,666
SHARS - Individual	$5,096,998	$9,743,329
TB Clinic	$4,962	$9,486
Texas Health Steps - Medical	$5,203,037	$9,946,030

The impact shown is an estimate of the overall impact to the provider type as a whole. The impact to small or micro-businesses alone are not known. Based on data available to HHSC, small or micro-businesses for all provider types cannot be identified.

Figure: 10 TAC §50.3

PROGRAM CALENDAR

2012 Program Year Due Date	2013 Program Year Due Date	Documentation Required
12/19/2011	12/17/2012	Application Acceptance Period Begins (Competitive HTC Only).
12/19/2011	12/17/2012	Pre-application Neighborhood Organization Request Date (Competitive HTC Only).
12/30/2011	12/28/2012	Pre-application Response to Neighborhood Organization Request Date (Competitive HTC Only).
01/10/2012	01/08/2013	Pre-Application Final Delivery Date (Competitive HTC Only).
01/20/2012	01/18/2013	Full Application Neighborhood Organization Request Date (Competitive HTC Only). For Tax-Exempt Bond, Rural Rescue, HOME or HTF Applications the request must be sent no later than fourteen (14) days prior to the submission of the Threshold Documentation.
02/23/2012	02/22/2013	Full Application Response to Neighborhood Organization Request Date (Competitive HTC Only). For Tax-Exempt Bond, HOME or HTF Applications the response should be received no later than seven (7) days prior to the Application submission.
03/01/2012	03/01/2013	Full Application Delivery Date (Competitive HTC Only).
03/01/2012	03/01/2013	Quantifiable Community Participation (QCP) Delivery Date (Competitive HTC Only).
03/01/2012	03/01/2013	Unit of General Local Government Resolutions for Applications applying for TDHCA HOME funds and selecting §50.9(b)(5) points (must be submitted with Application).
03/01/2012	03/01/2013	Third Party Report Delivery Date (Environmental Site Assessment (ESA), Property Condition Assessment (PCA), Appraisal (if applicable). For Tax-Exempt Bond Developments the Third Party Reports must be submitted no later than 60 days prior to the Board meeting at which the tax credits will be considered. The 60 day deadlines are

2012 Program Year Due Date	2013 Program Year Due Date	Documentation Required
		available on the Department's website.
03/02/2012	03/04/2013	Rural Rescue Application Submission Period (Ends 11/13/2012 and 11/12/2013 respectively).
04/02/2012	04/01/2013	Market Analysis Delivery Date (Competitive HTC Only).
04/02/2012	04/01/2013	Resolutions Delivery Date. (For Tax-Exempt Bond Developments all resolutions are due no later than 14 days prior to the Board meeting at which the tax credits will be considered).
05/01/2012	05/01/2013	Final Input from State Representative or State Senator Delivery Date (Competitive HTC Only).
Mid-May	Mid-May	Final Scoring Notices Issued (Competitive HTC Only).
06/13/2012	06/12/2013	Application Challenges Deadline (Competitive HTC Only).
Late June	Late June	Release of Eligible Applications for Consideration for Award in July (Competitive HTC Only).
Late July	Late July	Final Awards (Competitive HTC Only).
Mid-August	Mid-August	Commitments are Issued (Competitive HTC Only).
11/01/2012	11/01/2013	Carryover Documentation Delivery Date (Competitive HTC Only).
07/01/2013	07/01/2014	10% Test Documentation Delivery Date (Competitive HTC Only).
12/31/2014	12/31/2015	Placement in Service Deadline (Competitive HTC Only).
Forty-five (45) calendar days prior to Board meeting	Forty-five (45) calendar days prior to Board meeting	Amendment Requests.
Thirty (30) calendar days prior to the deadline, as applicable	Thirty (30) calendar days prior to the deadline, as applicable	Extension Requests.
Five (5) business days after the Deficiency Notice date (without incurring point loss or penalty fee)	Five (5) business days after the Deficiency Notice date (without incurring point loss or penalty fee)	Administrative Deficiency Deadline.

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	$29,440.00
	(B) Mobile	$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	$3,240.00
	(B) Fixed	$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	$56,060.00
	(B) Other Manufacturing and Commercial Distribution	$9,140.00
	(C) Commercial Distribution Only	$4,230.00
	(D) Limited Manufacturing (Loose Material)	$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: 25 TAC §289.229(e)(14)

$$C = \frac{s}{\overline{X}} = \frac{1}{\overline{X}}\left[\sum_{i=1}^{n} \frac{(X_i - \overline{X})^2}{n-1}\right]^{1/2}$$

Where: s = estimated standard deviation of the population
$\overline{X}$ = mean value of observations in sample
X_i = ith observation in sample
n = number of observations in sample.

Figure: 25 TAC §289.229(h)(2)(A)(i)

TABLE I.

System	Leakage Limit	Measurement Location
0-150 kVp (manufactured or installed prior to March 1, 1989)	1 R (10 mGy) in 1 hr	1 meter (m) from source
0-150 kVp (manufactured on or after March 1, 1989)	100 mR (1mGy) in 1 hr	1 m from source
151-499 kVp	1 R (10 mGy) in 1 hr	1 m from source

Figure: 25 TAC §289.229(h)(4)(B)(i)

TABLE IV.
HALF-VALUE LAYER FOR SELECTED kVp

	X-ray tube voltage (kilovolt peak)	Minimum HVL (mm of aluminum)	Minimum HVL (mm of aluminum)
Designed operating range	Measured operating potential	X-ray systems (except dental) manufactured before June 10, 2006	X-ray systems (except dental) manufactured on or after June 10, 2006
Below 51	30	0.3	0.3
	40	0.4	0.4
	50	0.5	0.5
51 to 70	51	1.2	1.3
	60	1.3	1.5
	70	1.5	1.8
Above 70	71	2.1	2.5
	80	2.3	2.9
	90	2.5	3.2
	100	2.7	3.6
	110	3.0	3.9
	120	3.2	4.3
	130	3.5	4.7
	140	3.8	5.0
	150	4.1	5.4

Figure: 25 TAC §289.229(l)

Name of Record	Rule Cross-Reference	Time Interval Required for Record Keeping
Accelerators used for research and development and Industrial Operations		
(A) Initial surveys	(f)(2)(C)(iii)	Until termination of registration
(B) Tests and repairs	(f)(3)(A)(x)	5 years
(C) Calibration, surveys	(f)(3)(F)	5 years
(D) Contamination smear for units operating greater than 10 MeV	(f)(3)(G)	Until termination of registration
(E) Receipt, transfers, and disposal	(f) (3)(H)	Until termination of registration
(F) Training for operators	(f)(4)(B)	Until 2 years after the individual terminates employment
Therapeutic radiation machines, simulators, and electronic brachytherapy devices		
(G) Credentials of operators	(h)(1)(C)	Until 2 years after the individuals leave the facility
Electronic brachytherapy device operators	(h)(i)(E)(iii)	Until 2 years after the individuals leave the facility
(H) Review of quality assurance program	(h)(1)(F)(vii)	5 years
(I) FDA Variances	(h)(1)(H)	Until transfer of machine or termination of registration
(J) Initial Surveys		
Therapy (below 1 MeV)	(h)(2)(D)(i)(II)	Until termination of registration
Therapy (1 MeV) and above	(h)(3)(C)(i)(III)	Until termination of registration
Electronic brachytherapy device	(k)(2)(A)(ii)	Until termination of registration
(K) Calibration		
Therapy (below 1 MeV)	(h)(2)(D)(i)(II)	5 years
Therapy (1 MeV and above)	(h)(3)(C)(ii)(VI)	5 years
Electronic brachytherapy device	(k)(2)(B)(vi)	5 years

(L) Contamination Smears for units operating greater than 10 MeV	(h)(1)(I)	Until termination of registration
(M) Spot checks and corrective actions		
Therapy (below 1 MeV)	(h)(2)(D)(iii)(VI)	5 years after the spot checks
Therapy (1 MeV and above)	(h)(3)(C)(iii)(VII)	5 years after the spot checks
Electronic brachytherapy device	(k)(2)(C)(v)	5 years after the spot checks
(N) Leakage measurements		
Therapy (1 MeV and above)	(h)(3)(A)(i)	5 years
(O) Protective devices for simulators	(h)(4)(A)(iii)(II)	3 years
(P) Film processing records for simulators	(h)(4)(A)((viii)(VI) and (ix)	3 years
(Q) Digital imaging acquisition systems	(h)(4)(A)(x)	3 years
(R) CT dose measurements	(h)(4)(D)(iii)(III)	5 years
(S) CT films resulting from quality control tests	(h)(4)(D)(iv)(II)	1 year or until a new phantom image is performed
(T) Record of device-specific training for electronic brachytherapy-devices	(h)(1)(E)(iii)	Until 2 years after the individual leaves the facility

Figure: 30 TAC §115.112(a)(1)

Table I(a): Required Control for a Storage Tank Storing Volatile Organic Compounds (VOC) Other than Crude Oil and Condensate

True Vapor Pressure (pounds per square inch absolute (psia))	Storage Capacity (gallon (gal))	Control Requirements
≥ 1.5 psia and < 11 psia	> 1,000 gal and ≤ 25,000 gal	Submerged fill pipe or Vapor control system
≥ 1.5 psia and < 11 psia	> 25,000 gal and ≤ 40,000 gal	Internal floating cover, or External floating roof (any type), or Vapor control system
≥ 1.5 psia and < 11 psia	> 40,000 gal	Internal floating cover, or External floating roof with primary seal (any type) and secondary seal, or Vapor control system
≥ 11 psia	> 1,000 gal and ≤ 25,000 gal	Submerged fill pipe or Vapor control system
≥ 11 psia	> 25,000 gal	Submerged fill pipe and Vapor control system

Table II(a): Required Control for a Storage Tank Storing Crude Oil and Condensate

True Vapor Pressure (pounds per square inch absolute (psia))	Storage Capacity (gallon (gal))	Control Requirements
≥ 1.5 psia and < 11 psia	> 1,000 gal and ≤ 40,000 gal	Submerged fill pipe or Vapor control system
≥ 1.5 psia and < 11 psia	> 40,000 gal	Internal floating cover, or External floating roof with primary seal (any type) and secondary seal, or Vapor control system
≥ 11 psia	> 1,000 gal and ≤ 40,000 gal	Submerged fill pipe or Vapor control system
≥ 11 psia	> 40,000 gal	Submerged fill pipe and Vapor control system

Figure: 30 TAC §115.112(c)(1)

Table I(b). Required Control for a Storage Tank Storing Volatile Organic Compounds (VOC) Other than Crude Oil and Condensate

True Vapor Pressure (pounds per square inch absolute (psia))	Storage Capacity (gallon (gal))	Control Requirements
≥ 1.5 psia and < 11 psia	> 1,000 gal and ≤ 25,000 gal	Submerged fill pipe or Vapor control system
≥ 1.5 psia and < 11 psia	> 25,000 gal	Internal floating cover or external floating roof (any type) or Vapor control system
≥ 11 psia	> 1,000 gal and ≤ 25,000 gal	Submerged fill pipe or Vapor control system
≥ 11 psia	> 25,000 gal	Submerged fill pipe and Vapor control system

Figure: 30 TAC §115.112(e)(1)

Table 1: Required Control for a Storage Tank Storing Volatile Organic Compounds Other Than Crude Oil and Condensate

True Vapor Pressure (pounds per square inch absolute (psia))	Storage Capacity (gallon (gal))	Control Requirements
≥ 1.5 psia and < 11 psia	> 1,000 gal and ≤ 25,000 gal	Submerged fill pipe or Vapor control system
≥ 1.5 psia and < 11 psia	> 25,000 gal and ≤ 40,000 gal	Internal floating cover, or External floating roof (any type), or Vapor control system
≥ 1.5 psia and < 11 psia	> 40,000 gal	Internal floating cover, or External floating roof with primary seal (any type) and secondary seal, or Vapor control system
≥ 11 psia	> 1,000 gal and ≤ 25,000 gal	Submerged fill pipe or Vapor control system
≥ 11 psia	> 25,000 gal	Submerged fill pipe and Vapor control system

Table 2: Required Control for a Storage Tank Storing Crude Oil and Condensate

True Vapor Pressure (pounds per square inch absolute (psia))	Storage Capacity (gallon (gal))	Control Requirements
≥ 1.5 psia and < 11 psia	> 1,000 gal and ≤ 40,000 gal	Submerged fill pipe, or Vapor control system
≥ 1.5 psia and < 11 psia	> 40,000 gal	Internal floating cover, or External floating roof with primary seal (any type) and secondary seal, or Vapor control system
≥ 11 psia	> 1,000 gal and ≤ 40,000 gal	Submerged fill pipe, or Vapor control system
≥ 11 psia	> 40,000 gal	Submerged fill pipe, and Vapor control system

Figure: 30 TAC §115.118(a)(3)

$$EI_{Reportable} = (E_{1Seal} - E_{2Seals}) \times \left(\frac{G_m - G_a}{G_a} \right) \times \left(\frac{G_{8thL}}{\pi D} \right) \times 90$$

Where:

$EI_{Reportable}$ = The calculated emissions inventory reportable emissions that must be reported in the annual emissions inventory submittal required by §101.10 of this title (relating to Emissions Inventory Requirements.

E_{1Seal} = The AP-42 estimate of emissions from a floating roof or floating cover tank with a primary seal only. The material is assumed to be stored at a temperature equal to the maximum of the local monthly average temperatures during the emission inventory reporting year as reported by the National Weather Service. Units are pounds per day.

E_{2Seals} = The AP-42 estimate of emissions from a floating roof or floating cover tank with primary and secondary seals. The material is assumed to be stored at a temperature equal to the maximum of the local monthly average temperatures during the emission inventory reporting year as reported by the National Weather Service. Units are pounds per day.

G_m = The area of measured seal gaps greater than 1/8 inch wide. Units are square inches.

G_a = The area of allowable seal gaps greater than 1/8 inch wide, equal to one square inch per foot of tank diameter. Units are square inches.

G_{8thL} = The length of measured seal gaps greater than 1/8 inch wide. Units are linear feet.

D = The diameter of the storage tank. Units are feet.

90 = Constant. Units are days.

Figure: 30 TAC §115.432(c)(3)

$$E = \frac{(VOC - S)}{VOC}$$

Where:

E = The required overall control efficiency, decimal fraction.

VOC = The volatile organic compounds (VOC) content of the coatings applied on the printing line expressed in units consistent with the VOC limit in paragraph (1)(A) or (B) of this subsection. The owner or operator may choose to use either a daily weighted average or the maximum VOC content.

S = The applicable VOC limit in paragraph (1)(A) or (B) of this subsection. The units for this variable and the VOC variable must be the same.

Figure: 30 TAC §115.450(b)(11)

$$\text{Pounds of volatile organic compounds (VOC) per gallon of coating (minus water and exempt solvent)} = \frac{W_V}{(V_M - V_W - V_{ES})}$$

Where:

W_V = The weight of VOC contained in V_M gallons of coating measured in pounds.

V_M = The volume of coating, generally assumed to be one gallon.

V_W = The volume of water contained in V_M gallons of coating measured in gallons.

V_{ES} = The volume of exempt solvent contained in V_M gallons of coating measured in gallons.

Figure: 30 TAC §115.450(b)(12)

$$\text{Pounds of volatile organic compounds (VOC) per gallon of solids} = \frac{WV}{VM - VV - VW - VES}$$

Where:

W_V = The weight of VOC contained in V_M gallons of coating measured in pounds.

V_M = The volume of coating, generally assumed to be one gallon.

V_V = The volume of VOC contained in V_M gallons of coating measured in gallons.

V_W = The volume of water contained in V_M gallons of coating measured in gallons.

V_{ES} = The volume of exempt solvent contained in V_M gallons of coating measured in gallons.

Figure: 30 TAC §115.453(a)(1)(A)

Table 1.

Coating Type	Baked pounds of volatile organic compounds per gallon coating	Air-Dried pounds of volatile organic compounds per gallon coating
General Coating, One-Component	2.3	2.3
General Coating, Multi-Component	2.3	2.8
Extreme High-Gloss Coating	2.8	2.8
Extreme Performance Coating	2.8	2.8
Heat-Resistant Coating	2.8	2.8
Metallic Coating	2.8	2.8
Pretreatment Coating	2.8	2.8
Solar-Absorbent Coating	2.8	2.8

Table 2.

Coating Type	Baked pounds of volatile organic compounds per gallon solids	Air-Dried pounds of volatile organic compounds per gallon solids
General Coating, One-Component	3.3	3.3
General Coating, Multi-Component	3.3	4.5
Extreme High-Gloss Coating	4.5	4.5
Extreme Performance Coating	4.5	4.5
Heat-Resistant Coating	4.5	4.5
Metallic Coating	4.5	4.5
Pretreatment Coating	4.5	4.5
Solar-Absorbent Coating	4.5	4.5

Figure: 30 TAC §115.453(a)(1)(B)

Table 1.

Coating Type	Baked pounds of volatile organic compounds per gallon coating	Air-Dried pounds of volatile organic compounds per gallon coating
General Coating, One-Component	2.3	2.3
General Coating, Multi-Component	2.3	2.8
Extreme High-Gloss Coating	3.0	2.8
Extreme Performance Coating	3.0	3.0
Heat-Resistant Coating	3.0	3.0
Metallic Coating	3.0	3.0
Pretreatment Coating	3.0	3.0
Solar-Absorbent Coating	3.0	3.0

Table 2.

Coating Type	Baked pounds of volatile organic compounds per gallon solids	Air-Dried pounds of volatile organic compounds per gallon solids
General Coating, One-Component	3.3	3.3
General Coating, Multi-Component	3.3	4.5
Extreme High-Gloss Coating	5.1	4.5
Extreme Performance Coating	5.1	5.1
Heat-Resistant Coating	5.1	5.1
Metallic Coating	5.1	5.1
Pretreatment Coating	5.1	5.1
Solar-Absorbent Coating	5.1	5.1

Figure: 30 TAC §115.453(a)(1)(C)

Table 1.

Coating Category	Air-Dried pounds of volatile organic compounds per gallon coating	Baked pounds of volatile organic compounds per gallon coating
General Coating, One-Component	2.8	2.3
General Coating, Multi-Component	2.8	2.3
Camouflage Coating	3.5	3.0
Electric-Insulating Varnish Coating	3.5	3.0
Etching Filler Coating	3.5	3.0
Extreme High-Gloss Coating	3.5	3.0
Extreme Performance Coating	3.5	3.0
Heat-Resistant Coating	3.5	3.0
High Performance Architectural Coating	6.2	6.2
High Temperature Coating	3.5	3.5
Metallic Coating	3.5	3.0
Military Specification Coating	2.8	2.3
Mold-Seal Coating	3.5	3.0
Pan-Backing Coating	3.5	3.5
Prefabricated Architectural Coating, Multi-Component	3.5	2.3
Prefabricated Architectural Coating, One-Component	3.5	2.3
Pretreatment Coating	3.5	3.0
Repair and Touch-Up Coating	3.5	3.0
Silicone Release Coating	3.5	3.0
Solar-Absorbent Coating	3.5	3.0
Vacuum-Metalizing Coating	3.5	3.0
Drum Coating, New, Exterior	2.8	2.8
Drum Coating, New, Interior	3.5	3.5
Drum Coating, Reconditioned, Exterior	3.5	3.0
Drum Coating, Reconditioned, Interior	4.2	4.2

Table 2.

Coating Category	Air-Dried pounds of volatile organic compounds per gallon solids	Baked pounds of volatile organic compounds per gallon solids
General Coating, One-Component	4.52	3.35
General Coating, Multi-Component	4.52	3.35
Camouflage Coating	6.67	5.06
Electric-Insulating Varnish Coating	6.67	5.06
Etching Filler Coating	6.67	5.06
Extreme High-Gloss Coating	6.67	5.06
Extreme Performance Coating	6.67	5.06
Heat-Resistant Coating	6.67	5.06
High Performance Architectural Coating	38.0	38.0
High Temperature Coating	6.67	6.67
Metallic Coating	6.67	5.06
Military Specification Coating	4.52	3.35
Mold-Seal Coating	6.67	5.06
Pan-Backing Coating	6.67	6.67
Prefabricated Architectural Coating, Multi-Component	6.67	3.35
Prefabricated Architectural Coating, One-Component	6.67	3.35
Pretreatment Coating	6.67	5.06
Repair and Touch-up Coating	6.67	5.06
Silicone Release Coating	6.67	5.06
Solar-Absorbent Coating	6.67	5.06
Vacuum-Metalizing Coating	6.67	5.06
Drum Coating, New, Exterior	4.52	4.52
Drum Coating, New, Interior	6.67	6.67
Drum Coating, Reconditioned, Exterior	6.67	5.06
Drum Coating, Reconditioned, Interior	9.78	9.78

Figure: 30 TAC §115.453(a)(1)(D)

Table 1.

Coating Category	Pounds of volatile organic compounds per gallon coating
General Coating, One-Component	2.3
General Coating, Multi-Component	3.5
Electric-Dissipating and Shock-Free Coating	6.7
Extreme Performance Coating, Multi-Component	3.5
Metallic Coating	3.5
Military Specification Coating, One-Component	2.8
Military Specification Coating, Multi-Component	3.5
Mold-Seal Coating	6.3
Multi-Colored Coating	5.7
Optical Coating	6.7
Vacuum-Metalizing Coating	6.7

Table 2.

Coating Category	Pounds of volatile organic compounds per gallon solids
General Coating, One-Component	3.35
General Coating, Multi-Component	6.67
Electric-Dissipating and Shock-Free Coating	74.7
Extreme Performance Coating, Multi-Component	6.67
Metallic Coating	6.67
Military Specification Coating, One-Component	4.52
Military Specification Coating, Multi-Component	6.67
Mold-Seal Coating	43.7
Multi-Colored Coating	25.3
Optical Coating	74.7
Vacuum-Metalizing Coating	74.7

Figure: 30 TAC §115.453(a)(1)(E)

Table 1.

Automotive/Transportation Coating Category	Pounds of volatile organic compounds per gallon coating	Pounds of volatile organic compounds per gallon solids
Flexible Primer, Baked, Interior and Exterior Parts	4.5	11.58
Non-flexible Primer, Baked, Interior and Exterior Parts	3.5	6.67
Base Coats, Baked, Interior and Exterior Parts	4.3	10.34
Clear Coat, Baked, Interior and Exterior Parts	4.0	8.76
Non-basecoat/clear coat, Baked, Interior and Exterior Parts	4.3	10.34
Primers, Air-Dried, Exterior Parts	4.8	13.80
Basecoat, Air-Dried, Exterior Parts	5.0	15.59
Clear coats, Air-Dried, Exterior Parts	4.5	11.58
Non-basecoat/clear coat, Air-Dried, Exterior Parts	5.0	15.59
Air-Dried Coatings, Interior Parts	5.0	15.59
Touch-up and Repair Coatings	5.2	17.72

Table 2.

Business Machine Coating Category	Pounds of volatile organic compounds per gallon coating	Pounds of volatile organic compounds per gallon solids
Primers	2.9	4.80
Topcoat	2.9	4.80
Texture Coat	2.9	4.80
Fog Coat	2.2	3.14
Touch-up and repair	2.9	4.80

Figure: 30 TAC §115.453(a)(1)(F)

Table 1.

Coating Category	Pounds of volatile organic compounds per gallon coating
Extreme High-Gloss Topcoat	5.0
High-Gloss Topcoat	3.5
Pretreatment Wash Primers	6.5
Finish Primer-Surfacer	5.0
High Build Primer-Surfacer	2.8
Aluminum Substrate Antifoulant	4.7
Other Substrate Antifoulant	3.3
Antifoulant Sealer/Tie Coating	3.5
All other pleasure craft surface coatings for metal or plastic	3.5

Table 2.

Coating Category	Pounds of volatile organic compounds per gallon solids
Extreme High-Gloss Topcoat	15.6
High-Gloss Topcoat	6.7
Pretreatment Wash Primers	55.6
Finish Primer-Surfacer	15.6
High Build Primer-Surfacer	4.6
Aluminum Substrate Antifoulant	12.8
Other Substrate Antifoulant	6.0
Antifoulant Sealer/Tie Coating	6.7
All other pleasure craft surface coatings for metal or plastic	6.7

Figure: 30 TAC §115.453(a)(2)

Coating Category	Pounds of volatile organic compounds per gallon coating
Motor vehicle cavity wax	5.4
Motor vehicle sealer	5.4
Motor vehicle deadener	5.4
Motor vehicle gasket/gasket sealing material	1.7
Motor vehicle underbody	5.4
Motor vehicle trunk interior	5.4
Motor vehicle bedliner	1.7
Motor vehicle lubricating wax/compound	5.8

Figure: 30 TAC §115.453(a)(3)

Table 1.

Assembly Coating Process	**Volatile organic compounds (VOC) limit**
Electrodeposition primer (EDP) operations (including application area, spray/rinse stations, and curing oven) When solids turnover ratio (R_T) $\geq$ 0.16	0.7 pound per gallon (lb/gal) of coating solids applied
EDP operations (including application area, spray/rinse stations, and curing oven) When 0.040 $\leq R_T <$ 0.16	$0.7 \times 350^{0.160-R_T}$ lb/gal of coating solids applied
EDP operations (including application area, spray/rinse stations, and curing oven) When $R_T <$ 0.0400	No VOC limit
Primer-surfacer operations (including application area, flash-off area, and oven)	12.0 lb VOC/gal of solids deposited
Topcoat operations (including application area, flash-off area, and oven)	12.0 lb VOC/gal of solids deposited
Combined primer-surfacer and topcoat operations	12.0 lb VOC/gal of solids deposited
Final repair operations	4.8 lb VOC/gal of coating (minus water and exempt solvent)

Table 2.

Material	Volatile organic compounds (VOC) limit (excluding water and exempt solvent, as applied)
Automobile and light-duty truck glass-bonding primer	7.51 pounds volatile organic compounds per gallon of coating (lb VOC/gal)
Automobile and light-duty truck adhesive	2.09 lb VOC/gal of coating
Automobile and light-duty truck cavity wax	5.42 lb VOC/gal of coating
Automobile and light-duty truck sealer	5.42 lb VOC/gal of coating
Automobile and light-duty truck deadener	5.42 lb VOC/gal of coating
Automobile and light-duty truck gasket/gasket sealing material	1.67 lb VOC/gal of coating
Automobile and light-duty truck underbody coating	5.42 lb VOC/gal of coating
Automobile and light-duty truck trunk interior coating	5.42 lb VOC/gal of coating
Automobile and light-duty truck bedliner	1.67 lb VOC/gal of coating
Automobile and light-duty truck weatherstrip adhesive	6.26 lb VOC/gal of coating
Automobile and light-duty truck lubricating wax/compound	5.84 lb VOC/gal of coating

Figure: 30 TAC §115.453(a)(4)

Coating Type	Pounds of volatile organic compounds per pound coating	Pounds of volatile organic compounds per pound solids
Pressure Sensitive Tape and Label Surface Coating	0.067	0.2
Paper, Film, and Foil Surface Coating (Not including Pressure Sensitive Tape and Label)	0.08	0.4

Figure: 30 TAC §115.453(a)(5)

$$E = \frac{(VOC - S)}{VOC}$$

Where:

E = The required overall control efficiency, decimal fraction.

VOC = The volatile organic compounds (VOC) content of the coatings used on the coating line expressed on a solids basis in units consistent with the VOC emission limits provided in paragraph (1) or (4) of this subsection. The owner or operator may choose to use either a daily weighted average or the maximum VOC content.

S = The applicable VOC emission limit in paragraph (1) or (4) of this subsection expressed on a solids basis in units consistent with the units expressed in the VOC variable above.

Figure: 30 TAC §115.455(a)(2)(B)(i)

$$U_P = T_P\left(\frac{100}{S_P}\right)$$

$$U_B = T_B\left(\frac{100}{S_B}\right)$$

$$U_C = T_C\left(\frac{100}{S_C}\right)$$

Where:

U_P = The relative primer usage in gallons of primer per square inch of solids applied.

T_P = The target dry film thickness of the primer in mils (0.001 inch).

S_P = The volume percentage of solids in the primer, minus water and exempt solvent.

U_B = The relative basecoat usage in gallons of basecoat per square inch of solids applied.

T_B = The target dry film thickness of the basecoat in mils (0.001 inch).

S_B = The volume percentage of solids in the basecoat, minus water and exempt solvent.

U_C = The relative clearcoat usage in gallons of clearcoat per square inch of solids applied.

T_C = The target dry film thickness of the clearcoat in mils (0.001 inch).

S_C = The volume percentage of solids in the clearcoat, minus water and exempt solvent.

Figure: 30 TAC §115.455(a)(2)(B)(ii)

$$Q = \frac{(U_P \times V_P) + (U_B \times V_B) + (U_C \times V_C)}{(U_P) + (U_B) + (U_C)}$$

Where:

Q = The occurrence weighted average in pounds of volatile organic compounds (VOC) per gallon of coating (minus water and exempt solvent) as applied.

U_P = The relative primer usage in gallons of primer per square inch of solids applied.

V_P = The VOC content of the primer in pounds per gallon.

U_B = The relative basecoat usage in gallons of basecoat per square inch of solids applied.

V_B = The VOC content of the basecoat in pounds per gallon.

U_C = The relative clearcoat usage in gallons of clearcoat per square inch of solids applied.

V_C = The VOC content of the clearcoat in pounds per gallon.

Figure: 30 TAC §115.455(a)(4)(B)(i)

$$CE = \frac{Gw}{(Gw + Fw)}$$

Where:

CE = The capture efficiency, decimal fraction.

G_W = The mass of volatile organic compounds (VOC) captured and delivered to control device using a temporary total enclosure (TTE) (use Procedure G.2).

F_W = The mass of fugitive VOC that escapes from a TTE (use Procedure F.1).

Figure: 30 TAC §115.455(a)(4)(B)(ii)

$$CE = \frac{(L - F)}{L}$$

Where:

CE = The capture efficiency, decimal fraction.

L = The mass of liquid volatile organic compounds (VOC) input to process (use Procedure L).

F = The mass of fugitive VOC that escapes from a temporary total enclosure (TTE) (use Procedure F.1).

Figure: 30 TAC §115.455(a)(4)(B)(iii)

$$CE = \frac{G}{(G + F_B)}$$

Where:

CE = The capture efficiency, decimal fraction.

G = The mass of volatile organic compounds (VOC) captured and delivered to a control device (use Procedure G.2).

F_B = The mass of fugitive VOC that escapes from building enclosure (use Procedure F.2).

Figure: 30 TAC §115.455(a)(4)(B)(iv)

$$CE = \frac{L}{F_B - L}$$

Where:

CE = The capture efficiency, decimal fraction.

L = The mass of liquid volatile organic compounds (VOC) input to process (use Procedure L).

F_B = The mass of fugitive VOC that escapes from building or room enclosure (use Procedure F.2).

Figure: 30 TAC §115.460(b)(11)

$$PPc = \sum_{i-1}^{n} \frac{\left(\frac{Wi}{MWi} \times Vpi\right)}{\frac{Ww}{MWw} + \sum_{e-1}^{n} \frac{We}{MWe} + \sum_{i-1}^{n} \frac{Wi}{MWi}}$$

Where:

PPc = The volatile organic compound (VOC) composite partial vapor pressure of a solution at 20 degrees Celsius in millimeters of mercury (mmHg).

Wi = The weight of VOC i in grams (g).

MWi = The molecular weight of VOC i in g per g-mole.

VPi = The vapor pressure of VOC i at 20 degrees Celsius in mmHg.

Ww = The weight of water in g.

MWw = The molecular weight of water in g per g-mole.

We = The weight of non-water exempt compound e in g.

MWe = The molecular weight of non-water exempt compound e in g per g-mole.

Figure: 30 TAC §115.465(2)(B)(i)

$$CE = \frac{GW}{(GW + FW)}$$

Where:

CE = The capture efficiency, decimal fraction.

G_W = The mass of volatile organic compounds (VOC) captured and delivered to control device using a temporary total enclosure (TTE) (use Procedure G.2).

F_W = The mass of fugitive VOC that escapes from a TTE (use Procedure F.1).

Figure: 30 TAC §115.465(2)(B)(ii)

$$CE = \frac{(L - F)}{L}$$

Where:

CE = The capture efficiency, decimal fraction.

L = The mass of liquid volatile organic compounds (VOC) input to process (use Procedure L).

F = The mass of fugitive VOC that escapes from a temporary total enclosure (use Procedure F.1).

Figure: 30 TAC §115.465(2)(B)(iii)

$$CE = \frac{G}{(G + F_B)}$$

Where:

CE = The capture efficiency, decimal fraction.

G = The mass of volatile organic compounds (VOC) captured and delivered to a control device (use Procedure G.2).

F_B = The mass of fugitive VOC that escapes from building or room enclosure (use Procedure F.2).

Figure: 30 TAC §115.465(2)(B)(iv)

$$CE = \frac{L}{F_B - L}$$

Where:

CE = The capture efficiency, decimal fraction.

L = The mass of liquid volatile organic compounds (VOC) input to process (use Procedure L).

F_B = The mass of fugitive VOC that escapes from a building or room enclosure (use Procedure F.2).

Figure: 30 TAC §115.470(b)(35)

$$\text{Pounds of volatile organic compounds (VOC) per gallon of adhesive (minus water and exempt solvent)} = \frac{W_V}{(V_M - V_W - V_{ES})}$$

Where:

W_V = The weight of VOC contained in V_M gallons of adhesive or adhesive primer measured in pounds.

V_M = The volume of adhesive or adhesive primer, generally assumed to be one gallon.

V_W = The volume of water contained in V_M gallons of adhesive or adhesive primer measured in gallons.

V_{ES} = The volume of exempt solvent contained in V_M gallons of adhesive or adhesive primer measured in gallons.

Figure: 30 TAC §115.470(b)(36)

$$\text{Pounds of volatile organic compounds (VOC) per gallon of solids} = \frac{W_V}{V_M - V_V - V_W - V_{ES}}$$

Where:

W_V = The weight of VOC contained in V_M gallons of adhesive or adhesive primer measured in pounds.

V_M = The volume of adhesive or adhesive primer, generally assumed to be one gallon.

V_V = The volume of VOC contained in V_M gallons of adhesive or adhesive primer measured in gallons.

V_W = The volume of water contained in V_M gallons of adhesive or adhesive primer measured in gallons.

V_{ES} = The volume of exempt solvent contained in V_M gallons of adhesive or adhesive primer measured in gallons.

Figure: 30 TAC §115.473(a)

Table 1.

General Adhesive Application Processes	Pounds of volatile organic compounds per gallon adhesive
Reinforced Plastic Composite	1.7
Flexible vinyl	2.1
Metal	0.3
Porous Material (Except Wood)	1.0
Rubber	2.1
Wood	0.3
Other Substrates	2.1

Table 2.

Specialty Adhesive Application Processes	Pounds of volatile organic compounds per gallon adhesive
Ceramic Tile Installation	1.1
Contact Adhesive	2.1
Cove Base Installation	1.3
Floor Covering Installation (Indoor)	1.3
Floor Covering Installation (Outdoor)	2.1
Floor Covering Installation (Perimeter Bonded Sheet Vinyl)	5.5
Metal to Urethane/Rubber Molding or Casting	7.1
Motor Vehicle Adhesive	2.1
Motor Vehicle Weatherstrip Adhesive	6.3
Multipurpose Construction	1.7
Plastic Solvent Welding acrylonitrile butadiene styrene (ABS)	3.3
Plastic Solvent Welding (Except ABS)	4.2
Sheet Rubber Lining Installation	7.1
Single-Ply Roof Membrane Installation/Repair (Except Ethylene Propylene Diene Monomer)	2.1
Structural Glazing	0.8
Thin Metal Laminating	6.5
Tire Repair	0.8
Waterproof Resorcinol Glue	1.4

Table 3.

Adhesive Primer Application Processes	Pounds of volatile organic compounds per gallon adhesive
Motor Vehicle Glass-Bonding Primer	7.5
Plastic Solvent Welding Adhesive Primer	5.4
Single-Ply Roof Membrane Adhesive Primer	2.1
Other Adhesive Primer	2.1

Figure: 30 TAC §115.473(a)(3)

Equation 1.

$$S = \frac{C}{\left(1 - \left(\frac{C}{D}\right)\right)}$$

Where:

S = The applicable volatile organic compounds (VOC) emission limit expressed on a pounds of VOC per gallon of solids basis.

C = The applicable VOC content limit from Tables 1 - 3 in subsection (a) of this section expressed on a pounds of VOC per gallon of adhesive basis.

D = An assumed density of 7.36 pounds of VOC per gallon of VOC.

Equation 2.

$$E = \frac{(VOC - S)}{VOC}$$

Where:

E = The required overall control efficiency, decimal fraction.

VOC = The volatile organic compounds (VOC) content of the adhesives or adhesive primers used for each application process expressed on a solids basis in pounds of VOC per gallon of solids. The owner or operator may choose to use either a daily weighted average or the maximum VOC content.

S = The applicable VOC emission limit expressed on a pounds of VOC per gallon of solids basis calculated using Equation 1.

Figure: 30 TAC §115.475(3)(B)(i)

$$CE = \frac{Gw}{(Gw + Fw)}$$

Where:

CE = The capture efficiency, decimal fraction.

G_W = The mass of volatile organic compounds (VOC) captured and delivered to control device using a temporary total enclosure (TTE) (use Procedure G.2).

F_W = The mass of fugitive VOC that escapes from a TTE (use Procedure F.1).

Figure: 30 TAC §115.475(3)(B)(ii)

$$CE = \frac{(L-F)}{L}$$

Where:

CE = Capture efficiency, decimal fraction.

L = The mass of liquid volatile organic compounds (VOC) input to process (use Procedure L).

F = The mass of fugitive VOC that escapes from a temporary total enclosure (use Procedure F.1).

Figure: 30 TAC §115.475(3)(B)(iii)

$$CE = \frac{G}{(G + F_B)}$$

Where:

CE = Capture efficiency, decimal fraction.

G = The mass of volatile organic compounds (VOC) captured and delivered to a control device (use Procedure G.2).

F_B = The mass of fugitive VOC that escapes from the building or room enclosure (use Procedure F.2).

Figure: 30 TAC §115.475(3)(B)(iv)

$$CE = \frac{L}{F_B - L}$$

Where:

CE = The capture efficiency, decimal fraction.

L = The mass of liquid volatile organic compounds (VOC) input to process (use Procedure L).

F_B = The mass of fugitive VOC that escapes from building or room enclosure (use Procedure F.2).

Figure: 37 TAC §152.5(b)

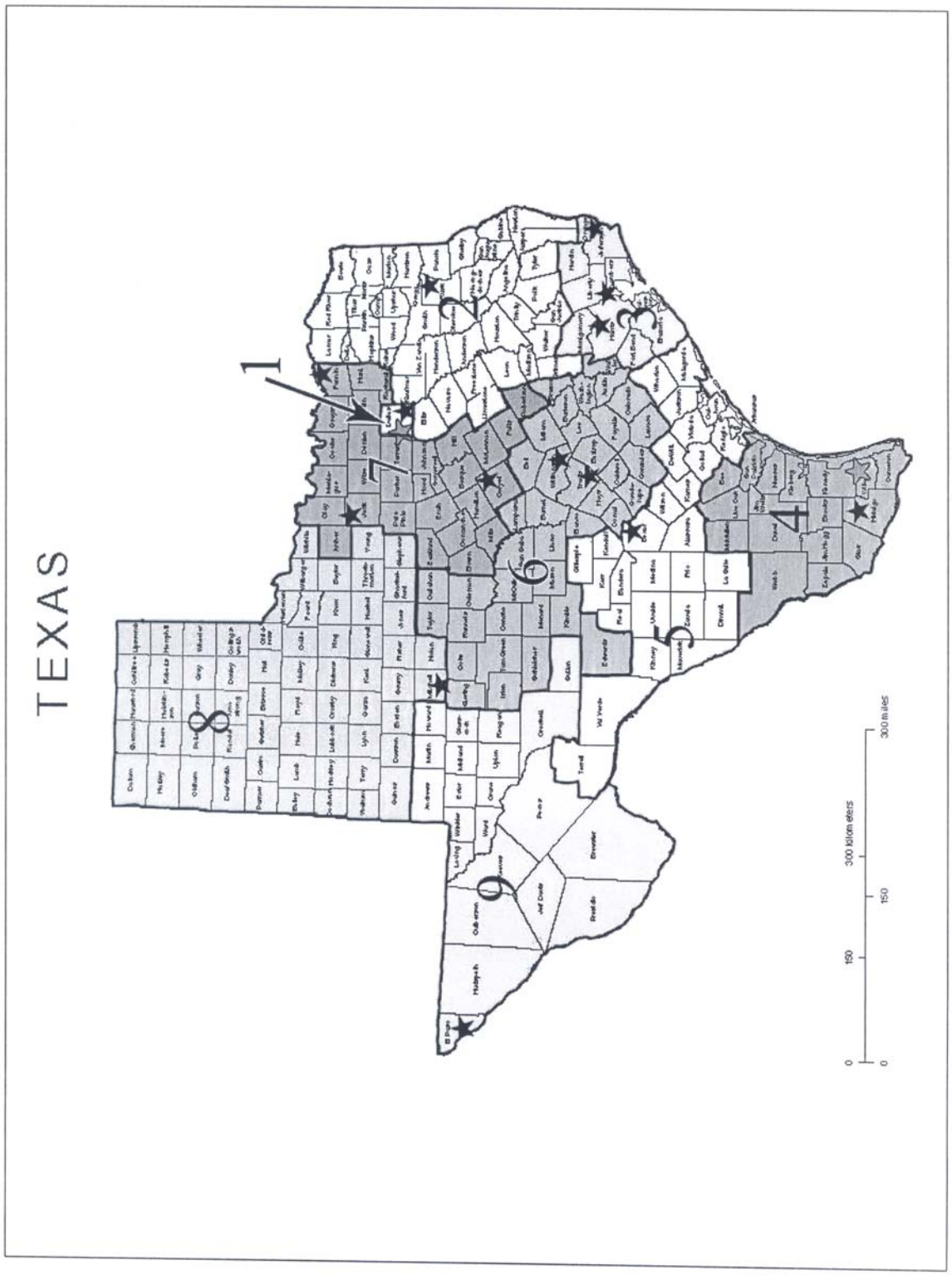

Figure: 37 TAC §152.25

Unit Name	Capacity
Allred	3,722 [~~3,682~~]
Bartlett	1,049 [~~1,001~~]
Beto	3,471
Boyd	1,372 [~~1,330~~]
Bradshaw	1,980
Bridgeport	520
Briscoe	1,384 [~~1,342~~]
Byrd	1,365
[~~Central~~]	[~~1,060~~]
Clemens	1,215
Clements	3,798 [~~3,714~~]
Cleveland	520
Coffield	4,139
Cole	900
Connally	2,928 [~~2,848~~]
Cotulla	606
Crain	2,115
Dalhart	1,398 [~~1,356~~]
Daniel	1,384 [~~1,342~~]
Darrington	1,931
Dawson	2,216
Diboll	518
Dominguez	2,276
Duncan	606
Eastham	2,474
Ellis	2,482 [~~2,404~~]
Estelle	3,360 [~~3,273~~]
Estes	1,040 [~~1,000~~]
Ferguson	2,421
Formby	1,100
Fort Stockton	606
Garza East* *(Includes co-located boot camps and work camps.)*	2,458
Garza West	2,278
[~~Gatesville~~]	[~~2,115~~]
Gist	2,276
Glossbrenner	612

Goodman	612
Goree	1,321
Gurney	2,128
Halbert	612
Hamilton	1,166
Havins	596
Henley	576
Hightower	1,384 [~~1,342~~]
Hilltop	553 [~~677~~]
Hobby	1,384 [~~1,342~~]
Hodge	989
Holliday	2,128
Hospital Galveston* *(Medical beds are not permanent housing and do not count toward capacity.)*	0
Hughes	2,984 [~~2,900~~]
Huntsville	1,705
Hutchins	2,276
Jester I	323
Jester III	1,131
Jester IV	550
Johnston	612
Jordan	1,008
Kegans	667
Kyle	520
LeBlanc	1,224
Lewis	2,232 [~~2,190~~]
Lindsey	1,031
Lockhart	500
Lopez	1,100
Luther	1,316
Lychner	2,276
Lynaugh	1,416 [~~1,374~~]
Marlin	606
McConnell	2,984 [~~2,900~~]
Michael	3,305 [~~3,221~~]
Middleton	2,128
Montford	950
Moore, B.	500
Moore, C.	1,224

Mt. View	645
Murray	1,341 [~~1,313~~]
Neal	1,732 [~~1,690~~]
Ney	576
Pack	1,478
Plane	2,291 [~~2,276~~]
Polunsky	2,984 [~~2,900~~]
Powledge	1,137
Ramsey [~~I~~]	1,891
[~~Ramsey II~~]	[~~1,212~~]
Roach* *(Includes co-located boot camp [~~camps~~] and work camp [~~camps~~].)*	1,884 [~~1,842~~]
Robertson	2,984 [~~2,900~~]
Rudd	612
San Saba	606
Sanchez	1,100
Sayle	632
Scott	1,130
Segovia	1,224
Skyview	562 [~~528~~]
Smith	2,234 [~~2,125~~]
Stevenson	1,384 [~~1,342~~]
Stiles	2,981 [~~2,897~~]
Stringfellow	1,212
Telford	2,872 [~~2,832~~]
Terrell, C.T.	1,603
Torres	1,384 [~~1,342~~]
Travis Co.	1,161
Tulia	606
Vance	378
Wallace* *(Includes co-located [~~boot camps and~~] work camp [~~camps~~].)*	1,448 [~~1,502~~]
Ware	916
Wheeler	576
Willacy Co.	1,069
Woodman	900
Wynne	2,621
Young	314 [~~310~~]

Figure: 37 TAC §159.13(c)

696PD811M0170

STATE OF TEXAS §

COUNTY OF TRAVIS §

Division Number:	360	**Program Name:**	Adult and Community Education
Org. Code:	NA	**Legal/Funding Authority:**	
Speed Chart:	NA	TGC 508.318 & TGC 771.001	
Payee Name:	NA	**Payee ID:**	NA
ISAS Contract #:		**PO #:**	NA

MEMORANDUM OF UNDERSTANDING

This memorandum of understanding (MOU) is a non-financial, mutual agreement between the state agencies shown below as Participating Agencies, pursuant to the authority granted and in compliance with the provisions of Texas Government Code §771.001 and §508.318.

I. PARTICIPATING AGENCIES:

Receiving Agency: TEXAS EDUCATION AGENCY

Performing Agency: THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE

II. STATEMENT OF SERVICES TO BE PERFORMED:

Pursuant to the Texas Government Code, the Texas Department of Criminal Justice (TDCJ) and the Texas Education Agency shall set forth the respective responsibilities of both agencies in implementing a continuing education program to increase the literacy of releasees.

The objective of this program is to offer releasees choices and opportunities, within the realm of educational services to remain outside of prison and achieve maximum integration in the community. The following are guiding principals to accomplish the objectives of this MOU:

- the releasee will achieve more success outside of prison if a support system is in place to promote educational growth;
- the releasee may be less likely to become a repeat offender if he/she pursues an education; and
- the releasee must be encouraged to recognize the need for increasing his/her educational level to remain in the free world and learn to function as a productive citizen.

Participation:

The Texas Department of Criminal Justice will:

- establish a continuing education system to increase literacy for releasees in the District Reentry Centers;
- establish a system whereby TDCJ will inform adult education cooperatives of the process and requirements for continued education of releasees;
- provide adult education cooperatives with assessment and educational profile information that will facilitate student placement in appropriate programs;
- coordinate with adult education cooperatives in implementing a system for identification of student needs and barriers, student referral, outreach activities and releasee's compliance with educational requirements;

- identify resources that assist adult education cooperatives in expanding services for releasees; and
- participate in training necessary to develop the capacity at the local level to access and interact effectively with adult education service providers.

The Texas Education Agency will:

- coordinate with the TDCJ to inform local parole offices of services available through the adult education cooperative system in which local school districts, junior colleges, and education service centers provide instructional programs throughout the state;
- assist TDCJ in identifying barriers to provide adult education services to released offenders;
- assist local adult education programs in developing capacity to serve the released offender population;
- coordinate with TDCJ in establishing a referral process between local parole offices and adult education cooperatives whereby releasees will be referred to adult education programs;
- assist adult education cooperatives in providing services to releasees in adult education programs on a first-come, first-serve basis and to the extent the funds and classroom space are available;
- assist local [~~education~~] adult education cooperatives in communicating and coordinating with local parole offices on prospective students awaiting referral to education programs, availability of services, identification of financial resources, and other educational programs available for released offenders;
- coordinate with the TDCJ in the development of proof program objectives and collecting data to establish performance standards for released offenders;
- coordinate with the TDCJ in providing training to assist local parole officers with the coordination of adult education services to released offenders; and
- monitor program quality and compliance of local adult education programs serving released offenders.

III. TERM OF THE MOU:

This MOU is effective September 1, 2011 and shall terminate on August 31, 2015. This MOU may also be cancelled prior to the termination date by mutual agreement of both parties. This MOU may be considered for expansion, modification, or amended at any time during the term of the MOU upon mutual agreement of both parties.

IV. GENERAL PROVISIONS:

Attached hereto and made a part hereof by reference are the documents indicated with an "X" beside each:

☒ General Provisions

THE UNDERSIGNED PARTICIPATING PARTIES do hereby certify that (1) the services specified above are necessary and essential for activities that are properly within the statutory functions and programs of the effected agencies of state government, (2) the proposed arrangements serve the interest of efficient and economical administration of the state government, and (3) the services, supplies, or materials in this MOU are not required by Section 21 of Article 16 of the Texas Constitution to be supplied under contract given to the lowest responsible bidder.

RECEIVING AGENCY further certifies that it has the authority to receive the above services by authority granted in: Texas Government Code §508.318 and §771.003.

PERFORMING AGENCY further certifies that it has authority to perform the above services by authority granted in: Texas Government Code §508.318 and §771.003.

The authorized representatives of the undersigned parties bind themselves to the faithful performance of this MOU. It is mutually understood that this MOU will be effective on the earliest date shown in Section III.

RECEIVING AGENCY	PERFORMING AGENCY
TEXAS EDUCATION AGENCY	TEXAS DEPARTMENT OF CRIMINAL JUSTICE
Name of Agency	Name of Agency
By: _____	By: _____
Associate Commissioner / CFO	Chief Financial Officer

Return one copy with original signature to:
Norma Barrera
Texas Education Agency
1701 North Congress Avenue
Austin, Texas 78701-1494

General Provisions

Dispute Resolution: The dispute resolution process provided for in Chapter 2260 of the Texas Government Code must be used by TEA and Contractor to attempt to resolve all disputes arising under this Contract.

Right to Audit: Contractor understands that acceptance of funds under this contract acts as acceptance of the authority of the State Auditor's office, or any successor agency, to conduct an audit or investigation in connection with those funds. Contractor further agrees to cooperate fully with the State Auditor's Office or its successor in the conduct of the audit or investigation, including providing all records requested. Contractor will ensure that this clause concerning the authority to audit funds received indirectly by subcontractors through Contractor and the requirements to cooperate is included in any subcontract it awards.

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 Regarding Update of the Texas Landowner's Bill of Rights

The Texas Legislature requires the Office of the Attorney General to provide the Texas Landowner's Bill of Rights in accordance with Government Code §402.031 and Chapter 21 of the Property Code. The Office of the Attorney General has updated the Texas Landowner's Bill of Rights to reflect the legislative changes made during the 82nd Legislative Regular and 1st Special Sessions.

The text of the proposed updated Texas Landowner's Bill of Rights is published below. Written comments should be directed to Brooke Paup, Deputy Division Chief, Intergovernmental Relations Division, Office of the Attorney General, P.O. Box 12548, Austin, Texas 78711-2548, facsimile (512) 370-9359 or at brooke.paup@oag.state.tx.us. All comments must be received no later than January 30, 2012.

The Office of the Attorney General will review any comments submitted and will publish the final document on the agency website (www.oag.state.tx.us).

TEXAS LANDOWNER'S BILL OF RIGHTS

This Landowner's Bill of Rights applies to any attempt by the government or a private entity to take your property. The contents of this Bill of Rights are prescribed by the Texas Legislature in Texas Government Code Sec. 402.031 and Chapter 21 of the Texas Property Code.

1. You are entitled to receive adequate compensation if your property is taken for a public use.

2. Your property can only be taken for a public use.

3. Your property can only be taken by a governmental entity or private entity authorized by law to do so.

4. The entity that wants to take your property must notify you that it wants to take your property.

5. The entity proposing to take your property must provide you with an assessment detailing the adequate compensation you are owed for your property.

6. The entity proposing to take your property must make a good faith offer to buy the property before it files a lawsuit to condemn the property.

7. You may hire an appraiser or other professional to determine the value of your property or to assist you in any condemnation proceeding.

8. You may hire an attorney to negotiate with the condemning entity and to represent you in any legal proceedings involving the condemnation.

9. Before your property is condemned, you are entitled to a hearing before a court appointed panel that includes three special commissioners. The special commissioners must determine the amount of compensation the condemning entity owes for the taking of your property. The commissioners must also determine what compensation, if any, you are entitled to receive for any reduction in value of your remaining property.

10. If you are unsatisfied with the compensation awarded by the special commissioners, or if you question whether the taking of your property was proper, you have the right to a trial by a judge or jury. If you are dissatisfied with the trial court's judgment, you may appeal that decision.

Condemnation Procedure

Eminent domain is the legal authority that certain entities are granted that allows those entities to take private property for a public use. Private property can include land and certain improvements that are on that property.

Private property may only be taken by a governmental entity or private entity that is authorized by law to do so. Your property may be taken only for a public purpose. That means it can only be taken for a purpose or use that serves the general public. Texas law prohibits condemnation authorities from taking your property to enhance tax revenues or foster economic development.

Your property cannot be taken without adequate compensation. Adequate compensation includes the market value of the property being taken. It may also include certain damages if your remaining property's market value is diminished by the acquisition itself or by the way the condemning entity will use the property.

How the Taking Process Begins

The taking of private property by eminent domain must follow certain procedures. First, the entity that wants to condemn your property must provide you a copy of this Landowner's Bill of Rights before - or at the same time - the entity first represents to you that it possesses eminent domain authority.

Second, if it has not been previously provided, the condemning entity must send this Landowner's Bill of Rights to the last known address of the person who is listed as the property owner on the most recent tax roll. This requirement stipulates that the Landowner's Bill of Rights must be provided to the property owner at least seven days before the entity makes a final offer to acquire the property.

Third, the condemning entity must make a good faith offer to purchase the property. The condemning entity's purchase offer must be based on an investigation and an assessment of adequate compensation for the property. At the time the purchase offer is made, the condemning entity must disclose any appraisal reports it produced or acquired that relate specifically to the property and were prepared in the ten years preceding the date of the purchase offer. You have the right to either accept or reject the offer made by the condemning entity.

Condemnation Proceedings

If you and the condemning entity do not agree on the value of your property, the entity may begin condemnation proceedings. Condemnation is the legal process that eligible entities utilize to take private property. It begins with a condemning entity filing a claim for your property in court. If you live in a county where part of the property being condemned is located, the claim must be filed in that county. Otherwise, the condemnation claim can be filed in any county where at least part of the property being condemned is located. The claim must describe the property being condemned, state with specificity the public use, state

the name of the landowner, state that the landowner and the condemning entity were unable to agree on the value of the property, state that the condemning entity provided the landowner with the Landowner's Bill of Rights, and state that the condemning entity made a bona fide offer to acquire the property from the property owner voluntarily.

Special Commissioners' Hearing

After the condemning entity files a condemnation claim in court, the judge will appoint three local landowners to serve as special commissioners. The judge will give you a reasonable period to strike one of the special commissioners. If a commissioner is struck, the judge will appoint a replacement. These special commissioners must live in the county where the condemnation proceeding is filed, and they must take an oath to assess the amount of adequate compensation fairly, impartially, and according to the law. The special commissioners are not legally authorized to decide whether the condemnation is necessary or if the public use is proper. Their role is limited to assessing adequate compensation for you. After being appointed, the special commissioners must schedule a hearing at the earliest practical time and place. The special commissioners are also required to give you written notice of the condemnation hearing.

You are required to provide the governmental condemning entity any appraisal reports that were used to determine your claim about adequate compensation for the condemned property. Under a new law enacted in 2011, landowners' appraisal reports must be provided to the condemning entity either ten days after they receive the report or three business days before the special commissioners' hearing - whichever is earlier. You may hire an appraiser or real estate professional to help you determine the value of your private property. Additionally, you can hire an attorney to represent you during condemnation proceedings.

At the condemnation hearing, the special commissioners will consider your evidence on the value of your condemned property, the damages to remaining property, any value added to the remaining property as a result of the condemnation, and the condemned entity's proposed use of your condemned property.

Special Commissioners' Award

After hearing evidence from all interested parties, the special commissioners will determine the amount of money that you should be awarded to adequately compensate you for your property. The special commissioners' decision is significant to you not only because it determines the amount that qualifies as adequate compensation, but also because it impacts who pays for the cost of the condemnation proceedings. Under the Texas Property Code, if the special commissioners' award is less than or equal to the amount the condemning entity first offered to pay in order to purchase the property, then you may be financially responsible for the cost of the condemnation proceedings. However, if the special commissioners' award more than you were originally offered, then the condemning entity will be responsible for the costs associated with the proceedings.

The special commissioners are required to provide the court that appointed them a written decision. That decision is called the "Award." The Award must be filed with the court and the court must send written notice of the Award to all parties. After the Award is filed, the condemning entity may take possession of the property being condemned, even if either party appeals the Award of the special commissioners. To take possession of the property, the condemning entity must either pay the amount of the Award or deposit the amount of the Award into the court's registry. You have the right to withdraw funds that are deposited into the registry of the court.

Objection to the Special Commissioners' Award

If either the landowner or the condemning entity is dissatisfied with the amount of the Award, either party can formally object to the Award. In order to successfully make this valuation objection, it must be filed in writing with the court. If neither party timely objects to the special commissioners' Award, the court will adopt the Award as the final judgment of the court. If a party timely objects to the special commissioners' Award, the court will hear the case in the same manner that other civil cases are heard.

Landowners who object to the Award and ask the court to hear the matter have the right to a trial and can elect whether to have the case decided by a judge or jury. The allocation of any trial costs is decided in the same manner that costs are allocated with the special commissioners' Award. After trial, either party may appeal any judgment entered by the court.

Dismissal of the Condemnation Action

A condemning entity may file a motion to dismiss the condemnation proceeding if it decides it no longer needs your condemned property. If the court grants the motion to dismiss, the case is over and you are entitled to recover reasonable and necessary fees for attorneys, appraisers, photographers, and for other expenses incurred to the date of the hearing on the motion to dismiss.

If you wish to challenge the condemning entity's authority to take your property, you can lodge that challenge by filing a motion to dismiss the condemnation proceeding. Such a motion to dismiss would allege that the condemning entity did not have the right to condemn your property. For example, a landowner could challenge the condemning entity's claim that it seeks to take the property for a public use. If the court grants the landowner's motion, the court may award the landowner reasonable and necessary fees for attorneys, appraisers, photographers, and for other expenses incurred to the date of the hearing or judgment.

Relocation Costs

If you are displaced from your residence or place of business, you may be entitled to reimbursement for reasonable expenses incurred while moving personal property from the residence or relocating the business to a new site. However, during condemnation proceedings, reimbursement for relocation costs may not be available if those costs are separately recoverable under another law. Texas law limits the total amount of available relocation costs to the market value of the property being moved. Further, the law provides that moving costs are limited to the amount that a move would cost if it were within 50 miles.

Reclamation Options

If private property was condemned by a governmental entity, and the public use for which the property was acquired is canceled within ten years, no actual progress is made toward the public use within ten years or the property becomes unnecessary for public use within ten years, landowners may have the right to repurchase the property for the fair market value of the property at the time the public use was canceled.

Disclaimer

The information in this statement is intended to be a summary of the applicable portions of Texas state law as required by HB 1495, enacted by the 80th Texas Legislature, Regular Session. This statement is not legal advice and is not a substitute for legal counsel.

Additional Resources

Further information regarding the procedures, timelines and requirements outlined in this document can be found in Chapter 21 of the Texas Property Code.

For information regarding this publication, contact Zindia Thomas, Agency Liaison, at (512) 936-9901.

TRD-201105520
Jay Dyer
Deputy Attorney General
Office of the Attorney General
Filed: December 12, 2011

♦ ♦ ♦

Request for Proposal

This Request for Proposal is filed pursuant to Texas Government Code §2254.021 *et seq.*

The Office of the Attorney General of Texas (the OAG) requests that professional consultants with documented expertise and experience in the field of indirect cost recovery and cost allocation plans for governmental units submit proposals to prepare Indirect Cost Plans for State Fiscal Years 2011 (FY11) (based on actual expenditures) and 2013 (FY13) (based on budgeted expenditures) and to analyze and update standardized billing rates for legal services provided by the OAG. In accordance with Texas Government Code §2254.029(b), the OAG hereby discloses that similar services related to indirect cost plans and legal billing rates covering earlier fiscal years have been previously provided to the OAG by a consultant.

The OAG administers millions of dollars of federal funds for the Child Support (Title IV-D) and Medicaid (Title XIX) programs. Currently, the OAG is recouping its indirect costs from these federal programs based on rates approved by the United States Department of Health and Human Services (DHHS).

The OAG also provides legal services to other state agencies. The consultant selected will be responsible for analyzing the existing billing rates and actual costs and then updating the legal services rates for use in FY13.

The consultant selected to prepare the Indirect Cost Plans and to develop current, standardized legal billing rates must demonstrate the necessary qualifications and experience listed in the "QUALIFICATIONS" section. The successful consultant will also be required to perform the services and generate the reports listed in the "SCOPE OF SERVICES" section. The acceptance of a proposal by the OAG, made in response to this Request for Proposal, will be based on the OAG's evaluation of the competence, knowledge, and qualifications of the consultant, in addition to the reasonableness of the proposed fee for services. If other considerations are equal, the OAG will give preference to a consultant whose principal place of business is in Texas or who will manage the consulting contract wholly from an office in Texas. The total contract award will not exceed Forty-Nine Thousand and NO/100 Dollars ($49,000.00).

SCOPE OF SERVICES

The successful consultant will be required to comply with the consulting services, performances, terms and conditions as described in the draft "Consulting Services Contract Between the Office of the Attorney General and Name of Contractor" which is hereby incorporated into the Request for Proposal as Addendum A.

The selected consultant will accumulate and analyze all data that are required. The OAG is not expected to provide any staff resources to the selected consultant. The OAG will provide a liaison with staff within the OAG and with other state agencies, as appropriate.

QUALIFICATIONS

Each individual, company, or organization submitting a proposal must include all of the references and financial status information as specified within this Request for Proposal (see the section below titled "References and Financial Condition") at the time of opening or it will be disqualified. Each consultant that submits a proposal must present evidence or otherwise demonstrate to the satisfaction of the OAG that such entity:

1. Has the expertise to prepare and successfully negotiate the type of Indirect Cost Plans described above;

2. Has a thorough understanding of cost allocation issues and has the expertise in the preparation of Indirect Cost Plans at the state agency level;

3. Has a thorough understanding of legal services billing procedures and has the expertise in the preparation of a Legal Services Billing Schedule; and

4. Can develop and execute the Indirect Cost Plans and Legal Services Billing Schedule within the required time frames as described in Addendum A.

Please provide evidence of the above qualifications and a proposal which includes:

1. A detailed description of the plan of action to fulfill all of the requirements as described in Addendum A;

2. Detailed information on the consultant staff to be assigned to the project; and

3. The proposed fee amount for provision of the desired services.

A signed original and five (5) copies of the proposal must be received in the OAG Purchasing Section, 300 West 15th Street, Third Floor, Austin, Texas 78701, no later than 3:00 p.m., Central Standard Time, January 23, 2012. Any proposal received after the specified time and date will not be given consideration. Conditioned on the OAG's receipt of the requisite finding of fact from the Governor's Budget and Planning Office pursuant to Texas Government Code §2254.028, the OAG anticipates entering into the resultant contract on or about February 8, 2012.

Proposals should be sealed and clearly marked with the specified time and date and the title, "Proposal for Consulting Services for an Indirect Cost Recovery/Cost Allocation Plan and Legal Services Billing Schedule for the OAG".

REFERENCES AND FINANCIAL CONDITION

Prospective consultants will provide the names of at least three (3) different references meeting the following criteria:

1. The reference company or entity must have engaged the prospective consultant for the same or similar services as those to be provided in accordance with the terms of this Request for Proposal;

2. The services must have been provided by the prospective consultant to the reference company or entity within the five (5) years preceding the issuance of this Request for Proposal;

3. The reference company or entity must not be affiliated with the prospective consultant in any ownership or joint venture arrangement;

4. References must include the company or entity name, address, contact name, and telephone number for each reference. The OAG may not be used as a reference. The contact name must be the name of a senior representative of the reference company or entity who was directly responsible for interacting with the prospective consultant throughout the performance of the engagement and who can address questions about the performance of the prospective consultant from personal experience. References will accompany the proposal.

5. The prospective consultant will provide a signed release from liability for each reference provided in response to this requirement. The release from liability will absolve the specified reference company or

entity from liability for information provided to the OAG concerning the prospective consultant's performance of its engagement with the reference.

6. The prospective consultant must disclose if and when it has filed for bankruptcy within the last seven (7) years. For prospective consultants conducting business as a corporation, partnership, limited liability partnership, or other form of artificial person, the prospective consultant must disclose whether any of its principals, partners, or officers have filed for bankruptcy within the last seven (7) years.

7. As part of any proposal submission, the prospective consultant must include information regarding financial condition, including income statements, balance sheets, and any other information which accurately shows the prospective consultant's current financial condition. The OAG reserves the right to request such additional financial information as it deems necessary to evaluate the prospective consultant, and by submission of a proposal, the prospective consultant agrees to provide same.

DISCLOSURE

Any individual who provides a proposal for consulting services in response to this Request for Proposal and who has been employed by the OAG or any other state agency(ies) at any time during the two (2) years preceding the tendering of the proposal will disclose in the proposal:

1. the nature of the previous employment with the OAG or any other state agency(ies);

2. the date(s) the employment(s) terminated; and

3. the annual rate(s) of compensation for the employment(s) at the time(s) of termination.

Each consultant that submits a proposal must certify to the following:

1. consultant has no unresolved audit exceptions(s) with the OAG. An unresolved audit exception is an exception for which the consultant has exhausted all administrative and/or judicial remedies and refuses to comply with any resulting demand for payment.

2. consultant certifies that the consultant's staff or governing authority has not participated in the development of specific criteria for award of this contract, and will not participate in the selection of consultant(s) awarded contracts.

3. consultant has not retained or promised to retain an agent or utilized or promised to utilize a consultant who has participated in the development of specific criteria for the award of contract, nor will participate in the selection of any successful consultant.

4. consultant agrees to provide information necessary to validate any statements made in consultant's response, if requested by the OAG. This may include, but is not limited to, granting permission for the OAG to verify information with third parties, and allowing inspection of consultant's records.

5. consultant understands that failure to substantiate any statements made in the response when substantiation is requested by OAG may disqualify the response, which could cause the consultant to fail to receive a contract or to receive a contract for an amount less than that requested.

6. consultant certifies that the consultant's organization has not had a contract terminated or been denied the renewal of any contract for noncompliance with policies or regulation of any state or federal funded program within the past five years nor is it currently prohibited from contracting with a government agency.

7. consultant certifies that its Corporate Texas Franchise Tax payments are current, or that it is exempt from or not subject to such tax.

8. consultant has not given nor intends to give at any time hereafter any economic opportunity, future employment, gift, loan, gratuity, special discount, trip, favor, or service to a public servant in connection with the submitted response.

9. Neither the consultant nor the firm, corporation, partnership or institution represented by the consultant, anyone acting for such firm, corporation partnership or institution has violated the antitrust laws of this State, the Federal antitrust laws nor communicated directly or indirectly its response to any competitor or any other person engaged in such line or business.

10. Under Family Code §231.006 (relating to child support), the consultant certifies that the individual or business entity named in this response is not ineligible to receive a specified payment and acknowledges that this contract may be terminated and payment may be withheld if this certification is inaccurate.

11. If the consultant is an individual not residing in Texas or a business entity not incorporated in or whose principal domicile is not in Texas, the consultant certifies that it either: (a) holds a permit issued by the Texas comptroller to collect or remit all state and local sales and use taxes that become due and owing as a result of the consultant's business in Texas; or (b) does not sell tangible personal property or services that are subject to the state and local sales and use tax.

12. consultant certifies that if a Texas address is shown as the address of the vendor, Vendor qualifies as a Texas Bidder as defined in 34 TAC §20.32(68).

13. consultant certifies that it has not received compensation for participation in the preparation of the specifications for this solicitation.

14. consultant must answer the following questions:

* If an award is issued, do you plan to utilize a subcontractor or supplier for any portion of the contract? If consultant plans to utilize a subcontractor, the subcontractor will comply with the same terms as the consultant as contained in this solicitation and other relevant OAG policy and procedure and the subcontractor must be approved in advance by OAG.

* If yes, what percentage of the total award would be subcontracted or supplied by Historically Underutilized Businesses (HUBs)?

* If no, explain why no subcontracting opportunities are available or what efforts were made to subcontract part of this project.

* Is consultant certified as a Texas HUB?

PAYMENT

Payment for services will be made upon receipt of invoices presented to the OAG in the form and manner specified by the OAG after certification of acceptance of all deliverables.

PROPOSAL PREPARATION AND CONTRACTING EXPENSES

All proposals must be typed, double spaced, on 8 1/2" x 11" paper, clearly legible, with all pages sequentially numbered and bound or stapled together. The name of the prospective consultant must be typed at the top of each page. Do not attach covers, binders, pamphlets, or other items not specifically requested.

A Table of Contents must be included with respective page numbers opposite each topic. The proposal must contain the following completed items in the following sequence:

1. Transmittal Letter: A letter addressed to Ms. Julie Geeslin (address at the end of this Request for Proposal) that identifies the person or entity submitting the proposal and includes a commitment by that per-

son or entity to provide the services required by the OAG. The letter must state, "The proposal enclosed is binding and valid at the discretion of the OAG." The letter must specifically identify the project for this proposal. The letter must include "full acceptance of the terms and conditions of the Request for Proposal." Any exceptions to the Request for Proposal must be specifically noted in the letter. However, any exceptions to the terms and conditions of the Request for Proposal or subsequently negotiated contract may disqualify the Consultant from further consideration at the OAG's discretion.

2. Executive Summary: A summary of the contents of the proposal, excluding cost information. Address services that are offered beyond those specifically requested as well as those offered within specified deliverables. Explain any missing or other requirements not met, realizing that failure to provide necessary information or offer required service deliverables may result in disqualification of the proposal.

3. Project Proposal

4. Cost Proposal

5. Relevant Technical Skill Statement (with references and vitae)

6. Relevant Experience Statement (with references and vitae)

To be considered responsive, a proposal must set forth full, accurate, and complete information as required by this request. A non-responsive proposal will not be considered for further evaluation. If the requirement that is not met is considered a minor irregularity or an inconsequential variation, an exception may be made at the discretion of the OAG and the proposal may be considered responsive.

A written request for withdrawal of a proposal is permitted any time prior to the submission deadline and must be received by Ms. Julie Geeslin (address at the end of this Request for Proposal). After the deadline, proposals will be considered firm and binding offers at the option of the OAG.

Preliminary and final negotiations with top-ranked prospective consultants may be held at the discretion of the OAG. The OAG may decide, at its sole option and in its sole discretion, to negotiate with one, several, or none of the prospective consultants submitting proposals pursuant to this request. During the negotiation process, the OAG and any prospective consultant(s) with whom the OAG chooses to negotiate, may adjust the scope of the services, alter the method of providing the services, and/or alter the costs of the services so long as the changes are mutually agreed upon and are in the best interest of the OAG. Statements made by a prospective consultant in the proposal packet or in other appropriate written form will be binding unless specifically changed during final negotiations. A contract award may be made by the OAG without negotiations if the OAG determines that such an award is in the OAG's best interest.

All prospective consultants of record will be sent written notice of which, if any, prospective consultant(s) is selected for the contract award on or about February 15, 2012 or within ten (10) days of making an award, whichever is later.

All proposals are considered to be public information subsequent to an award of the contract. All information relating to proposals will be subject to the Public Information Act, Texas Government Code Annotated, Chapter 552, after the award of the contract. All documents will be presumed to be public unless a specific exception in that Act applies. Prospective consultants are requested to avoid providing information which is proprietary, but if it is necessary to do so, proposals must specify the specific information which the prospective consultant considers to be exempted from disclosure under the Act and those pages or portions of pages which contain the protected information must be clearly marked. The specific exemption which the prospective consultant believes protects that information must be cited. The OAG will assume that a proposal submitted to the OAG contains no proprietary or confidential information if the prospective consultant has not marked or otherwise identified such information in the proposal at the time of its submission to the OAG.

Pursuant to Texas Government Code §§411.127 - 411.1271, the OAG may elect to obtain criminal history information from the Texas Department of Public Safety, the Federal Bureau of Investigation, or another law enforcement agency about any person or employee of an entity that proposes to enter into a contract, or who has entered a contract, to supply goods and services to the agency. This authorization includes subcontractors and their employees. If requested, the vendor shall provide identifying data necessary to facilitate the performance of initial and periodic criminal background checks on its employees and the employees of any subcontractor. In its sole discretion, the OAG may reject the assignment or restrict the access of personnel on the basis of reported criminal history, and is prohibited by law from disclosing the results of any criminal background check to the vendor.

The OAG has sole discretion and the absolute right to reject any and all offers, terminate this Request for Proposal, or amend or delay this Request for Proposal. The OAG will not pay any cost incurred by a prospective consultant in the preparation of a response to this Request for Proposal and such costs will not be included in the budget of the prospective consultant submitted pursuant to this Request for Proposal. The issuance of this Request for Proposal does not constitute a commitment by the OAG to award any contract. This Request for Proposal and any contract which may result from it are subject to appropriation of State and Federal funds and the Request for Proposal and/or contract may be terminated at any time if such funds are not available.

The OAG reserves the right to accept or reject any or all proposals submitted in response to this request and to negotiate modifications necessary to improve the quality or cost effectiveness of any proposal to the OAG. The OAG is under no legal obligation to enter into a contract with any offer or of any proposal on the basis of this request. The OAG intends any material provided in this Request for Proposal only and solely as a means of identifying the scope of services and qualifications sought.

The State of Texas assumes no responsibility for expenses incurred in the preparation of responses to this Request for Proposal. All expenses associated with the preparation of the proposal solicited by this Request for Proposal will remain the sole responsibility of the prospective consultant. Further, in the event that the prospective consultant is engaged to provide the services contemplated by this Request for Proposal, any expenses incurred by the prospective consultant associated with the negotiation and execution of the contract for the engagement will remain the obligation of the consultant.

Please address responses to:

Ms. Julie Geeslin

Budget and Purchasing Division

Office of the Attorney General of Texas

300 W. 15th Street, Third Floor

Austin, Texas 78701

Phone: (512) 475-4495

CONSULTING SERVICES CONTRACT
BETWEEN
THE OFFICE OF THE ATTORNEY GENERAL
AND
NAME OF CONTRACTOR

STATE OF TEXAS	**§**	**OAG CONTRACT NO. 12-XXXXX**
TRAVIS COUNTY	**§**	

THIS CONTRACT is entered into by and between the Office of the Attorney General (hereinafter referred to as "OAG") and NAME OF CONTRACTOR. (hereinafter referred to as "Contractor") and collectively referred to as the Parties. The Parties, in consideration of their respective promises, agreements, and covenants contained and recited herein, hereby agree to the mutual obligations and performances described in this contract as follows.

SECTION 1. CONTRACT PERIOD. This contract shall commence on the date the final signature is affixed hereto and shall terminate on August 31, 2012 or upon the completion of Contractor's work described herein, whichever occurs last, unless terminated earlier pursuant the terms of this contract. If the performance(s) continues beyond August 31, 2012, then the Parties agree the OAG's obligation to pay is specifically contingent upon availability of legislative appropriations for the purpose(s) in the contract.

SECTION 2. AUTHORITY. The performances required of Contractor by this contract constitute "consulting services" and are governed by the requirements applicable to consulting services or major consulting services as described and defined in the TEX. GOV'T CODE §§ 2254.021 - .040.

SECTION 3. SERVICES TO BE PERFORMED BY CONTRACTOR. Contractor shall perform the consulting services in accordance with the terms and conditions herein:

3.1 **Recommendations.** Contractor shall make recommendations throughout the Term of this Contract to improve the integration and reconciliation of indirect and direct billing methodologies.

3.2 **Indirect Cost Allocation Plans**. Contractor will prepare two Indirect Cost Allocation Plans one based upon actual expenditures of the OAG for FY 2011 and another based upon budgeted expenditures of the OAG for FY 2013.

3.2.1 **Planning**. Contractor shall plan for the review of the methodologies, rates and obtain the necessary information, raw cost data, and statistical data necessary to identify allocable costs for evaluating, preparing, submitting and negotiating the final Indirect Cost Allocation Plans.

3.2.2 **Review the Indirect Cost Methodologies and Develop Rates**. Contractor shall review the indirect cost methodologies of the OAG to determine areas of cost recovery which will maximize revenue from the recovery of indirect costs. Contractor shall also develop new indirect cost rates throughout the OAG, as appropriate.

3.2.3 **Prepare Indirect Cost Allocation Plans**. After Contractor completes work applicable to the *Review the Indirect Cost Methodologies and Develop Rates*, Contractor will prepare two Indirect Cost Allocation Plans in accordance with OMB Curricular A-87 that satisfy the

requirements of the United States Department of Health & Human Services, Region VI, DCA (hereinafter referred to as "DHHS"), one based upon actual expenditures of the OAG for FY 2011 and another based upon budgeted expenditures of the OAG for FY 2013. Contractor shall perform all necessary services to prepare and obtain approval for the Indirect Cost Allocation Plans to include but not limited to:

3.2.3.1 Identify the sources of financial information;
3.2.3.2 Inventory all federal and other programs administered by the OAG;
3.2.3.3 Classify all OAG divisions;
3.2.3.4 Determine administrative divisions;
3.2.3.5 Determine allocation bases for allotting services to benefitting divisions;
3.2.3.6 Develop allocation data for each allocation base;
3.2.3.7 Prepare allocation worksheets based upon actual FY11 expenditures and budgeted FY13 expenditures;
3.2.3.8 Summarize costs by benefitting division;
3.2.3.9 Collect cost data for all of the programs included in the inventory of federal and other programs administered by the OAG;
3.2.3.10 Determine indirect cost rates throughout the OAG on an annual basis;
3.2.3.11 Acquire and include information on costs billed or allocated internally to programs and funding sources.
3.2.3.12 Prepare and present draft Indirect Cost Plans to the OAG for review and comment *no later than April 6, 2012*;
3.2.3.13 Formalize the Actual FY11 and Budgeted FY13 Indirect Cost Plans and present them to the DHHS *no later than April 30, 2012*; and
3.2.3.14 Negotiate the Indirect Cost Plans' approval with DHHS *no later than August 31, 2012.*

3.3 Legal Billing. Contractor will prepare FY 2013 billing rates for legal services and reconcile FY 2011 legal billing rates with actual costs of legal services. The FY 2013 billing rates for legal services will be used to directly bill state agencies and other users of the legal services of the OAG.

3.3.1 Planning. Contractor shall plan for the review of the methodologies, rates and obtain the necessary information, raw cost data, and statistical data necessary to reconcile the existing rates with actual costs and to prepare an updated report regarding the standardized Legal Billing Rates,

3.3.2 Reconcile FY 2011 Legal Billing Rates with Actual Costs. Contractor will reconcile FY 2011 legal billing rates with actual costs of the OAG in providing the legal services and provide to the OAG a report of that reconciliation;

3.3.3 FY 2013 Billing Rates for Legal Services and Reconciliation Report. Contractor shall develop and present a report to the OAG for the FY 2013 billing rates for legal services which will be used to directly bill state agencies and other users of the legal services of the OAG. Contractor shall also prepare a final report which reconciles FY 2011 billing rates with actual costs for the OAG. Contractor will perform all services necessary to prepare and deliver the reports to the OAG. Examples of the types of services to be performed are:

3.3.3.1 Review current criteria used by the OAG for charging various agencies;
3.3.3.2 Determine the types of legal services provided to the agencies;
3.3.3.3 Compile direct hours for each type of service;
3.3.3.4 Determine effort reporting requirements;

3.3.3.5 Reexamine billing rate options;

3.3.3.6 Determine the actual cost of services;

3.3.3.7 Analyze and confirm revenues and cost analyses;

3.3.3.8 Prepare and present a draft Legal Services Billing Schedule for FY 2011 actual costs and FY 2013 budgeted costs to the OAG *no later than July 27, 2012*; and

3.3.3.9 Formalize a Legal Services Billing Schedule *no later than August 31, 2012*.

3.4 DHHS Approval. The Parties agree that one of the primary purposes of this Contract is for the OAG to have Indirect Cost Allocation Plans and Legal Billing Rates approved by the DHHS. Therefore Contractor will negotiate the approval of the final FY 2011 and the budgeted FY 2013 Indirect Cost Allocation Plans and the FY 2013 Legal Billing Rates with DHHS, keeping the OAG fully informed about all significant developments relating to DHHS approval.

3.5 Delivery of Final Approved Plans. Contractor will deliver to the OAG ten [10] copies of the approved Indirect Cost Allocation Plans. Contractor will also deliver to the OAG eight [8] copies of the final updated standardized Legal Billing Rates Report and eight [8] copies of the detailed report reconciling FY 2011 legal billing rates with actual costs.

3.6 Provision of Audit Assistance. Regardless of time period, Contractor will respond to questions and defend them should the indirect cost plans, indirect cost rates or legal billing schedules or methodologies be questioned or audited.

SECTION 4. SCHEDULE FOR PERFORMANCE OF SERVICES BY CONTRACTOR.

4.1 Time Is of the Essence. Time is of the essence in the rendering of services required by this contract.

4.2 Indirect Cost Allocation Plans Schedule.

4.2.1 Submission of Draft Plans. Prepare and present draft Indirect Cost Allocation Plans to the OAG for review and comment *no later than April 6, 2012*.

4.2.2 Submission to DHHS. Formalize the Actual FY11 and Budgeted FY13 Indirect Cost Plans and present them to the DHHS *no later than April 30, 2012*; and

4.2.3 DHHS Negotiation and Final Approval. Contractor agrees to perform all work required to accomplish negotiation and approval by the DHHS of the two Indirect Cost Allocation Plans *no later than August 31, 2012*, unless the OAG agrees in writing to extend that date.

4.3 Legal Billing Services and Report(s) Schedule.

4.3.1 Schedule for Delivery of Report Reconciliation of the Existing Rates and Actual Costs. Contractor agrees to perform and complete all work required to reconcile existing billing rates with actual costs and for delivering to the OAG a detailed report which reconciles the existing rates and actual costs *no later than August 31, 2012*, unless the OAG agrees in writing to extend that date.

4.3.2 Schedule for Delivery of Final Report for Standardized Legal Billing Rates.

Contractor agrees to perform all work required to update the standardized Legal Billing Rates, including the submission of a final report to the OAG regarding those updated rates, as outlined above and in the request for proposal referred to above, *no later than August 31, 2012*, unless the OAG agrees in writing to extend that date.

4.4 Target Date for Completion of All Contractor's Obligations. The target date for completion of all of the Contractor's obligations under the terms of this Contract, including DHHS approval of the FY 2010 Indirect Cost Allocation Plan, is *August 31, 2012.*

4.5 Extension of Performance Dates. The OAG acknowledges that due to circumstances beyond its control, Contractor may not be able to obtain DHHS approval by August 31, 2012. In the event that Contractor is unable to obtain DHHS approval by August 31, 2012, Contractor shall so notify the OAG and the contract will hereby be extended until such time that Contractor obtains the DHHS approval.

SECTION 5. INCORPORATED DOCUMENTS. The following documents may describe the required performances in more detail and are incorporated herein in their entirety in descending order of precedence:

5.1 The Request for Proposal dated December 23, 2011, issued by the OAG; and

5.2 The Proposal to Provide Services dated MONTH DATE, 2012, issued by the Contractor.

Any conflict between the incorporated documents will be resolved according to the order of precedence. To the extent of any conflict between the terms of this contract and the incorporated documents, the terms of this contract will control.

SECTION 6. COMPENSATION. The total amount of compensation to be paid Contractor in consideration of full, satisfactory and timely performance of all its obligations as set forth in this agreement shall not exceed _____ **($) DOLLARS**. The parties agree to abide by the following payment schedule.

6.1 Indirect Cost Allocation Plans. Upon receipt and approval by the OAG of the completed FY 2011 Indirect Cost Allocation Plan and the completed proposed Indirect Cost Allocation Plan for use in FY 2013, including the submission of the plans to DHHS, the Contractor shall submit an invoice in an amount not to exceed _____ **($) DOLLARS**.

6.2 Executed Negotiation Agreement from DHHS. Upon receipt and acceptance by the OAG of an executed Negotiation Agreement from DHHS for the fixed FY 2013 Indirect Cost Allocation Rate, including the delivery of final approved plans to the OAG, the Contractor shall submit an invoice in an amount not to exceed _____ **($) DOLLARS**.

6.3 Final Report for Standardized Legal Billing Rates. Upon receipt and acceptance by the OAG of the completed final report on the updated standardized Legal Billing Rates, including the delivery of the final updated standardized Legal Billing Rates Report and the detailed report reconciling FY 2011 legal billing rates with actual costs, the Contractor shall submit an invoice in an amount not to exceed _____ **($) DOLLARS**.

The form of any invoice submitted under this section must comply with the specifications of the Attorney General and must be submitted in the manner and with the documentation the Attorney General may require.

Upon acceptance of Contractor's performance and receipt of an acceptable invoice required to be submitted under this section, the OAG shall pay the Contractor said amount in accordance with Chapter 2251 of the Texas Government Code. It is the policy of the OAG to make payment on a properly prepared and submitted invoice within thirty (30) days of any final acceptance of performance.

SECTION 7. TERMINATION.

7.1 Termination for Convenience. The OAG reserves the right to terminate the contract at any time for convenience, in whole or in part, by providing thirty (30) calendar days advance written notice of termination. In the event of such a termination, the contractor shall, unless otherwise mutually agreed upon in writing, cease all work immediately upon the effective date of termination. The OAG shall be liable for payments limited only to the portion of work authorized by the OAG in writing and completed prior to the effective date of termination, provided that the OAG shall not be liable or any work performed that is not acceptable to the OAG and/or does not meet contract requirements. All work products produced by the Contractor and paid for by the OAG shall become the property of the OAG and shall be tendered upon request.

7.2 Termination for Breach. The OAG may, by written notice of material breach to the contractor, terminate this contract, in whole or in part, if the contractor fails to perform in full compliance with the contract requirements. Upon receipt of written notice to terminate, the contractor shall promptly discontinue all services affected (unless the notice directs otherwise) and shall deliver or otherwise make available to the OAG, all data, drawings, specifications, reports, estimates, summaries, and such other information and materials as may have been accumulated by the contractor in performing this contract, whether completed or in progress.

7.3 Ownership of Work Product. Upon the completion, expiration, or termination of the Contract, Contractor grants and assigns to the OAG the exclusive ownership of all works in connection with this contract. Nothing contained herein is intended nor shall it be construed to confer to the OAG any rights to Contractor's proprietary software.

7.4 Dispute Resolution.

7.4.1 The dispute resolution process provided for in Chapter 2260 of the Texas Government Code shall be used, as further described herein, by the OAG and by Contractor to attempt to resolve any claim for breach of contract made by the Contractor:

7.4.1.1 Contractor's claims for breach of this contract that the parties cannot resolve in the ordinary course of business shall be submitted to the negotiation process provided in Chapter 2260, subchapter B, of the Government Code. To initiate the process, Contractor shall submit written notice, as required by subchapter B, to Julie Geeslin, Director of Budget & Purchasing, or her designate. Said notice shall specifically state that the provisions of Ch. 2260, subchapter B, are being invoked. A copy of the notice shall also be given to all other representatives of Contractor and the OAG otherwise entitled to notice under the parties' contract. Compliance by Contractor with subchapter B is a condition precedent to the filing of a contested case proceeding under Chapter 2260, subchapter C, of the Government Code.

7.4.1.2 The contested case process provided in Chapter 2260, subchapter C, of the Government Code is Contractor's sole and exclusive process for seeking a remedy for any

and all alleged breaches of contract by OAG if the parties are unable to resolve their disputes under subsection 7.4.1.

7.4.1.3 Compliance with the contested case process provided in subchapter C is a condition precedent to seeking consent to sue from the Legislature under Chapter 107 of the Civil Practices and Remedies Code. Neither the execution of this contract by OAG nor any other conduct of any representative of OAG relating to the contract shall be considered a waiver of sovereign immunity to suit.

7.4.2 The submission, processing, and resolution of Contractor's claim are governed by the published rules (1 TAC § 68 et seq.) adopted by the OAG pursuant to Chapter 2260, as currently effective, hereafter enacted or subsequently amended.

7.4.3 Neither the occurrence of an event nor the pendency of a claim constitutes grounds for the suspension of performance by the Contractor, in whole or in part.

SECTION 8. CERTIFICATIONS OF CONTRACTOR. By agreeing to and signing this Contract, Contractor hereby makes the following certifications and warranties:

8.1 Delinquent Child Support Obligations. Under Section 231.006 of the Texas Family Code, Contractor certifies that it and/or the business entity named in this Contract is not ineligible to receive the specified grant, loan, or payment and acknowledges that this Contract may be terminated and payment may be withheld if this certification is inaccurate.

8.2 Contractor Participation in Development of Criteria. The Contractor certifies that neither it nor its employee(s), agents, or representatives have participated in the development of specific criteria for the award of this contract and/or in the selection of the successful offeror of this contract.

8.3 Previous Employment with the Office of the Attorney General. Contractor certifies that none of the people who will perform the services under this Contract have been employed by the OAG within the previous twelve (12) months.

8.4 Conflict of Interest. Contractor certifies that neither it nor the personnel or entities employed in rendering services under this Contract have, nor shall they knowingly acquire, any interest that would be adverse to or conflict in any manner with the performance of Contractor's obligations under this Contract.

8.5 Gifts to Public Servant. Contractor warrants that it has not given nor intends to give at any time hereafter any economic opportunity, future employment, gift, loan, gratuity, special discount, trip, favor, or service to a public servant in connection with the award of this Contract.

8.6 Corporate Franchise Tax. By signing this Contract, Contractor certifies that its Texas franchise tax payments are current or that it is exempt from, or not subject to, such tax.

8.7 No Claims. Contractor certifies that Contractor does not have any potential or existing claims against or unresolved audit exceptions with the State of Texas or any agency of the State of Texas.

8.8 Debt to State. Contractor acknowledges and agrees that, to the extent Contractor owes any debt or delinquent taxes to the State of Texas, any payment's Contractor is owed under this Contract will be applied by the Comptroller of Public Accounts toward any debt or delinquent taxes Contractor owes the State of Texas until the debt or delinquent taxes are paid in full.

8.9 Buy Texas. With respect to all services, if any, purchased pursuant to this Contract, Contractor represents and warrants that it will buy Texas products and materials for use in providing the services authorized herein when such products and materials are available at a comparable price and in a comparable period of time when compared to non-Texas products and materials.

8.10 Effect of Certifications. The Contractor, by signing this contract, certifies that the individual or business entity named in this contract is not ineligible to receive the specified contract and acknowledges that this contract may be terminated and payment withheld if this certification is inaccurate.

SECTION 9. GENERAL TERMS AND CONDITIONS.

9.1 Independent Contractor/Indemnification. Contractor agrees and acknowledges that during the existence of this contract, it acts as a consultant and is furnishing services in the capacity of an independent contractor. Contractor will be solely and entirely responsible for its acts and the acts of its agents, employees, and representatives during the performance of this agreement. Contractor agrees to indemnify and hold harmless the OAG, its employees and designees, and the State of Texas from any and all liability, actions, claims, demands, or suits, and all related costs, attorney fees, and expenses, which arise from or are occasioned by the negligence, misconduct, or wrongful act or omission of contractor, its employees, representatives, agents or subcontractors in its performance under this contract.

In the event of loss, damage, or destruction of any property of the OAG due to the negligence or misconduct, wrongful act or omission on the part of the Contractor, its employees, agents, representatives, or subcontractors, the Contractor shall indemnify the Attorney General and pay the full cost of either repair, reconstruction, or replacement of the property, at the Attorney General's election. Such cost shall be due and payable by the Contractor within ten calendar days after the date of the Contractor's receipt from the Attorney General of a written notice of the amount due.

The Contractor shall indemnify and hold harmless the OAG against any claim of copyright or patent infringement arising in connection with the performances required of the Contractor pursuant to this contract. The Contractor shall be liable to pay all costs, damages, and attorneys' fees incurred by the OAG as a result of any claim for the infringement of any United States or internationally protected patents or copyrights arising from the use by the Contractor or the OAG or its employees or designees of any equipment, materials, information, or ideas employed or furnished by the Contractor in connection with the performances called for in this contract. The Contractor and the OAG agrees to furnish timely written notice to each other of any such claim of copyright or patent infringement.

9.2 Assistants. The Contractor agrees that any person hired or engaged by the Contractor and who assists in performing the services agreed to herein shall not be considered employees or agents of the OAG. The Contractor shall be responsible for any payments and other claims due such persons. Further, the Contractor agrees to comply with all state and federal laws applicable to any such persons, including laws regarding wages, taxes, insurance, and workers' compensation. The OAG shall not be liable to the Contractor, its employees, agents, or others for the provision of unemployment insurance and/or workers' compensation.

9.3 Confidentiality of Information and Records. During the term of this contract, as well as thereafter, Contractor agrees to keep all information obtained from the OAG – if such information is not otherwise open to the public under Chapter 552, Texas Government Code -- confidential, and will not use any such information to the detriment of the OAG or its officers, employees, or clients at any time. All information in whatever form prepared by the Contractor for the OAG pursuant to this contract shall not be

disclosed by Contractor without the prior written approval of the OAG.

9.4 Assignment.

9.4.1 Contractor Assignment. Contractor may not assign this Contract or any of its rights or obligations hereunder (including, without limitation, rights and duties of performance) to any third party or entity, without the prior written consent of the OAG. Any attempted assignment without the OAG's prior written consent is void. The initiation of bankruptcy proceeding by or on behalf of Contractor and/or any involuntarily assignment or other assignment by operation of law shall result in the automatic termination of this Contract.

9.4.2 Antitrust. Contractor hereby assigns to the OAG any and all claims for overcharges associated with this Contract which arise under the antitrust laws of the United States 15 U.S.C.A. Section 1, et seq. (1973), and which arise under the antitrust laws of the State of Texas, Tex. Bus. & Comm. Code Ann. Sec. 15.01, et seq. (1967).

9.5 Subcontracting. In the event that the Contractor should determine that it is necessary or expedient to subcontract for any of the performances herein, prior to executing a subcontract, the Contractor shall submit a copy of the proposed subcontract to the OAG and shall obtain the written approval of the OAG for subcontracting the subject performances. The Contractor, in subcontracting for any performances specified herein, expressly understands and agrees that the OAG shall not be liable in any manner to the Contractor's subcontractor(s).

In no event shall this section or any other provision of this contract be construed as relieving the Contractor of the responsibility for ensuring that all performances rendered under this contract, and any subcontracts thereto, are rendered in compliance with all of the terms of this contract.

9.6 Media Releases or Pronouncements. The Contractor understands that the OAG does not endorse any vendor, commodity, or service. Neither the Contractor, its employees, representatives nor other agents or subcontractors may issue any media release, advertisement, publication, or public pronouncement which pertains to this contract or the services or project to which this contract relates or which mentions the OAG without the prior written approval of the OAG.

9.7 Amendments. This contract may be amended only upon written agreement by the parties.

9.8 Applicable Law and Venue. This Contract is made and entered into in the State of Texas, and this Contract and all disputes arising out of or relating to the Contract and/or the Work Orders shall be governed by the laws of the State of Texas, without regard to any otherwise applicable conflict of law rules or requirements.

Contractor agrees that the OAG and/or the State do not waive any immunity (including, without limitation, sovereign immunity). Contractor further agrees that any properly allowed litigation arising out of or in any way relating to this Contract and/or any Work Order shall be commenced exclusively in the state district courts of Travis County, Texas. Contractor thus hereby irrevocably and unconditionally consents to the exclusive jurisdiction of the state district courts of Travis County, Texas for the purpose of prosecuting and/or defending such litigation. Contractor hereby waives and agrees not to assert: (a) that Contractor is not personally subject to the jurisdiction of the state district courts of Travis County, Texas, (b) that the suit, action or proceeding is brought in an inconvenient forum, (c) that the venue of the suit, action or proceeding is improper, or (d) any other challenge to jurisdiction or venue.

9.10 Tex. Gov't Code § 2262.003. Required Contract Provision Relating to Auditing. Contractor understands that acceptance of funds under this contract, acts as acceptance of the authority of the State Auditor's Office, or any successor agency, to conduct an audit or investigation in connection with those funds. Contractor further agrees to cooperate fully with the State Auditor's office or its successor in the conduct of the audit or investigation, including providing all records requested. Contractor will ensure that this clause concerning the authority to audit funds received indirectly by subcontractors through Contractor and the requirement to cooperate is included in any subcontract it awards. Contractor will reimburse the State of Texas for all costs associated with enforcing this provision.

9.11 Signatory. The Parties agree the signatories to this Contract are acting in their official capacities. Having agreed to the terms herein, the undersigned signatories hereby represent and warrant that they have actual or delegated authority to sign this Contract.

9.12 Severability/Interpretation. The fact that a particular provision is held under any applicable law to be void or unenforceable will in no way affect the validity of other provisions and the Contract will continue to be binding on both parties. Any provision that is held to be void or unenforceable will be replaced with language that is as close as possible to the intent of the original provision. Any vague, ambiguous or conflicting terms shall be interpreted and construed in such a manner as to accomplish the purpose of the Contract.

9.13 Written Notice Delivery

9.13.1 Any notice required or permitted to be given under this Contract by the OAG to the Contractor shall be in writing and shall be deemed to have been given immediately if delivered by fax, e-mail, or in person to the Contractor as set forth in this section. Any notice required or permitted to be given under this Contract by certified mail return receipt requested shall be deemed to have been given on the date of attempted or actual delivery to the recipient if addressed to the receiving party at the address specified in this section.

9.13.2 Contractor's Mailing Address. The mailing address of the Contractor for all purposes under this Contract and for all notices hereunder shall be:

NAME OF CONTRACTOR
STREET ADDRESS
CITY, STATE ZIP CODE

9.13.3 OAG's Address. The address of the OAG for all purposes under this Contract and for all notices hereunder shall be sent by registered or certified mail with return receipt to:

Office of the Attorney General
Post Office Box 12548
Austin, Texas 78711-2548
Attn: Julie Geeslin
Director, Budget and Purchasing

SECTION 10. BACKGROUND PROVISION. Pursuant to Texas Government Code Sections 411.127-1271, the OAG may elect to obtain criminal history information from the Texas Department of Public Safety, the Federal Bureau of Investigation, or another law enforcement agency about any person or employee of an entity that proposes to enter into a contract, or who has entered a contract, to supply goods and services to the agency. This authorization includes subcontractors and their employees. If requested,

the vendor shall provide identifying data necessary to facilitate the performance of initial and periodic criminal background checks on its employees and the employees of any subcontractor. In its sole discretion, the OAG may reject the assignment or restrict the access of personnel on the basis of reported criminal history, and is prohibited by law from disclosing the results of any criminal background check to the vendor.

SECTION 11. LIMITATION OF LIABILITY

11.1 **Contractor's Liability**. The OAG agrees that Contractor's total liability to the OAG for any and all damages whatsoever arising out of or in any way related to this contract from any cause, including but not limited to contract liability or Contractor's negligence, errors, omissions, strict liability, breach of contract or breach of warranty shall not, in the aggregate, exceed **FOUR HUNDRED THOUSAND ($400,000) DOLLARS**. In no event shall Contractor be liable for indirect, incidental, or consequential damages, regardless of the legal theory under which such damages are sought.

11.2 **OAG's Liability**. The Contractor agrees that OAG's total liability to the Contractor for any and all damages whatsoever arising out of or in any way related to this contract from any cause, including but not limited to contract liability or OAG's negligence, errors, omissions, strict liability, breach of contract or breach of warranty shall not, in the aggregate, exceed _____ **($) DOLLARS**. In no event shall the OAG be liable for indirect, incidental, or consequential damages, regardless of the legal theory under which such damages are sought.

IN WITNESS HEREOF, THE PARTIES HAVE SIGNED AND EXECUTED THIS CONTRACT IN MULTIPLE COUNTERPARTS.

OFFICE OF THE ATTORNEY GENERAL	NAME OF CONTRACTOR
_____	_____
Diane B. Smith Deputy for Administration	NAME OF REPRESENTATIVE, TITLE OF REPRESENTATIVE
Date:	Federal Tax Identification No. _____ Date:

For information regarding this publication, contact Zindia Thomas, Agency Liaison, at (512) 936-9901.

TRD-201105531
Jay Dyer
Deputy Attorney General
Office of the Attorney General
Filed: December 13, 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 12/19/11 - 12/25/11 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 12/19/11 - 12/25/11 is 18% for Commercial over $250,000.

[1] Credit for personal, family or household use.

[2] Credit for business, commercial, investment or other similar purpose.

TRD-201105523
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: December 13, 2011

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Commission on State Emergency Communications

Notice of Rates for the Wireline 9-1-1 Fee and Equalization Surcharge and Allocation of Appropriated Equalization Surcharge Revenue

Notice is hereby given of the Commission on State Emergency Communications' (CSEC) rates for the wireline 9-1-1 service fee (wireline fee) and equalization surcharge (surcharge), and the allocation of surcharge revenue under Texas Health and Safety Code Chapter 771. The current wireline fee is $.50 per "local exchange access line or equivalent local exchange access line" as defined by CSEC in 1 TAC §255.4 (access lines). The surcharge is currently set at 1.0% of the charges for "intrastate long-distance service" as defined by CSEC in 1 TAC §255.2. Effective March 1, 2012, and pursuant to revisions to Chapter 771 passed by the 82nd Texas Legislature, the surcharge becomes a fixed fee imposed on all non-exempt access lines and wireless telecommunications connections. The surcharge was set by CSEC at its November 2011 open meeting at $0.06 per month. The allocation of appropriated surcharge is authorized by CSEC consistent with the strategies in its approved appropriations bill pattern and as authorized by Health and Safety Code §§771.072, 771.075, and 771.0751.

Interested parties have 45 days from the date this notice is published in the *Texas Register* to file comments. Comments should be submitted to the Public Utility Commission of Texas c/o Central Records, P.O. Box 13326, Austin, TX 78711-3326. Hearing and speech-impaired individuals with text telephone (TTY) may contact the Public Utility Commission at (512) 936-7136. **All comments should reference Project Number 38917.**

Wireline Fee and Surcharge

The wireline fee is applicable in the geographic areas within each of Texas' 24 Regional Planning Commissions (RPCs) in which 9-1-1 service is provided through the state 9-1-1 program. This does not include areas for the following counties and cities that are not participating in the state 9-1-1 program. The counties not participating include: Smith, Taylor, Austin, Bexar, Comal, Guadalupe, Brazos, Calhoun, Cameron, Denton, El Paso, Ector, Galveston, Harris, Henderson, Howard, Kerr, Lubbock, McLennan, Medina, Midland, Montgomery, Wichita, Wilbarger, Potter, Randall, Tarrant, Rusk and Harrison. The cities not participating include: Addison, Aransas Pass, Dallas, Plano, Coppell, DeSoto, Ennis, Cedar Hill, Longview, Wylie, Denison, Duncanville, Farmers Branch, Garland, Highland Park, Mesquite, Richardson, Sherman, University Park, Glenn Heights, Hutchins, Lancaster, Portland, Rowlett, Corpus Christi, Kilgore and Sunnyvale.

The surcharge is a statewide fee that is applicable irrespective of whether 9-1-1 service is provided by an RPC or by an Emergency Communication District (ECD), as that term is defined in Texas Health and Safety Code §771.001(3).

Allocation of Surcharge

RPCs

CSEC allocates appropriated surcharge for 9-1-1 to the RPCs in order to subsidize those RPCs whose statutory allocation of appropriated service fees (wireline and wireless fees) is insufficient to fund their CSEC-approved strategic plans. Allocation of appropriated surcharge is based on need as initially determined by CSEC staff during the strategic plan process. The requirements of the RPCs' strategic plans are prescribed CSEC rule (1 TAC §255.1).

The RPCs submit their strategic plans in three stages: Stage 1 is submitted in even-numbered years, reviewed by CSEC, and incorporated as appropriate into CSEC's Legislative Appropriations Request. Stage 2 is submitted in odd-numbered years to correspond with the legislative session and requires detailed planning and financial information to allocate appropriated funding. Stage 3 is required when contingent funding has been certified by the Comptroller. At each stage, CSEC staff reviews and analyzes each plan to ensure that it is in accord with CSEC's hierarchical budget components.

The allocation of surcharge to the RPCs is limited by revised Health and Safety Code §771.072 to "not more than 40 percent" of the revenue derived from the surcharge. The Comptroller's estimate of available revenue (AR) for surcharge for FY 2012 is $38.220 million. For FY 2012, appropriated surcharge to be allocated to fund the RPCs' strategic plans is within statutory limits at $7,089,009.

Poison Control Program Funding of the Poison Control Program is appropriated and allocated in accordance with CSEC's legislative bill pattern. As of May 1, 2010, CSEC became the sole administrator of the Poison Control Program. The Texas Legislature has approved the following strategies for funding of poison control services:

B.1.1 Strategy: Poison Call Center Operations;

B.1.2. Strategy: Statewide Poison Network Operations; and

B.1.3 Strategy: CSEC Poison Program Management.

CSEC allocates appropriated surcharge to the six regional poison control centers (e.g., University of Texas Medical Branch at Galveston; Scott and White Memorial Hospital, Temple, Texas) through grants approved in accordance with CSEC rules, 1 TAC §254.1 and §254.3. CSEC issues vouchers to reimburse the regional poison control centers for approved costs up to the amount of the approved grants for Poison Call Center Operations; and directly pays vendors for Network Operations and Program Management.

The allocation of surcharge is limited by statute to "not more than 60 percent" of the revenue derived from the surcharge. The Comptroller's estimate of available revenue (AR) for surcharge for FY 2011 is $38.220 million. For FY 2012, appropriated surcharge to be allocated is within statutory limits at $7.089 million.

Referenced documents can be reviewed through the Public Utility Commission's InterChange at http://interchange.puc.state.tx.us/ by logging-in with the project number provided above. Additional details and related information can be obtained by request to the Commission on State Emergency Communications, 333 Guadalupe Street, Suite 2-212, Austin, Texas 78701-3942.

TRD-201105563
Patrick Tyler
General Counsel
Commission on State Emergency Communications
Filed: December 14, 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 January 23, 2012. 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 January 23, 2012. 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: ARIJA & ALISHAN INVESTMENT, INCORPORATED dba El Amigo; DOCKET NUMBER: 2011-1657-PST-E; IDENTIFIER: RN101803617; 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: $2,550; ENFORCEMENT COORDINATOR: Jaime Geil, (512) 239-5717; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(2) COMPANY: Chris Friday; DOCKET NUMBER: 2011-2020-WR-E; IDENTIFIER: RN106217938; LOCATION: Center, Shelby County; TYPE OF FACILITY: individual; RULE VIOLATED: TWC, §11.081 and §11.121, by failing to obtain proper authorization prior to impounding, diverting, or using state water; PENALTY: $350; ENFORCEMENT COORDINATOR: Harvey Wilson, (512) 230-0321; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(3) COMPANY: City of Cottonwood Shores; DOCKET NUMBER: 2011-1779-PWS-E; IDENTIFIER: RN101384683; LOCATION: Cottonwood Shores, Burnet County; TYPE OF FACILITY: municipal public water supply; RULE VIOLATED: 30 TAC §290.121(a) and (b), by failing to compile 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(q)(1), by failing to issue a boil water notification to the customers of the facility within 24 hours of a water outage using the prescribed format in 30 TAC §290.47(e); 30 TAC §290.46(m)(4), by failing to maintain all distribution system lines, storage and pressure maintenance facilities, water treatment units, and all related appurtenances in a watertight condition; and 30 TAC §290.46(e)(6)(A), by failing to employ a Class C or higher licensed individual at a surface water treatment plant serving no more than 1,000 connections and employing a part time operator with a Class B or higher license; PENALTY: $654; ENFORCEMENT COORDINATOR: Michaelle Sherlock, (210) 403-4076; REGIONAL OFFICE: 2800 South IH 35, Suite 100, Austin, Texas 78704-5712, (512) 339-2929.

(4) COMPANY: CODY COMPANY, INCORPORATED; DOCKET NUMBER: 2011-1413-PST-E; IDENTIFIER: RN102324225; LOCATION: Ennis, Ellis County; TYPE OF FACILITY: fleet refueling facility; RULE VIOLATED: 30 TAC §334.50(b)(2) and TWC, §26.3475(a), by failing to provide release detection for the piping associated with the underground storage tank; PENALTY: $2,005; ENFORCEMENT COORDINATOR: Clinton Sims, (512) 239-6933; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(5) COMPANY: Coil Tubing Services, L.L.C.; DOCKET NUMBER: 2011-0916-MLM-E; IDENTIFIER: RN103934329; LOCATION: Alice, Jim Wells County; TYPE OF FACILITY: truck washing facility; RULE VIOLATED: TWC, §26.121(a)(1), 30 TAC §305.125(1), and Texas Pollutant Discharge Elimination System (TPDES) Permit Number WQ0004589000, Effluent Limitations and Monitoring Requirements Number 1, by failing to comply with permitted effluent limits; 30 TAC §305.125(1) and (17) and §319.7(d), and TPDES Permit Number WQ0004589000, Monitoring and Reporting Requirements Number 1, by failing to timely submit discharge monitoring reports (DMRs) for the monitoring periods ending April 30, 2010; June 30, 2010; September 30, 2010; and February 28, 2011; 30 TAC §§305.125(1) and (11)(A), 319.6 and 319.9(d), and TPDES Permit Number WQ0004589000, Monitoring and Reporting Requirements Number 2, by failing to assure the quality of all measurements through the use of blanks, standards, duplicates analyses, and spikes; 30 TAC §305.125(1) and (11)(C) and §319.7(a) and TPDES Permit Number WQ0004589000, Monitoring and Reporting Requirements Number 3(c)(iii), by failing to maintain records of monitoring activities, which include the date and time the analysis was performed; 30 TAC §305.125(1) and §319.5(f), and TPDES Permit Number WQ0004589000, Definitions and Standard Permit

Conditions Number 2(a) and (c), by failing to accurately calculate effluent results; 30 TAC §305.125(1) and TPDES Permit Number WQ0004589000, Monitoring and Reporting Requirements Number 5, by failing to calibrate the flow meter by a trained person at plant start up and as often thereafter as necessary to ensure accuracy, but not less often than annually; 30 TAC §305.125(1) and §319.5(e) and TPDES Permit Number WQ0004589000, Monitoring and Reporting Requirements Number 4, by failing to include all results in the calculation and reporting of the values submitted on the DMRs; 30 TAC §305.125(1) and TPDES Permit Number WQ0004589000, Monitoring and Reporting Requirements Number 7.c, by failing to submit noncompliance notification reports for effluent violations that deviated from the permitted effluent limits by more than 40%; 30 TAC §305.125(1) and (11)(A) and §319.5(b), and TPDES Permit Number WQ0004589000, Monitoring and Reporting Requirements Number 3.a, by failing to monitor effluent at intervals specified in the permit; and 30 TAC §305.125(1) and §330.15(c) and TPDES Permit Number WQ0004589000, Operational Requirements Number 12, by failing to dispose of municipal solid waste at an authorized facility; PENALTY: $16,904; ENFORCEMENT COORDINATOR: Heather Brister, (254) 761-3034; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5503, (361) 825-3100.

(6) COMPANY: ConocoPhillips Company; DOCKET NUMBER: 2011-1766-AIR-E; IDENTIFIER: RN101619179; LOCATION: Old Ocean, Brazoria County; TYPE OF FACILITY: petroleum refinery; RULE VIOLATED: 30 TAC §§101.20(3), 116.115(c) and 122.143(4), Federal Operating Permit Number O1626, Special Terms and Conditions Number 19, Air Permit Number 30513, Special Conditions (SC) Number 1, Air Permit Numbers 5920A and PSDTX103M4, SC Number 1, and Texas Health and Safety Code, §382.085(b), by failing to prevent unauthorized emissions; PENALTY: $10,000; ENFORCEMENT COORDINATOR: Nadia Hameed, (713) 767-3629; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(7) COMPANY: Donald Mayo, Sr. dba Donald Mayo Texaco; DOCKET NUMBER: 2011-0706-PST-E; IDENTIFIER: RN101732576; LOCATION: Houston, Harris County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(b)(1)(A) and (2), and TWC, §26.3475(a) and (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 also by failing to provide release detection for the piping associated with the USTs; 30 TAC §334.8(c)(4)(A)(vii) and (5)(B)(ii), by failing to timely renew a previously issued UST delivery certificate by submitting a properly completed UST registration and self-certification form at least 30 days before the expiration date; 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; and 30 TAC §334.49(a)(1) and TWC, §26.3475(d), by failing to provide proper corrosion protection for the UST system; PENALTY: $6,629; ENFORCEMENT COORDINATOR: Rajesh Acharya, (512) 239-0577; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(8) COMPANY: Doyle W. Foster dba Weir Country Store; DOCKET NUMBER: 2011-1384-PST-E; IDENTIFIER: RN102054228; LOCATION: Weir, 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(a), by failing to monitor underground storage tanks for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring); PENALTY: $2,500; ENFORCEMENT COORDINATOR: Kimberly Walker, (512) 239-2596; REGIONAL OFFICE: 2800 South IH 35, Suite 100, Austin, Texas 78704-5712, (512) 339-2929.

(9) COMPANY: Explorer Pipeline Company; DOCKET NUMBER: 2011-1522-AIR-E; IDENTIFIER: RN101954394; LOCATION: Port Arthur, Jefferson County; TYPE OF FACILITY: petrochemical storage facility; RULE VIOLATED: 30 TAC §101.201(a) and (b), §122.143(4), and Federal Operating Permit (FOP) Number O2780, Special Terms and Conditions (STC) Number 2.F., and Texas Health and Safety Code (THSC), §382.085(b), by failing to timely submit the initial notification and final record for an emissions event; and 30 TAC §116.115(b)(2)(F) and (c), §122.143(4), New Source Review Permit Number 36100, Special Conditions Number 1, FOP Number O2780, STC Number 8, and THSC, §382.085(b), by failing to prevent unauthorized emissions during an emissions event; PENALTY: $149,248; ENFORCEMENT COORDINATOR: Trina Grieco, (210) 403-4006; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(10) COMPANY: Food Fast Corporation dba FOOD FAST 100; DOCKET NUMBER: 2011-1410-PST-E; IDENTIFIER: RN102837614; LOCATION: Paris, Lamar County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.49(c)(4) and TWC, §26.3475(d), by failing to have the cathodic protection system inspected and tested for operability and adequacy of protection at a frequency of at least once every three years; PENALTY: $4,348; ENFORCEMENT COORDINATOR: Audra Benoit, (409) 899-8799; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(11) COMPANY: Garcia, Miguel A.; DOCKET NUMBER: 2011-2071-WOC-E; IDENTIFIER: RN106086648; LOCATION: Hudspeth County; TYPE OF FACILITY: individual; RULE VIOLATED: 30 TAC §30.5(a), by failing to obtain a required occupational license; PENALTY: $210; ENFORCEMENT COORDINATOR: Heather Podlipny, (512) 239-2603; REGIONAL OFFICE: 401 East Franklin Avenue, Suite 560, El Paso, Texas 79901-1206, (915) 834-4949.

(12) COMPANY: GARY W. PURSER CONSTRUCTION, LTD.; DOCKET NUMBER: 2011-1931-WQ-E; IDENTIFIER: RN105733380; LOCATION: Killeen, Bell County; TYPE OF FACILITY: construction site; RULE VIOLATED: 30 TAC §305.125(1) and Texas Pollutant Discharge Elimination System (TPDES) General Permit Number TXR15NY83, Part III, Section F.6.(a), by failing to maintain best management practices in effective operating condition; 30 TAC §305.125(1) and TPDES General Permit Number TXR15NY83, Part II, Section E.3.(c), by failing to post a copy of the signed notice of intent at the site in a location where it is readily available for viewing; and 30 TAC §305.125(1) and TPDES General Permit Number TXR15NY83, Part III, Section D.2, by failing to post a construction site notice at the site in a location where it is readily available for viewing; PENALTY: $2,500; ENFORCEMENT COORDINATOR: Marty Hott, (512) 239-2587; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(13) COMPANY: Georgia-Pacific Gypsum LLC; DOCKET NUMBER: 2011-1418-AIR-E; IDENTIFIER: RN100216209; LOCATION: Quanah, Hardeman County; TYPE OF FACILITY: wallboard manufacturing plant; RULE VIOLATED: 30 TAC §122.143(4) and §122.147(a)(3), Federal Operating Permit (FOP) Number O-2753, Special Terms and Conditions Number 6, and Texas Health and Safety Code (THSC), §382.085(b), by failing to conduct compliance assurance monitoring at the Number 1 Line Board Stucco Silo Baghouse Stack (Emission Point Number 36); and 30 TAC §122.143(4) and §122.145(2)(A), FOP Number O-2753, General Terms and Conditions

Number 6, and THSC, §382.085(b), by failing to submit a semi-annual deviation report; PENALTY: $21,450; Supplemental Environmental Project offset amount of $8,580 applied to Texas Parent Teacher Association - Texas Parent Teacher Association Clean School Buses; ENFORCEMENT COORDINATOR: James Nolan, (512) 239-6634; REGIONAL OFFICE: 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (325) 698-9674.

(14) COMPANY: Harris County Municipal Utility District Number 189; DOCKET NUMBER: 2011-1755-MWD-E; IDENTIFIER: RN103040846; LOCATION: Houston, Harris County; TYPE OF FACILITY: wastewater treatment facility; RULE VIOLATED: TWC, §26.121(a)(1), 30 TAC §305.125(1), and Texas Pollutant Discharge Elimination System Permit Number WQ0012237001, Interim I and II Effluent Limitations and Monitoring Requirements Number 1, by failing to comply with permitted effluent limits; PENALTY: $5,190; ENFORCEMENT COORDINATOR: Lanae Foard, (512) 239-2554; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(15) COMPANY: Jack White Enterprises, Incorporated; DOCKET NUMBER: 2011-1340-PST-E; IDENTIFIER: RN101745891; LOCATION: Livingston, Polk County; TYPE OF FACILITY: property with five inactive underground storage tanks (USTs); RULE VIOLATED: 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: $5,250; ENFORCEMENT COORDINATOR: Jennifer Graves, (956) 430-6023; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(16) COMPANY: JAES ALL SEASONS MARKET, INCORPORATED dba Jaes All Season 2; DOCKET NUMBER: 2011-1753-PST-E; IDENTIFIER: RN102390242; LOCATION: Houston, Harris County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.8(c)(4)(A)(vii) and (5)(B)(ii), by failing to renew a previously issued underground storage tank (UST) delivery certificate by submitting a properly completed UST registration and self-certification form at least 30 days before the expiration date; 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 before accepting delivery of a regulated substance into the UST; and 30 TAC §334.50(b)(2), and TWC, §26.3475(a), by failing to provide proper release detection for the pressurized piping associated with the USTs; PENALTY: $16,042; ENFORCEMENT COORDINATOR: Keith Frank, (512) 239-1203; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(17) COMPANY: JAES ALL SEASONS MARKET, INCORPORATED dba Jaes All Season Market 1; DOCKET NUMBER: 2011-1448-PST-E; IDENTIFIER: RN102227196; 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: $5,000; ENFORCEMENT COORDINATOR: Andrea Park, (512) 239-4575; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(18) COMPANY: Kaneka Texas Corporation; DOCKET NUMBER: 2011-1787-AIR-E; IDENTIFIER: RN100218841; LOCATION: Pasadena, Harris County; TYPE OF FACILITY: chemical manufacturing plant; RULE VIOLATED: 30 TAC §§101.20(2), 116.115(c), and 122.143(4), Federal Operating Permit Number O3394, General Conditions and Special Terms and Conditions Number 9, New Source Review Permit Number 80931, Special Conditions Number 3.B., 40 Code of Federal Regulations §63.2450(e)(2) and Texas Health and Safety Code, §382.085(b), by failing to conduct a flare assessment test on the MS Polymer Flare, Emission Point Number Z-S421, within 180 days after start up; PENALTY: $1,400; ENFORCEMENT COORDINATOR: Trina Grieco, (210) 403-4006; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(19) COMPANY: KAPADIA SADLER DEVELOPMENT, INCORPORATED dba Kidd Jones 2; DOCKET NUMBER: 2011-1512-PST-E; IDENTIFIER: RN101838373; LOCATION: Athens, Henderson County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §37.815(a) and (b), by failing to demonstrate acceptable financial assurance for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum underground storage tanks (USTs); 30 TAC §334.49(a)(1) and TWC, §26.3475(d), by failing to provide corrosion protection for the UST system; 30 TAC §334.50(b)(1)(A) and TWC, §26.3475(c)(1), by failing to monitor the USTs for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring); 30 TAC §334.50(b)(2) and TWC, §26.3475(a), by failing to provide release detection for the piping associated with the USTs; 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: $11,208; ENFORCEMENT COORDINATOR: Charlie Lockwood, (512) 293-1653; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(20) COMPANY: Laguna Tres, Incorporated; DOCKET NUMBER: 2011-1845-PWS-E; IDENTIFIER: RN101276806; LOCATION: Granbury, Hood County; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.46(q)(1), by failing to issue a boil water notification to the customers of the facility within 24 hours of a water outage using the prescribed notification format as specified in 30 TAC §290.47(e); PENALTY: $310; ENFORCEMENT COORDINATOR: Katy Schumann, (512) 239-2602; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(21) COMPANY: Lopez, Robert; DOCKET NUMBER: 2011-2072-WOC-E; IDENTIFIER: RN103624326; LOCATION: Hudspeth County; TYPE OF FACILITY: individual; RULE VIOLATED: 30 TAC §30.5(a), by failing to obtain a required occupational license; PENALTY: $210; ENFORCEMENT COORDINATOR: Heather Podlipny, (512) 239-2603; REGIONAL OFFICE: 401 East Franklin Avenue, Suite 560, El Paso, Texas 79901-1206, (915) 834-4949.

(22) COMPANY: Merisol USA LLC; DOCKET NUMBER: 2011-1608-AIR-E; IDENTIFIER: RN100214576; LOCATION: Houston, Harris County; TYPE OF FACILITY: chemical manufacturing plant; RULE VIOLATED: 30 TAC §116.115(c) and §122.143(4), New Source Review Permit Number 20686, Special Conditions Number 1, Federal Operating Permit Number O1254, Special Terms and Conditions Number 11, and Texas Health and Safety Code, §382.085(b), by failing to comply with the annual (based on a rolling 12 month period) permitted emission limits of 0.61 tons per year (tpy) of nitrogen oxides, 0.36 tpy of carbon monoxide, 0.03 tpy of particulate matter, and 0.0 tpy of sulfur dioxide from the ground flare, Emission Point Number IEPAHRU02; PENALTY: $21,625; ENFORCEMENT COORDINATOR: Trina Grieco, (210) 403-4006; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(23) COMPANY: PARK AVENUE CONSTRUCTION LTD; DOCKET NUMBER: 2011-2009-WQ-E; IDENTIFIER: RN106223449; LOCATION: Wall, Tom Green County; TYPE OF FACILITY: commercial construction; RULE VIOLATED: 30 TAC §281.25(a)(4), by failing to obtain a Construction General Permit

(stormwater); PENALTY: $700; ENFORCEMENT COORDINATOR: Harvey Wilson, (512) 239-0321; REGIONAL OFFICE: 622 South Oakes, Suite K, San Angelo, Texas 76903-7013, (325) 655-9479.

(24) COMPANY: Roy Wayne Smith dba Smiths First and Last Chance Tire Repair; DOCKET NUMBER: 2011-1559-MSW-E; IDENTIFIER: RN102221058; LOCATION: Brady, McCulloch County; TYPE OF FACILITY: motor vehicle repair and used tire sales facility; RULE VIOLATED: 30 TAC §328.60(a), by failing to obtain a scrap tire storage site registration for the facility prior to storing more than 500 used or scrap tires on the ground or 2,000 used or scrap tires in enclosed and lockable containers; PENALTY: $2,750; ENFORCEMENT COORDINATOR: Wallace Myers, (512) 239-6580; REGIONAL OFFICE: 622 South Oakes, Suite K, San Angelo, Texas 76903-7013, (325) 655-9479.

(25) COMPANY: Saratoga Homes of Texas Austin, LLC; DOCKET NUMBER: 2011-2094-WQ-E; IDENTIFIER: RN106215908; LOCATION: Killeen, Bell County; TYPE OF FACILITY: residential construction; RULE VIOLATED: 30 TAC §281.25(a)(4), by failing to obtain a Construction General Permit (stormwater); PENALTY: $700; ENFORCEMENT COORDINATOR: Harvey Wilson, (512) 239-0321; REGIONAL OFFICE: 401 East Franklin Avenue, Suite 560, El Paso, Texas 79901-1206, (915) 834-4949.

(26) COMPANY: Silverton Oil Company, Incorporated; DOCKET NUMBER: 2011-1860-PST-E; IDENTIFIER: RN101868677; LOCATION: Silverton, Briscoe County; TYPE OF FACILITY: wholesale; RULE VIOLATED: 30 TAC §334.50(b)(2) and TWC, §26.3475(a), by failing to provide release detection for the piping associated with the underground storage tanks; PENALTY: $2,629; ENFORCEMENT COORDINATOR: Katy Schumann, (512) 239-2602; REGIONAL OFFICE: 3918 Canyon Drive, Amarillo, Texas 79109-4933, (806) 353-9251.

(27) COMPANY: TEXAS AUTO SALVAGE, INCORPORATED; DOCKET NUMBER: 2011-1349-IHW-E; IDENTIFIER: RN103207809; LOCATION: San Antonio, Bexar County; TYPE OF FACILITY: metal salvage facility; RULE VIOLATED: 30 TAC §335.261(b) and 40 Code of Federal Regulations (CFR) §273.11(b), by failing to properly manage universal waste; 30 TAC §335.261(b)(21) and 40 CFR §273.13(d)(1), by failing to properly manage universal waste in containers or packages that were adequate to prevent leakage and kept closed; and 30 TAC §335.261(b) and 40 CFR §273.14(e), by failing to label or mark containers or packages of a generated, universal stream of fluorescent lamps to identify the type of universal waste as specified; PENALTY: $3,570; ENFORCEMENT COORDINATOR: Clinton Sims, (512) 239-6933; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(28) COMPANY: The Boeing Company; DOCKET NUMBER: 2011-1503-AIR-E; IDENTIFIER: RN100215854; LOCATION: San Antonio, Bexar County; TYPE OF FACILITY: aircraft assembly and maintenance plant; RULE VIOLATED: 30 TAC §122.143(4) and §122.146(2), Federal Operating Permit Number O-02099, General Terms and Conditions, and Texas Health and Safety Code, §382.085(b), by failing to timely submit an annual permit compliance certification within 30 days after the end of the certification period; PENALTY: $2,050; ENFORCEMENT COORDINATOR: Trina Grieco, (210) 403-4006; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(29) COMPANY: THE UNIVERSAL CHURCH; DOCKET NUMBER: 2011-1312-PWS-E; IDENTIFIER: RN103991980; LOCATION: El Paso, El Paso County; TYPE OF FACILITY: church with a public water supply; RULE VIOLATED: 30 TAC §290.109(c)(2)(A)(i) and §290.122(c)(2)(B) and Texas Health and Safety Code, §341.033(d), by failing to collect routine distribution water samples for coliform analysis and by failing to provide notification to the persons served by the facility regarding the failure to conduct routine coliform monitoring; PENALTY: $3,397; ENFORCEMENT COORDINATOR: Marty Hott, (512) 239-2587; REGIONAL OFFICE: 401 East Franklin Avenue, Suite 560, El Paso, Texas 79901-1206, (915) 834-4949.

(30) COMPANY: Warren Water Supply Corporation; DOCKET NUMBER: 2011-1428-PWS-E; IDENTIFIER: RN101459006; LOCATION: Warren, Tyler County; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.43(c)(3), by failing to maintain the overflows on the facility's ground storage tanks (GST) in strict accordance with American Water Works Association standards; 30 TAC §290.46(m)(4), by failing to maintain all treatment units, storage and pressure maintenance facilities, distribution system lines and related appurtenances in a watertight condition; 30 TAC §290.46(m)(1)(A), by failing to conduct an annual inspection of the facility's GSTs; 30 TAC §290.46(s)(2)(C)(i), by failing to verify the accuracy of the manual disinfectant residual analyzers at least once every 30 days using chlorine solutions of known concentrations; 30 TAC §290.39(j), by failing to notify the executive director prior to making any significant change to the facility's production, treatment, storage, pressure maintenance, or distribution system; 30 TAC §290.39(j)(i)(A) and (B), by failing to conduct customer service inspections by an individual that is a plumbing inspector or a water supply protection specialist licensed by the State Board of Plumbing Examiners or by a customer service inspector who has completed a commission approved course, passed an examination administered by the executive director, and holds current professional certification or endorsement as a customer service inspector; and 30 TAC §290.46(m)(1)(B), by failing to conduct an annual inspection of the facility's pressure tanks; PENALTY: $2,075; ENFORCEMENT COORDINATOR: Katy Schumann, (512) 239-2602; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

TRD-201105525
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: December 13, 2011

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Notice of a Public Hearing on Proposed Revisions to 30 TAC Chapter 80

The Texas Commission on Environmental Quality (commission) will conduct a public hearing to receive testimony regarding proposed revisions to 30 TAC Chapter 80, Contested Case Hearings, proposed new §80.110, under the requirements of Texas Government Code, Chapter 2001, Subchapter B.

The proposed rulemaking would implement House Bill 2694, §3.04, 82nd Legislature, 2011, Regular Session, relating to Texas Water Code, §5.276, Factors for Public Interest Representation. The proposed rule would establish factors the public interest counsel must consider before deciding to represent the public interest as a party to a commission proceeding, including factors to determine the nature and extent of the public interest and factors to consider in prioritizing the workload of the office of public interest counsel.

The commission will hold a public hearing on this proposal in Austin on January 24, 2012, at 10:00 a.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested

persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services, at (512) 239-1802. Requests should be made as far in advance as possible.

Written comments may be submitted to Patricia Duron, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: *http://www5.tceq.texas.gov/rules/ecomments/.* File size restrictions may apply to comments being submitted via the *eComments* system. **All comments should reference Rule Project Number 2011-035-080-AD. The comment period closes on January 30, 2012.** Copies of the proposed rulemaking can be obtained from the commission's Web site at *http://www.tceq.texas.gov/nav/rules/propose_adopt.html.* For further information, please contact Vic McWherter, TCEQ Office of Public Interest Counsel, (512) 239-6363.

TRD-201105427
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: December 9, 2011

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Notice of Public Hearing on Proposed Revisions to 30 TAC Chapter 336

The Texas Commission on Environmental Quality (commission) will conduct a public hearing to receive testimony regarding proposed revisions to 30 TAC Chapter 336, Radioactive Substance Rules, under the requirements of Texas Government Code, Chapter 2001, Subchapter B.

The proposed rulemaking would revise the commission's radiation control rules to implement Senate Bill 1504, 82nd Legislature, 2011. The proposed rulemaking would establish requirements at the licensed low-level radioactive compact waste disposal facility for the disposal of party state compact waste that has been commingled with waste from other sources at a commercial waste processing facility. The proposed rulemaking would also add definitions and prohibit the receipt and disposal of waste of international origin.

The commission will hold a public hearing on this proposal in Austin on January 12, 2012, at 2:00 p.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services, at (512) 239-1802. Requests should be made as far in advance as possible.

Written comments may be submitted to Bruce McAnally, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: *http://www5.tceq.texas.gov/rules/ecomments/.* File size restrictions may apply to comments being submitted via the *eComments* system. **All comments should reference Rule Project Number 2011-036-336-WS. The comment period closes January 23, 2012.** Copies of the proposed rulemaking can be obtained from the commission's Web site at *http://www.tceq.texas.gov/nav/rules/propose_adopt.html.* For further information, please contact Hans Weger, Project Manager, Radioactive Materials Unit, (512) 239-6465.

TRD-201105424
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: December 9, 2011

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Notice of Minor Amendment Radioactive Material License

APPLICATION. Waste Control Specialists LLC (WCS) has applied to the Texas Commission on Environmental Quality (TCEQ) for minor and administrative amendments to Radioactive Material License R04100. Radioactive Material License R04100 authorizes commercial disposal of low-level radioactive waste. WCS currently conducts waste management services at its site in Andrews County, Texas and is the licensed operator of the Compact Waste Disposal Facility (CWF) and Federal Facility Waste Facility (FWF) for commercial and federal low-level radioactive waste disposal. The land disposal facility for low-level radioactive waste disposal is currently under construction and is located at 9998 State Highway 176 West in Andrews County, Texas. The State of Texas is the owner of the CWF.

Five of the amendment applications request design changes to the CWF and FWF, and two of the amendment applications seek authorization to use new and/or revised plans, programs and procedures as follows. As part of this amendment package, TCEQ proposes to replace Attachments C and D. New Attachment C sets forth the Waste Acceptance Criteria, including statutory and regulatory considerations relating to rates and contracts. New Attachment D sets forth pavement design considerations. In addition to these new attachments, TCEQ is revising license conditions regarding new statutory language requirements and definition for waste of international origin, regarding a definition of waste of international origin, regarding waste acceptance criteria, regarding reporting of inventory, regarding liability coverage, as well as cross-references to issued TCEQ wastewater permit.

The following link to an electronic map of the facility's general location is provided as a public courtesy and is not part of the application or notice: http://www.tceq.texas.gov/assets/public/hb610/index.html?lat=32.4425&lng=-103.063055&zoom=13&type=. For an exact location, refer to the applications. The seven amendment applications were originally submitted to the TCEQ by WCS on: May 6, 2011 (revised August 11, 2011, September 1, 2011, September 29, 2011, and November 4, 2011) June 29, 2011 (revised October 11, 2011) August 19, 2011 (Revised November 23, 2011) August 22, 2011 (Revised October 12, 2011) August 22, 2011 (Revised October 27, 2011) August 30, 2011, and October 14, 2011.

The TCEQ Executive Director has completed the technical review of the amendment applications and prepared a draft license. The draft license, if approved, would establish the conditions under which the land disposal facility must operate. The Executive Director has made a preliminary decision that this license, if issued, meets all statutory and regulatory requirements. The license amendment applications, the Executive Director's technical summary, and the amended draft license are available for viewing and copying at the TCEQ's central office in Austin, Texas and at the Andrews Public Library in Andrews, Texas.

PUBLIC COMMENT/PUBLIC MEETING. The purpose of a public meeting is to provide the opportunity to submit comments or to ask

questions about the application. The TCEQ holds a public meeting if the Executive Director determines that there is a significant degree of public interest in the applications or if requested by a local legislator. A public meeting is not a contested case hearing. After the deadline for submitting public comments, the Executive Director will consider all timely comments and prepare a response to all relevant and material, or significant public comments.

EXECUTIVE DIRECTOR ACTION. The application is subject to Commission rules which direct the Executive Director to act on behalf of the Commission and provide authority to the Executive Director to issue final approval of these applications for amendments after consideration of all timely comments submitted on the applications.

MAILING LIST. If you submit public comments or a request for reconsideration of the Executive Director's decision, you will be added to the mailing list for this specific application to receive future public notices mailed by the Office of the Chief Clerk. In addition, you may request to be placed on: (1) the permanent mailing list for a specific applicant name and license or permit number; and/or (2) the mailing list for a specific county. If you wish to be placed on the permanent and/or the county mailing list, clearly specify which list(s) and send your request to TCEQ Office of the Chief Clerk at the address below.

All written public comments and requests must be submitted to the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, TX 78711-3087 or electronically at www.tceq.state.tx.us/about/comments.html within 10 days from the date of this notice or 10 days from the date of publication in the *Texas Register,* whichever is later.

AGENCY CONTACTS AND INFORMATION. If you need more information about this license application or the licensing process, please call the TCEQ Office of Public Assistance, toll free, at 1-800-687-4040. Si desea información en español, puede llamar al 1-800-687-4040. General information about the TCEQ can be found at our web site at www.TCEQ.state.tx.us. Further information may also be obtained from WCS at the address stated above or by calling Mr. Scott Kirk at (432) 525-8500.

TRD-201105558
Bridget C. Bohac
Chief Clerk
Texas Commission on Environmental Quality
Filed: December 14, 2011

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Notice of Water Quality Applications

The following notices were issued on December 2, 2011 through December 9, 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

UNIVAR USA INC, which operates a Chemical Distribution, has applied for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No.WQ0004687000, to authorize the discharge of storm water on a routine basis. The facility is located at 3636 Dan Morton Drive, Dallas County, Texas 75236. The effluent is discharged from Outfall 001 via a pipeline and from Outfall 002 via overland flow from a settling pond to the City of Dallas storm water collection system, thence to the Upper Trinity River, in Segement No. 0805 of the Trinity River Basin., in Segment No. 0805 of the Trinity River. The designated use for the unclassified receiving waters are: Series of Ditches & Unnamed Tributary: no significant aquatic life use; 2.0 mg/L dissolved oxygen. The designated uses for Segment No. 0805 are contact recreation, high aquatic life use, and 5.0 mg/L dissolved oxygen.

TEXAS DEPARTMENT OF CRIMINAL JUSTICE has applied to the Texas Commission on Environmental Quality (TCEQ) for a renewal of TPDES Permit No. WQ0010823001 which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 2,850,000 gallons per day. The facility is located within the Texas Department of Criminal Justice Coffield Farm Unit at the southwest terminus of Farm-to-Market Road 2054 at a point approximately 4.5 miles southwest of Tennessee Colony in Anderson County, Texas 75884.

UNITED STATES DEPARTMENT OF THE AIR FORCE AND PETRUS ENVIRONMENTAL SERVICES INC have applied for a major amendment to TPDES Permit No. WQ0012512001 to authorize an increase in the discharge of treated domestic wastewater from a daily average flow not to exceed 14,400 gallons per day to a daily average flow not to exceed 30,000 gallons per day. The facility is located at 501 Rock Creek Road, approximately eight miles north of the town of Sandusky, on the southern shoreline of Lake Texoma in Grayson County, Texas 76273.

NORTHWEST HARRIS COUNTY MUNICIPAL UTILITY DISTRICT NO 36 has applied for a renewal of TPDES Permit No. WQ0013573001 which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 500,000 gallons per day. The facility is located at 3640 Louetta Road, 210 feet north northeast of the intersection of Seals Gully and Louetta Road and approximately 12,600 feet west of the intersection of Interstate Highway 45 and Holzwarth Road in Harris County, Texas 77388.

ENCANTO REAL UTILITY DISTRICT has applied for a renewal of TPDES Permit No. WQ0013648001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 500,000 gallons per day. The facility is located approximately 3-1/4 miles northwest of the intersection of Interstate Highway 45 and Spring-Stuebner Road, just south of Spring Creek and north of the City of Houston in Harris County, Texas 77389.

HARRIS COUNTY MUNICIPAL UTILITY DISTRICT NO. 360 has applied for a renewal of TPDES Permit No. WQ0013753001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 400,000 gallons per day. The facility is located at 13930 Conway Place, approximately 3,500 feet north of the intersection of Kluge Road and Huffmeister Road, 1,100 feet northwest of Kluge Road and approximately 4.0 miles north of the intersection of U.S. Highway 290 and Huffmeister Road in Harris County, Texas 77429.

HOLCIM TEXAS LIMITED PARTNERSHIP which operates Holcim Texas Midlothian Plant has applied for a renewal of TPDES Permit No. WQ0002580000, which authorizes the discharge of storm water associated with industrial activity on an intermittent and flow variable basis via Outfall 001. The facility is located at 1800 Dove Lane, in the City of Midlothian, Ellis County, Texas 76065-4435.

CHEVRON PHILLIPS CHEMICAL COMPANY LP, a Petrochemical and Plastics Manufacturing Plant, which operates from the Pasadena Plastics Complex, a Plastic Manufacturing Plant, has applied for a major amendment to TPDES Permit No. WQ0000815000 to remove Outfalls 005, 006, and 007 from the permit; to authorize the use of a new treatment chemical in on-site ponds, to revise Other Requirement No. 6 of the permit extending the 24-hour storm water exclusion from calculation of flow to a 48-hour storm water calculation exclusion from flow, and to add a requirement specifying when samples should be re-

ported. The current permit authorizes the discharge of process wastewater, cooling tower blowdown, boiler blowdown, domestic wastewater, storm water, and hydrosatic test water at a daily average flow not to exceed 4,300,000 gallons per day via Outfall 001; the discharge of storm water runoff and wash down water on an intermittent and flow variable basis via Outfall 002; and the discharge of storm water runoff on an intermittent and flow variable basis via Outfalls 003, 004, 005, 006, and 007. The facility is located at 1400 Jefferson Road, on the south side of the Houston Ship Channel and approximately 0.5 mile west of the mouth of Greens Bayou, Harris County, Texas 77506.

WEST HARRIS COUNTY MUNICIPAL UTILITY DISTRICT NO 21 has applied for a renewal of TPDES Permit No. WQ0013623001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 250,000 gallons per day. The facility is located at 8585 Fallbrook Drive, 1,500 feet south of the Sam Houston Toll Road, east of Windfern Road, west of Fairbanks North Houston Road in Harris County, Texas 77064.

TEXAS H2O INC has applied for a renewal of TPDES Permit No. WQ0013786001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 42,000 gallons per day. The facility is located adjacent to Lake Granbury, approximately two miles north of the intersection of Farm-to-Market Road 2425 and Farm-to-Market Road 3210 in Hood County, Texas 76048.

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-201105559
Bridget C. Bohac
Chief Clerk
Texas Commission on Environmental Quality
Filed: December 14, 2011

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Proposal for Decision

The State Office of Administrative Hearings issued a Proposal for Decision and Order to the Texas Commission on Environmental Quality on December 13, 2011, in the matter of the Executive Director of the Texas Commission on Environmental Quality, Petitioner v. Aqua Utilities, Inc. a/k/a Aqua Texas, Inc.; SOAH Docket No. 582-09-2571; TCEQ Docket No. 2008-0767-UTL-E. The commission will consider the Administrative Law Judge's Proposal for Decision and Order regarding the enforcement action against Aqua Utilities, Inc. a/k/a Aqua Texas, Inc. on a date and time to be determined by the Office of the Chief Clerk in Room 201S of Building E, 12100 N. Interstate 35, Austin, Texas. This posting is Notice of Opportunity to Comment on the Proposal for Decision and Order. The comment period will end 30 days from date of this publication. Written public comments should be submitted to the Office of the Chief Clerk, MC-105, TCEQ, P.O. Box 13087, Austin, Texas 78711-3087. If you have any questions or need assistance, please contact Melissa Chao, Office of the Chief Clerk, (512) 239-3300.

TRD-201105560
Bridget C. Bohac
Chief Clerk
Texas Commission on Environmental Quality
Filed: December 14, 2011

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Texas Facilities Commission

Request for Proposals #303-3-20317

The Texas Facilities Commission (TFC), on behalf of the Texas Health and Human Services Commission and the Department of Aging and Disability Services, announces the issuance of Request for Proposals (RFP) #303-3-20317. TFC seeks a five or ten year lease of approximately 15,165 square feet of office space in Fort Worth, Tarrant County, Texas.

The deadline for questions is January 13, 2012 and the deadline for proposals is January 20, 2012 at 3:00 p.m. The award date is March 21, 2012. 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, Jana D. Walp, at (512) 463-3160. 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=98037*.

TRD-201105436
Kay Molina
General Counsel
Texas Facilities Commission
Filed: December 9, 2011

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General Land Office

Notice of Invitation for Offer for Renewal of Major Consulting Services

The Texas General Land Office (GLO) is seeking a consultant to provide services related to the Texas Coastal Ocean Observation Network (TCOON). The consultant will review and verify that tide and water level data generated by the Texas A&M Corpus Christi's Conrad Blucher Institute to prove that the data was collected in accordance with the National Oceanic and Atmospheric Administrative (NOAA) standards and procedures. Data from the TCOON stations is used identify the boundary between state and private ownership of submerged land, for approving coastal erosion and beach nourishment projects, for calculating acreage of submerged land tracts for mineral leasing, for identifying and defining the public beach, and for modeling oil spill projections.

Pursuant to §2254.029 and §2254.031 of the Texas Government Code, the GLO is seeking to renew its contract for consulting services relating to the review and verification of tide and water level data from Texas Coastal Ocean Observation Network (TCOON) stations for a two-year period beginning September 1, 2011 through August 31, 2013.

It is the intent of the GLO to award this contract to Mr. Douglas Martin subject to the approval of the Governor's Office of Budget and Planning as required by Texas Government Code §2254.028. Mr. Martin has previously provided these consulting services to the GLO with respect to the TCOON program. Further information may be obtained by contacting Craig Davis, Texas General Land Office, 1700 N. Congress Avenue, Austin, Texas 78701-1495, telephone (512) 483-8126.

TRD-201105554
Larry L. Laine
Chief Clerk, Deputy Land Commissioner
General Land Office
Filed: December 14, 2011

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Office of the Governor

Request for Grant Applications for the Criminal Justice Programs Solicitation

The Criminal Justice Division (CJD) of the Governor's Office is soliciting applications for projects that reduce crime and improve the criminal justice system during the state fiscal year 2013 grant cycle.

Purpose: The purpose of this solicitation is to reduce crime and improve the criminal justice system.

Available Funding: Federal funds are authorized under the Edward Byrne Memorial Justice Assistance Grant Program (JAG) (42 U.S.C. 3751(a)). JAG funds are made available through a Congressional appropriation to the United States Department of Justice. All awards are subject to the availability of appropriated federal funds and any modifications or additional requirements that may be imposed by law.

Funding Levels:

Minimum amount is $10,000

Maximum: None

Match Requirement: None

Standards: Grantees must comply with the standards applicable to this funding source cited in the *Texas Administrative Code* (1 TAC Chapter 3), and all statutes, requirements, and guidelines applicable to this funding.

Prohibitions: Grant funds may not be used to support the following services, activities, and costs:

(1) supplanting or use of grant funds to replace any other existing federal, state or local funds;

(2) inherently religious activities such as prayer, worship, religious instruction, or proselytization;

(3) lobbying;

(4) any portion of the salary of, or any other compensation for, an elected or appointed government official;

(5) non-law enforcement vehicles or equipment for government agencies that are for general agency use;

(6) weapons, ammunition, explosives or military vehicles;

(7) admission fees or tickets to any amusement park, recreational activity or sporting event;

(8) promotional gifts;

(9) food, meals, beverages, or other refreshments;

(10) membership dues for individuals;

(11) fundraising;

(12) construction, renovation or remodeling;

(13) medical services;

(14) transportation, lodging, per diem or any related costs for participants, when grant funds are used to develop and conduct training; and

(15) legal services for adult offenders.

Eligible Applicants:

(1) State agencies;

(2) Units of local government;

(3) Independent school districts;

(4) Native American tribes;

(5) Public universities;

(6) Public colleges; and

(7) Community supervision and corrections departments.

Eligibility Requirements:

(1) Projects must focus on reducing crime and improving the criminal justice system;

(2) Eligible applicants must provide law enforcement, corrections, or judicial services;

(3) In order for an applicant to be eligible, the county (or counties) in which the applicant is located must have an overall 90% average on reporting adult criminal history dispositions to the Texas Department of Public Safety for calendar years 2006 through 2010. This requirement must be met by August 1, 2012;

(4) Eligible applicants operating a law enforcement agency must be current on reporting Part I violent crime data to the Texas Department of Public Safety for inclusion in the annual Uniform Crime Report (UCR) and must have been current for the three previous years;

(5) Eligible applicants must have a DUNS (Data Universal Numbering System) number assigned to its agency, to request a DUNS number, go to http://fedgov.dnb.com/webform/displayHomePage.do; and

(6) Eligible applicants must be registered in the federal Central Contractor Registration (CCR) database located at http://www.ccr.gov and maintain an active registration throughout the grant period.

Project Period: Grant-funded projects must begin on or after September 1, 2012 and expire on or before August 31, 2013.

Application Process: Applicants must access CJD's grant management website at https://eGrants.governor.state.tx.us to register and apply for funding.

Preferences: Preference will be given to applicants who demonstrate cost effective programs focused on a comprehensive and effective approach to services that compliment the criminal justice system.

Closing Date for Receipt of Applications: All applications must be certified via CJD's grant management website on or before February 24, 2012.

Selection Process:

(1) For eligible local and regional projects:

(a) Applications will be forwarded by CJD to the appropriate regional council of governments (COG).

(b) The COG's criminal justice advisory committee prioritizes all eligible applications based on identified community and/or comprehensive planning, cost and program effectiveness.

(c) CJD will consider priority listings that are approved by the COG's executive committee.

(d) CJD will make all final funding decisions based on COG priorities, reasonableness, availability of funding, and cost-effectiveness.

(2) For state discretionary projects, applications will be reviewed by CJD staff members or a review group selected by the executive director. CJD will make all final funding decisions based on eligibility, reasonableness, availability of funding, and cost-effectiveness.

Contact Information: If additional information is needed, contact the eGrants Help Desk at eGrants@governor.state.tx.us or (512) 463-1919.

TRD-201105556
David Zimmerman
Assistant General Counsel
Office of the Governor
Filed: December 14, 2011

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Texas Department of Housing and Community Affairs

Notice of Public Hearing for the Movement of American Recovery and Reinvestment Act (ARRA) Weatherization Assistance Program (WAP) Funds

In commitment to the full expenditure of ARRA WAP funds, the Texas Department of Housing and Community Affairs (TDHCA) adopted 10 TAC Chapter 5, Subchapter I, §§5.900 - 5.905, Deobligation and Reobligation of Funds for Department of Energy Weatherization Assistance Program under the American Recovery and Reinvestment Act.

Pursuant to this rule, TDHCA proposes to:

* Obligate ARRA WAP funding to the City of Arlington in the amount of $105,000.

* Obligate ARRA WAP funding to the City of Austin in the amount of $200,000.

* Obligate ARRA WAP funding to Combined Community Action, Inc. in the amount of $300,000.

* Obligate ARRA WAP funding to Panhandle Community Services in the amount of $542,000.

* Obligate ARRA WAP funding to the City of San Antonio in the amount of $800,000.

* Obligate ARRA WAP funding to Sheltering Arms Senior Services, Inc. in the amount of $1,500,000.

* Obligate ARRA WAP funding to Texoma Council of Governments in the amount of $100,000.

* Accept the voluntary relinquishment of Alamo Area Council of Governments ARRA WAP funding in the amount of $2,059,564.

* Accept the voluntary relinquishment of Community Services, Inc. ARRA WAP funding in the amount of $654,584.

* Accept the voluntary relinquishment of Hill Country Community Action Agency ARRA WAP funding in the amount of $200,000.

* Accept the voluntary relinquishment of the City of Lubbock ARRA WAP funding in the amount of $1,400,000.

* Accept the voluntary relinquishment of Rolling Plains Management Corporation ARRA WAP funding in the amount of $500,000.

* Accept the voluntary relinquishment of South Plains Community Action Agency ARRA WAP funding in the amount of $108,000.

The public hearing has been scheduled as follows:

Monday, January 9, 2012, 2:00 p.m.

Texas Department of Housing and Community Affairs

221 East 11th Street, Room 116

Austin, Texas 78701

A representative from TDHCA will receive comments from interested citizens and affected groups regarding the proposed movement of funds.

Anyone may submit comments on the movement of funds in written form or oral testimony at the public hearing. TDHCA must receive written comments no later than 5:00 p.m., Monday, January 9, 2012. Public comments via email to cate.taylor@tdhca.state.tx.us, in writing to: TDHCA, Energy Assistance Section, P.O. Box 13941, Austin, TX 78711-3941, Attn: Ms. Cate Taylor, or by fax to (512) 475-3935.

Individuals who require auxiliary aids or services for this meeting should contact Ms. Gina Esteves at (512) 475-3943 or Relay Texas at 1-800-735-2989 at least two (2) days before the meeting so that appropriate arrangements can be made.

Non-English speaking individuals who require interpreters for this meeting should contact Jorge Reyes, (512) 475-4577, at least three days before the meeting so that appropriate arrangements can be made.

Personas que hablan español y requieren un intérprete, favor de llamar a Jorge Reyes al siguiente número (512) 475-4577 por lo menos tres días antes de la junta para hacer los preparativos apropiados.

TRD-201105557
Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
Filed: December 14, 2011

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Texas Department of Insurance

Third Party Administrator Applications

The following third party administrator (TPA) applications have been filed with the Texas Department of Insurance and are under consideration.

Application of CONTRACT CLAIMS SERVICES, INC., a domestic third party administrator. The home office is IRVING, TEXAS.

Application of SANTA FE PREFERRED HEALTHCARE, INC., a domestic third party administrator. The home office is TEMPLE, TEXAS.

Any objections must be filed within 20 days after this notice is published in the *Texas Register*, addressed to the attention of Godwin Ohaechesi, MC 305-2C, 333 Guadalupe, Austin, Texas 78701.

TRD-201105561
Sara Waitt
Acting General Counsel
Texas Department of Insurance
Filed: December 14, 2011

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Texas Lottery Commission

Instant Game Number 1388 "3 Times Lucky"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1388 is "3 TIMES LUCKY". The play style is "key number match with tripler".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1388 shall be $3.00 per ticket.

1.2 Definitions in Instant Game No. 1388.

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, $3.00, $6.00, $9.00, $10.00, $15.00, $18.00, $24.00, $30.00, $60.00, $90.00, $100, $300, $1,000, $3,000 and $30,000.

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. 1388 - 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
$3.00	THREE$

$6.00	SIX$
$9.00	NINE$
$10.00	TEN$
$15.00	FIFTN
$18.00	EGHTN
$24.00	TWY FOR
$30.00	THIRTY
$60.00	SIXTY
$90.00	NINTY
$100	ONE HUND
$300	THR HUND
$1,000	ONE THOU
$3,000	THR THOU
$30,000	30 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 $3.00, $6.00, $9.00, $15.00, $18.00 or $24.00.

G. Mid-Tier Prize - A prize of $30.00, $60.00, $90.00 or $300.

H. High-Tier Prize - A prize of $3,000 or $30,000.

I. Bar Code - A 24 (twenty-four) character interleaved two (2) of five (5) bar code which will include a four (4) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the ten (10) digit Validation Number. The bar code appears on the back of the ticket.

J. Pack-Ticket Number - A 14 (fourteen) digit number consisting of the four (4) digit game number (1388), 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: 1388-0000001-001.

K. Pack - A pack of "3 TIMES LUCKY" Instant Game tickets contains 125 tickets, packed in plastic shrink-wrapping and fanfolded in pages of one (1). There will be 2 fanfold configurations for this game. Configuration A will show the front of ticket 001 and the back of ticket 125. Configuration B will show the back of ticket 001 and the front of ticket 125.

L. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401.

M. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "3 TIMES LUCKY" Instant Game No. 1388 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 "3 TIMES LUCKY" Instant Game is determined once the latex on the ticket is scratched off to expose 50 (fifty) play symbols. IN EACH GAME ACROSS: If the LUCKY NUMBER play symbol matches the SINGLE YOUR NUMBER play symbol, the player wins the prize for that game. If the LUCKY NUMBER play symbol matches the DOUBLE YOUR NUMBER play symbol, the player wins DOUBLE the prize for that game. If the LUCKY NUMBER play symbol matches the TRIPLE YOUR NUMBER play symbol, the player wins TRIPLE 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 50 (fifty) 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 50 (fifty) 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 50 (fifty) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the 50 (fifty) 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 in the same positions.

C. Each game on a ticket will contain different LUCKY NUMBER play symbols.

D. YOUR NUMBERS play symbols within each game will be all different from each other.

E. Non-winning tickets will never contain more than two (2) identical prize symbols.

F. On winning tickets, non-winning prize symbols will never appear more than two (2) times.

G. The top prize ($30,000) will appear on every ticket unless otherwise restricted.

H. No prize amount in a non-winning game will correspond with the LUCKY NUMBER play symbol (i.e., 5 and $5).

2.3 Procedure for Claiming Prizes.

A. To claim a "3 TIMES LUCKY" Instant Game prize of $3.00, $6.00, $9.00, $15.00, $18.00, $24.00, $30.00, $60.00, $90.00 or $300, 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, 60.00, $90.00 or $300 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 "3 TIMES LUCKY" Instant Game prize of $3,000 or $30,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "3 TIMES LUCKY" 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 "3 TIMES LUCKY" 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 "3 TIMES LUCKY" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code, §466.408. Any rights to a prize that is not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 5,040,000 tickets in the Instant Game No. 1388. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 1388 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$3	322,560	15.63
$6	443,520	11.36
$9	131,040	38.46
$15	30,240	166.67
$18	50,400	100.00
$24	40,320	125.00
$30	40,320	125.00
$60	12,642	398.67
$90	5,460	923.08
$300	628	8,025.48
$3,000	15	336,000.00
$30,000	5	1,008,000.00

*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 4.68. 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. 1388 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. 1388, 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-201105552
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: December 14, 2011

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Texas Parks and Wildlife Department

Notice of Proposed Real Estate Transactions

Natural Gas Storage Lease

Gus Engeling Wildlife Management Area (WMA) - Anderson County

In a meeting on January 26, 2012, the Texas Parks and Wildlife Commission (the Commission) will consider authorization of a lease to store natural gas in a depleted geological formation under 547 acres of the Gus Engeling WMA. At this meeting, the public will have an opportunity to comment on the proposed transaction before the Commission takes action. The meeting will start at 9:00 a.m. at the Texas Parks and Wildlife Department Headquarters, 4200 Smith School Road, Austin, Texas 78744. Prior to the meeting, public comment may be submitted to Ted Hollingsworth, Land Conservation, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744, by e-mail at ted.hollingsworth@tpwd.state.tx.us, or through the TPWD website at tpwd.state.tx.us.

Access Easement

Goose Island State Park - Aransas County

In a meeting on January 26, 2012, the Texas Parks and Wildlife Commission (the Commission) will consider the granting of an easement to the Aransas County Municipal Utility District No. 1 for a driveway from Park Road 13 in Goose Island State Park to an adjacent wastewater treatment facility. At this meeting, the public will have an opportunity to comment on the proposed transaction before the Commission takes action. The meeting will start at 9:00 a.m. at the Texas Parks and Wildlife Department Headquarters, 4200 Smith School Road, Austin, Texas 78744. Prior to the meeting, public comment may be submitted to Ted Hollingsworth, Land Conservation, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744, by e-mail at ted.hollingsworth@tpwd.state.tx.us, or through the TPWD website at tpwd.state.tx.us.

Land Donation Galveston Island State Park - Galveston County

In a meeting on January 26, 2012 the Texas Parks and Wildlife Commission (the Commission) will consider accepting the donation of approximately 47 acres of land adjacent to Galveston Island State Park in Galveston County. At this meeting, the public will have an opportunity to comment on the proposed transaction before the Commission takes action. The meeting will start at 9:00 a.m. at the Texas Parks and Wildlife Department Headquarters, 4200 Smith School Road, Austin, Texas 78744. Prior to the meeting, public comment may be submitted to Corky Kuhlmann, Land Conservation, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744 or by email at corky.kuhlmann@tpwd.state.tx.us or through the TPWD website at tpwd.state.tx.us.

TRD-201105553
Ann Bright
General Counsel
Texas Parks and Wildlife Department
Filed: December 14, 2011

♦ ♦ ♦

Public Utility Commission of Texas

Announcement of Application for Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on December 7, 2011, to amend a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of Time Warner Cable to Amend its State-Issued Certificate of Franchise Authority; to add Bedford, Cedar Hill, Colleyville, Commerce, Farmersville, Flower Mound, Lancaster, Lewisville, Murphy, St. Paul, and Wylie, Texas, Project Number 39970.

The requested amendment is to expand the service area footprint to include the following municipalities: Bedford, Cedar Hill, Colleyville, Commerce, Farmersville, Flower Mound, Lancaster, Lewisville, Murphy, St. Paul, and Wylie, Texas.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at (888) 782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) (800) 735-2989. All inquiries should reference Project Number 39970.

TRD-201105506
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: December 12, 2011

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Announcement of Application for Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on Time Warner Cable 2011 to amend a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of Time Warner Cable to Amend its State-Issued Certificate of Franchise Authority; to add Service Area Footprint, Project Number 39971.

The requested amendment is to expand the service area footprint to include the following municipalities: Agua Dulce, Alice, Alton, Anthony, Archer City, Asherton, Bastrop, Beeville, Bishop, Copperas Cove, Cuero, Donna, Driscoll, Eagle Lake, Eagle Pass, Edcouch, Edinburg, El Cenizo, Elsa, Falfurrias, George West, Harlingen, Hutto, Indian Lake, Jonestown, Kyle, La Feria, La Grulla, La Joya, Laguna Vista, Lake City, Lakeside, Lakeway, Lorena, Los Fresno, Luling, Manor, Martindale, McAllen, McGregor, Mercedes, Mission, Nolanville, Odem, Orange Grove, Palmhurst, Penitas, Pine Forest, Pinehurst, Point Venture, Port Arthur, Port Isabel, Premont, Primera, Raymondville, Refugio, Rio Grande City, Rio Hondo, Robstown, Roma, San Benito, Santa Rosa, Seadrift, Silsbee, Sullivan City, Sunset Valley, Taylor, Uhland, Vinton, Volente, Wimberley, Woodcreek, Woodsboro, and Woodway, Texas.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326 or by phone at (512) 936-7120 or toll-free at (888) 782-8477. Hearing and speech-impaired individuals with text tele-

phone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) (800) 735-2989. All inquiries should reference Project Number 39971.

TRD-201105507
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: December 12, 2011

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Announcement of Application for Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on December 7, 2011, to amend a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of Time Warner Cable San Antonio, L.P. d/b/a Time Warner Cable to Amend its State-Issued Certificate of Franchise Authority; to add Bulverde, Elmendorf, Fair Oaks Ranch, Marion, and Somerset, Texas, Project Number 39972.

The requested amendment is to expand the service area footprint to include the following municipalities: Bulverde, Elmendorf, Fair Oaks, Ranch, Marion, and Somerset, Texas.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326 or by phone at (512) 936-7120 or toll-free at (888) 782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) (800) 735-2989. All inquiries should reference Project Number 39972.

TRD-201105508
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: December 12, 2011

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Announcement of Application for Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on December 7, 2011, to amend a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of CoBridge Broadband, LLC to Amend its State-Issued Certificate of Franchise Authority; Reduction of SAF, Project Number 39975.

The requested amendment is to reduce its service area footprint by removing the cities of Fulton, Port Aransas, Portland, Rockport, and Sinton; and the unincorporated areas, excluding federal properties, of the counties of Aransas, Nueces, and San Patricio.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326 or by phone at (512) 936-7120 or toll-free at (888) 782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) (800) 735-2989. All inquiries should reference Project Number 39975.

TRD-201105509
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: December 12, 2011

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Announcement of Application for Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on December 8, 2011, to amend a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of Texas Mid-Gulf Cablevision, LP to Amend its State-Issued Certificate of Franchise Authority; to add Cities of Manvel and Sweeny, Texas, Project Number 39978.

The requested amendment is to expand the service area footprint to include the municipalities of Manvel and Sweeny, Texas.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326 or by phone at (512) 936-7120 or toll-free at (888) 782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) (800) 735-2989. All inquiries should reference Project Number 39978.

TRD-201105510
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: December 12, 2011

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Announcement of Application for Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on December 8, 2011, to amend a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of Mid-Coast Cablevision, LP to Amend its State-Issued Certificate of Franchise Authority; to add City of Ganado, Texas, Project Number 39979.

The requested amendment is to expand the service area footprint to include the municipality of Ganado, Texas.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326 or by phone at (512) 936-7120 or toll-free at (888) 782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) (800) 735-2989. All inquiries should reference Project Number 39979.

TRD-201105511
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: December 12, 2011

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Announcement of Application for Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on December 8, 2011, to amend a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of Bay City Cablevision, LP to Amend its State-Issued Certificate of Franchise Authority; to add City of Bay City, Texas, Project Number 39980.

The requested amendment is to expand the service area footprint to include the municipality of Bay City, Texas.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326 or by phone at (512) 936-7120 or toll-free at (888) 782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) (800) 735-2989. All inquiries should reference Project Number 39980.

TRD-201105512
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: December 12, 2011

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Announcement of Application for Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on December 9, 2011, to amend a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of GTE Southwest Incorporated d/b/a Verizon Southwest to Amend its State-Issued Certificate of Franchise Authority, Project Number 39983.

The requested amendment is to expand the service area footprint to include the municipalities of Keller, Sachse, and Wylie, Texas.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326 or by phone at (512) 936-7120 or toll-free at (888) 782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) (800) 735-2989. All inquiries should reference Project Number 39983.

TRD-201105529
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: December 13, 2011

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Announcement of Application for Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on December 12, 2011, to amend a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of Cebridge Acquisition, L.P. to amend a State-Issued Certificate of Franchise Authority; to add city limits of City of Andrews, Texas, Project Number 39987.

The requested amendment is to expand the service area footprint to include the municipality of Andrews, Texas.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326 or by phone at (512) 936-7120 or toll-free at (888) 782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) (800) 735-2989. All inquiries should reference Project Number 39987.

TRD-201105551
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: December 13, 2011

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Notice of Application to Amend a Certificate of Convenience and Necessity for Proposed Solar Power Generation Projects

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) of an application on December 9, 2011, to amend a certificate of convenience and necessity for five solar power generation projects in El Paso and Culberson Counties, Texas.

Docket Style and Number: Application of El Paso Electric Company to Amend its Certificate of Convenience and Necessity for Five Solar Power Generation Projects. Docket Number 39973.

The Application: El Paso Electric Company (EPE) filed a request to amend its Certificate of Convenience and Necessity (CCN) for five solar-powered generation facilities. EPE proposes installation of four solar-powered generation facilities, in the City of El Paso, and the fifth one to be installed in the Town of Van Horn, Texas. The total rated capacity of all the facilities collectively will be approximately 2.6 megawatt. These projects will help EPE fulfill its Texas renewable energy requirements and commitments EPE made to the City of El Paso in connection with the settlement of EPE's last base rate case, Docket Number 37690, to invest $10 million in solar-powered projects over a two-year period through 2012.

Persons wishing to intervene or 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. The deadline to intervene in this proceeding is January 23, 2012. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989. All comments should reference Docket Number 39973.

TRD-201105530
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: December 13, 2011

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Request for Comments on Energy Storage Topics

The Public Utility Commission of Texas (commission) staff requests comments on energy storage issues for a possible rulemaking. In Project Number 39917, *Rulemaking on Energy Storage Issues*, the commission is currently considering classifying electricity purchased

in the Electric Reliability Council of Texas (ERCOT) by an energy storage facility for later regeneration and resale as a wholesale transaction settled at the nodal price, and is requesting comments on several questions, including whether the rule should allow ERCOT to establish pilot projects for storage facilities and other new technologies. In order to develop a strawman proposal on any other issues that market participants feel may facilitate the deployment and use of energy storage facilities in Texas, commission staff is requesting comments on:

Any other proposed changes to commission rules that would eliminate barriers to energy storage, encourage participation by energy storage providers, or clarify ambiguities in current commission rules relating to energy storage. Please provide specific rule language and an explanation identifying the issue(s) and proposed solution(s).

Comments may be filed by Friday, January 6, 2012, by submitting 16 copies to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, Austin, Texas 78711-3326. All comments should reference Project Number 39764.

Questions concerning Project Number 39764 should be referred to Jason Haas, Legal Division, at (512) 936-7295 or Temujin Roach, Competitive Markets Division, at (512) 936-7463. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136.

TRD-201105515
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: December 12, 2011

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Waller County

Request for Comments and Proposals: Additional Medicaid Beds

Section 32.0244 of the Texas Human Resources Code permits a County Commissioners Court of a county with no more than two (2) nursing homes to request that the Texas Department of Aging and Disability Services ("TDADS"), formerly known as (f/k/a) Texas Department of Human Services ("TDHS"), contract for additional Medicaid nursing facility beds in that county. This may be done without regard to the occupancy rate of available beds in the county.

The Waller County Commissioners Court is considering requesting that TDADS (f/k/a TDHS) contract for more Medicaid beds in Waller County. The Commissioners Court is soliciting:

(1) comments on whether the request should be made to TDADS; and

(2) proposals from persons interested in providing additional Medicaid beds in Waller County, including persons providing Medicaid beds in a nursing facility with a high occupancy rate.

Comments and proposals should be presented at the Public Hearing on January 18, 2012 at 9:00 a.m. during the Waller County Commissioners Court meeting at its meeting place at the Waller County Courthouse, located at 836 Austin Street, Hempstead, Texas 77445.

TRD-201105419
Glenn Beckendorff
County Judge
Waller County
Filed: December 8, 2011

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Texas Water Development Board

Applications for December 2011

Pursuant to Texas Water Code §6.195, the Texas Water Development Board provides notice of the following applications:

Project ID #73623, a request from the City of Center, P.O. Box 1744, Center, Texas 75935-1744, received June 8, 2011, for a loan in the amount of $2,070,000 from the Clean Water State Revolving Fund to finance wastewater system improvements, utilizing the pre-design funding option.

Project ID #62512, a request from the City of Hubbard, 118 N. Magnolia, Hubbard, Texas 76648, received August 16, 2011, for a loan in the amount of $1,500,000 from the Drinking Water State Revolving Fund to finance water system improvements, utilizing the pre-design commitment option.

Project ID #62514, a request from the City of Robert Lee, P.O. Box 26, Robert Lee, Texas 76945-0026, received October 17, 2011, for: (a) financial assistance in the amount of $2,750,000, consisting of a $825,000 loan and $1,925,000 in loan forgiveness from the Drinking Water State Revolving Fund - Disadvantaged Community Program to finance water system improvements, utilizing the pre-design commitment option; and (b) a waiver of the requirement for consistency with the Regional and State Water Plans.

Project ID #10365, a request from the Agua Special Utility District, P.O. Box 4379, Mission, Texas 78573, received April 15, 2011, for a grant in the amount of $2,426,000 from the Economically Distressed Area Program to finance acquisition and design costs for a wastewater project in the Eastern portion of the District.

Project ID #10406, a request from City of Alamo, 420 North Tower Road, Alamo, Texas 78516, received August 15, 2011, for financial assistance in the amount of $4,679,000 consisting of a $4,400,000 grant and a $279,000 loan from the Economically Distressed Areas Program to finance water system improvements.

Project ID #21684, a request from the Greater Texoma Utility Authority - Gainsville, 5100 Airport Drive, Denison, Texas 75020, received October 4, 2011, for a loan in the amount of $1,135,000 from the Water Infrastructure Fund to finance water system improvements.

Project ID #21698, a request from the Guadalupe Blanco River Authority, 933 E. Court Street, Seguin, Texas 78155, received October 15, 2011, for a loan in the amount of $4,400,000 from the Water Infrastructure Fund to finance development costs for the Mid-Basin water supply project, utilizing the pre-design funding option.

Project ID #21700, a request from the West Harris County Regional Water Authority, 3200 Southwest Freeway, Suite 2600, Houston, Texas 77027-7597, received October 19, 2010, for a loan in the amount of $41,965,000 from the Water Infrastructure Fund to finance development costs for a water supply project, utilizing the pre-design funding option.

Project ID #62511, a request from the Birome Water Supply Corporation, Route 1, Box 73, Mt. Calm, Texas 76673, received July 8, 2011, for a loan in the amount of $665,000 from the Rural Water Assistance Fund to finance water system improvements, utilizing the pre-design funding option.

Project ID #21625, a request from the Parker County Special Utility District, 500 Brock Spur, Millsap, Texas 76066, received October 12, 2011, for a loan in the amount of $2,000,000 from the Texas Water Development Fund to finance water system improvements.

TRD-201105435

Kenneth Petersen
General Counsel
Texas Water Development Board
Filed: December 9, 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)*